CITIC Australia Steel Products Pty Ltd
ABN 82 603 950 778
Level 7 CITIC House, 99 King Street, Melbourne Vic 3000 Australia
Telephone: (+61 3) 9614 8000 Facsimile: (+61 3) 9614 7157

18th April 2016

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
CANBERRA CITY ACT 2601

By email: ADRP_support@customs.gov.au

Dear Sir/Madam

Application for review of the Minister's decision to publish a dumping duty notice in respect of Anti-Dumping Commission Case 290 – Zinc Coated (Galvanized) steel exported from the Republic of Korea, Taiwan and PRC

Please find attached for your consideration CITIC Australia Steel Products Pty Ltd's application for the review of the Assistant Minister's decision to revise a dumping duty notice in respect of the abovementioned Anti-Dumping Commission Anti-circumvention Case 290 ***(Application).***

The attached Application details the grounds for which the Assistant Minister's decision is not the correct or preferable decision.

If you have any questions in respect of this Application or would like to discuss any aspect of the Application, please do not hesitate to contact me on kelvinchan@citic.com.au.

Yours faithfully

Kelvin Chan
Deputy General Manager

CITIC Australia Steel Products Pty Ltd
ABN 82 603 950 778
Level 7 CITIC House, 99 King Street, Melbourne Vic 3000 Australia
Telephone: (+61 3) 9614 8000 Facsimile: (+61 3) 9614 7157

Authority to Act and Obtain Information

I, Kelvin Chan, Deputy General Manager of CITIC Australia Steel Products Pty Ltd authorise Jeffrey Waincymer, Trade Consultant, and any external counsel engaged to act on behalf of CITIC Australia Steel Products Pty Ltd to submit its application to the Anti-Dumping Review Panel to review the Assistant Minister's decision in Anti-Dumping Commission Case 290 ***(Application)***.

I also authorise Jeffrey Waincymer and staff to request and receive information and documentation in relation to CITIC Australia Steel Products Pty Ltd's Application.

This authority to act and obtain information is provided for the duration of the Application, the review by the Anti-Dumping Review Panel ***(Review)*** and the Assistant Minister of the ADRP Report and any further actions in respect of the Application and Review.

Kelvin Chan 

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 2 March 2016 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
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

[1] By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

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: CITIC Australia Steel Products Pty Ltd

Address: Level 7 CITIC House, 99 King Street, Melbourne VIC 3000 Australia

Type of entity (trade union, corporation, government etc.): Corporation

2. **Contact person for applicant**

Full name: Kelvin Chan

Position: Deputy General Manager

Email address: kelvinchan@citic.com.au

Telephone number: (+61 3) 9614 8000.

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

The applicant is the importer subject to the anti-circumvention duty.

4. **Is the applicant represented?**

Yes

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. See attached.

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.*

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 published by the Assistant Minister for Science were as follows (emphasis in original):

- With regards to subsection 269TG(2) of the Act:

Flat rolled products of iron and non-alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc; ***and***
Flat rolled products of alloyed steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc exported from:

  - **China by Angang Steel Co., Ltd or Benxi Iron and Steel (Group) International Economic & Trading Co.; or**
  - **Taiwan by Yieh Phui Enterprise Co. Ltd.**

- With regards to subsection 269TJ(2) of the Act:

Flat rolled products of iron and non-alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc; **and**
flat rolled products of alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc exported from China by Benxi Iron and Steel (Group) International Economic & Trading Co.

This application is in respect of ***Flat rolled products of alloyed steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc exported from*** **Taiwan by Yieh Phui Enterprise Co. Ltd.**

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

The goods subject to the original notice are classified to tariff subheadings 7210.49.00 (statistical codes 55, 56, 57 and 58) and 7212.30.00 (statistical code 61) of Schedule 3 to the Customs Tariff Act 1995.
The circumvention goods are classified to tariff subheadings 7225.92.00 (statistical code 38) and 7226.99.00 (statistical code 71) in schedule 3 of the *Custom Tariff Act 1995*.

8. Provide the Anti-Dumping Notice (ADN) number of the reviewable decision
If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

Anti-Dumping Notice No. 2016/23 attached.

9. Provide the date the notice of the reviewable decision was published

18 March 2016

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

See attached.

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 grounds 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.

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: ✔

10. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.**

See attached

11. **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 10.**

The correct or preferable decision is to not alter the original dumping duty notice as set out in the attached reasons.

12. **Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.**

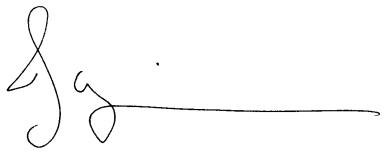
See attached.

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

PART D: DECLARATION

The applicant's authorised representative 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;
- 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: Jeffrey Waincymer

Position: Trade Consultant

Organisation: Self Employed

Date: 18 / 4 / 2016

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: Jeffrey Waincymer

Organisation: Self employed

Address: 45 Victoria Road North, Malvern, Melbourne, 3144

Email address: jeffreywaincymer@gmail.com

Telephone number: +61 418 147 629

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

See attached.

The person named in the attached authorisation 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.

Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

Anti-Dumping Notice No. 2016/23

Customs Act 1901 – Part XVB

Findings in relation to anti-circumvention inquiries into the slight modification of goods exported to Australia Zinc Coated (Galvanised) Steel

Exported from the Republic of Korea and Taiwan (Inquiry 290) and from the People's Republic of China (Inquiry 298)

Notice under subsection 269ZDBH(1) of the Customs Act 1901

Following applications for anti-circumvention inquiries, the Commissioner of the Anti-Dumping Commission (Commissioner) initiated Inquiry 290 and Inquiry 298 into the slight modification of zinc coated (galvanised) steel (the goods) exported to Australia from the Republic of Korea (Korea) and Taiwan (Inquiry 290), and from the People's Republic of China (China) (Inquiry 298).

The goods exported from those countries are subject to a dumping duty notice published under subsection 269TG(2) of the *Customs Act 1901* (the Act) on 5 August 2013, and to a countervailing duty notice published under subsection 269TJ(2) of the Act on 5 August 2013 (collectively, the original notices).

The full description of the goods in the original notices is:

flat rolled products of iron and non-alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc

The goods subject to the original notice are classified to tariff subheadings 7210.49.00 (statistical codes 55, 56, 57 and 58) and 7212.30.00 (statistical code 61) in Schedule 3 of the *Custom Tariff Act 1995*.

The circumvention goods are classified to tariff subheadings 7225.92.00 (statistical code 38) and 7226.99.00 (statistical code 71) in Schedule 3 of the *Custom Tariff Act 1995*.

The Commissioner has completed his anti-circumvention inquiries and has provided me with one final report that sets out his findings from both Inquiry 290 and Inquiry 298, *Final Report No. 290 and 298* (REP 290 and 298). Recommendations resulting from the inquiries, reasons for the recommendations and material findings of fact and law in relation to the inquiries are contained in REP 290 and 298.

I, Karen Lesley Andrews, the Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science have considered REP 290 and 298 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts or law set out in REP 290 and 298.

Under subsection 269ZDBH(1) of the Act, I DECLARE that for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975*:

- the original notice under subsection 269TG(2) of the Act be altered by amending the goods description to:

flat rolled products of iron and non-alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc; ***and***

flat rolled products of alloyed steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc exported from:

- ***China by Angang Steel Co., Ltd or Benxi Iron and Steel (Group) International Economic & Trading Co.; or***
- ***Taiwan by Yieh Phui Enterprise Co., Ltd.***

Text in **bold** outlines the changes in the notice.

- The original notice under subsection 269TJ(2) of the Act be altered by amending the goods description to:

flat rolled products of iron and non-alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc; ***and***

flat rolled products of alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc exported from China by Benxi Iron and Steel (Group) International Economic & Trading Co.

Text in **bold** outlines the changes in the notice.

I also DECLARE that the alterations specified in this declaration are taken to have been made to the original notices:

- For the goods exported from Korea and Taiwan (Inquiry 290), with effect on and after 5 May 2015; and
- For the goods exported from China (Inquiry 298), with effect on and after 1 June 2015.

REP 290 and 298 has been placed on the public record, which may be examined at the Anti-Dumping Commission's office during business hours by contacting the case manager using the contact details provided below. Alternatively, the public record is available at www.adcommission.gov.au

Enquiries about this notice may be directed to the case manager on telephone number 03 8539 2440, or +61 3 8539 2440 (outside Australia), fax number +61 3 8539 2499 or email at operations2@adcommission.gov.au.

Dated this 17th day of March 2016

Karen Lesley Andrews
Assistant Minister for Science
Parliamentary Secretary to the Minister for Industry, Innovation and Science

NON-CONFIDENTIAL

ADRP Submission Re Final Report No. 290

Zinc Coated (Galvanised) Steel Exported from the Republic of Korea, Taiwan and The People's Republic of China

The grounds on which the Ministerial decision is argued to not be the correct or preferable one

1. The Assistant Minister for Science (the Assistant Minister) by notice dated 17 March 2015, determined that alloyed zinc coated (galvanised) steel exported from Taiwan by Yieh Phui should be included in a dumping notice published on 5 August 2013. The Assistant Minister can only validly make such a determination if each and every element as required under the legislation so as to justify a retrospective duty is satisfied. The Assistant Minister's determination is based on an application by Bluescope Steel and a subsequent investigation and Report by the Anti-Dumping Commissioner (the Commissioner). Where, as has occurred in this case, the Assistant Minister accepts the Report in toto, in turn, that Report must show that the legal provisions have been satisfied and that on balance, facts exist that satisfy the legal requirements.

2. This Review Application relies on a range of grounds that individually and collectively render the Ministerial decision as not being the correct or preferable one:

3. The Assistant Minister and Commissioner wrongly recommended a retrospective and unchallengeable duty.

4. The Assistant Minister and Commissioner wrongly recommended a variation of the original dumping notice that was overly broad in scope.

5. The Assistant Minister wrongly determined to apply a retrospective duty without sufficient policy grounds.

6. The Assistant Minister wrongly determined to apply retrospective duty on goods ordered before the minor modification Regulation came into force.

7. The Commissioner erred in recommending a retrospective duty, notwithstanding that his officers had intimated that such a duty would not apply.

8. The Assistant Minister and Commissioner wrongly recommended a variation to the original dumping notice without consideration of updated variable factors and without considering the most reasonable means of determining interim dumping duty.

9. The Assistant Minister and Commissioner wrongly ignored information from other investigations, including Investigation 249, which made a reconsideration of variable factors the only reasonable determination in all the circumstances.

10. The Commissioner failed to undertake a proper investigation. In particular, the Assistant Minister's decision is not the correct or preferable one as the Commissioner failed to address key scientific questions or failed to adequately evaluate the scientific evidence before the Commissioner. In particular, the Commission failed to investigate the scientific issues prior to the publication of the SEF or thereafter in a meaningful fashion. Furthermore, the wrong questions were asked of the expert appointed, well after the publication of the SEF. The Commissioner and Assistant Minister also wrongly ignored the one relevant comment of the expert that negated the contentions of the applicant. Commission officers also wrongly ignored the fact that the appointed expert had worked with the research centre funded by the applicant.

11. The Assistant Minister's decision was not the correct or preferable one as it wrongly determined that differences between the original goods and the circumvention goods were merely minor.

12. In particular, the Assistant Minister and Commissioner failed to draw complete and accurate conclusions about each relevant factor and cumulatively assess those factors in a reasonable manner.

13. The Commissioner had further failed to undertake a proper investigation by various procedural errors that together render the ultimate recommendation and decision, not the correct or preferable one. In particular, the Commission wrongly dealt with matters of confidentiality in two ways, first ignoring confidential material that undermined BlueScope's assertion and secondly, failing to acknowledge and deal with the fact that redacted material presented by BlueScope was either not confidential or could readily have been rendered into non-confidential form.

14. The Commissioner misapplied evidence by treating various inquiries as a parallel endeavour.

15. An unfair inquiry period was selected and relied upon by the Assistant Minister.

16. The Assistant Minister and Commissioner failed to established each and every required element under Regulation 48(2) of the Customs (International Obligations) Regulation 2015.

17. The Assistant Minister's decision failed to make an analysis required in law of normal value, export price, injury and causation before a taxing power can be employed.

18. The Commissioner wrongly believed that it did not need to address each of the designated factors in Regulation 48(3) and wrongly failed to address each of the designated factors.

19. The Assistant Minister's decision was also based on an incomplete application that should have been rejected at the outset.

20. In the alternative, if permitted by law and if the Assistant Minister had sufficient facts to consider the application, the balance of facts would show that the Assistant Minister should have rejected the application and resolved not to recommend any changes to the original notice.

21. This application for Review is divided into four sections dealing with the above contentions. The first section deals with the possibility, which is denied, that the Assistant Minister was entitled to make a determination to amend the original anti-dumping notice. Under that scenario, Section I of this application contends that there are three key reasons why the decision was nonetheless not the correct or preferable one. First, the Assistant Minister was wrong to apply retrospective interim dumping duty that cannot now be re-evaluated and reduced in amount under the assessment provisions or the review powers contained in the *Customs Act*.

22. The second reason is that the Assistant Minister was wrong to amend the original notice to include all alloy goods, regardless of composition, which must of necessity include goods that cannot be said to have only been slightly modified and which in turn, denies the targets of such notices, the ability to compete for the supply of products that should never be seen as circumvention goods.

23. The third reason is the failure to either consider or employ a clear discretion to review normal value and export prices, given the unchallengeable proposition, well known to the Assistant Minister, that worldwide prices in all steel products have dropped drastically in recent years, rendering the variable factors applicable at the time of the original notice, commercially unrealistic and unfair to persons subject to retrospective duty, particularly in the context of the unchallengeable aspect of such duties as noted above.

24. Section II then deals with various aspects of the Commissioner's determination that constitute an erroneous or insufficient assessment on the facts, to a degree which implies that the Assistant Minister's decision based on those supposed findings of fact is not the correct or preferable one.

25. Here the key complaints are a failure to adequately apply each and every one of the factors stipulated in Regulation 48(3) of the *Customs (Internal Obligations) Regulation* 2015; a failure to adequately assess scientific contentions as to physical characteristics; a failure to directly consider end use and a failure to consider directed factors discretely; and instead, concentrate primarily on trade patterns.

26. Section III then deals with a number of elements of unfair process, some of which overlap with the Section II analysis. While it is noted that ADRP has concluded that process concerns in and of themselves cannot justify overturning the Assistant Minister's decision, nevertheless, ADRP also concedes that in appropriate circumstances, procedural failings can lead to the conclusion that the Assistant Minister's decision is not the correct or preferable one.

27. Key procedural errors include the failure to properly consider scientific issues in a timely manner; the failure to utilise an independent expert; the failure to ask the expert the right questions; the use of an inappropriate investigation period; the failure to consider relevant information from other investigations; and erroneous treatment of confidential material and confidentiality claims.

28. Finally, Section IV argues against the presumption underlying the first three sections and submits that there is no legal basis whatever for the Assistant Minister to have made a determination, no matter what view is properly taken of the facts.

29. This section argues that the Assistant Minister has wrongly interpreted Regulation 48(2); has wrongly determined that all factors mentioned in Regulation 48(3) need not be considered; has wrongly determined to apply a duty contrary to the requirements in s 8 of the *Customs Tariff (Anti-Dumping) Act* 1975 and the International Treaty on which that is based; and finally, has made a determination to amend the original notice based on an application that should have been rejected *ab initio*.

30. For all of the foregoing reasons, the Assistant Minister's decision is not the correct and preferable one.

SECTION I

THE RECOMMENDED CHANGES TO THE ORIGINAL DUMPING DUTY NOTICE ARE INAPPROPRIATE BOTH AS TO TIMING AND SCOPE

31. The Commissioner's Final Report notes that s 269ZDBG specifies that if the original notice is to be altered, it must consider what alterations ought to be made and further, specify the dates on which those changes should take effect.

32. In terms of the alterations, the Commission notes that in the SEF, it merely proposed to recommend that boron alloyed galvanised steel exported from Taiwan by Yieh Phui, be added to the original notice. In terms of the date, it proposed a retrospective duty as from 5 May 2015.

33. In the Final Report as accepted by the Assistant Minister, it recommended that the amendment cover all alloy steel and again be operative from 5 May 2015. Both recommendations are not the correct or preferable ones.

The Assistant Minister wrongly revised the original notice as from 5 May 2015

The date of effect should not have been 5 May 2015 as this renders interim duty incapable of re-assessment

34. The Assistant Minister has accepted a recommendation of the Commissioner to make the operative date of the change to the original anti-dumping notice 5 May 2015. This has the effect of imposing retrospective dumping duty to 5 May 2015. I made it clear in submissions that this would lead to an unrealistic

and excessive interim dumping duty that could never lead to a proper final dumping duty, as contemplated in the relevant taxing Act.

35. It is important in that sense to understand how the interim duty provisions are intended to work with the assessment procedures, the aim being to lead to a final duty consistent with properly assessed dumping and injury. Countries imposing anti-dumping duty can either do so on a shipment by shipment basis, or instead, utilize an assessment regime as applicable in Australia, that provides for an interim duty, often higher than that which would ultimately be appropriate, coupled with an assessment regime allowing interested parties to seek a refund of overpaid duty.

36. In Australia, after interim dumping duty is assessed, importers have a right to seek assessment of that duty under ss 269V and 269W of the Customs Act 1901. Such an assessment process allows importers to seek a re-evaluation of normal value and export prices. If a lesser duty is shown to be applicable than the interim dumping duty paid, a refund is required. If a higher amount should have been paid under such an assessment, no extra is payable. This assessment regime favours the government in demanding typically higher interim payments, with importers then having six-month blocks over which to seek reassessment, where they have no down-side exposure in such assessments.

37. A claim for interim duty was sent on 16 April 2016. It has not as yet been paid.

38. There are then very clear and strict stipulations in these provisions dealing with duty assessment. Section 269V(1) states that: "(a) An importer of goods on which, under the Dumping Duty 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 that Act." (emphasis added)

39. Clearly, payment of interim duty is a pre-condition to the right to make such an application.

40. Sub-paragraph (2) then indicates that such an application may "only" be lodged, if it is "lodged not more than 6 months after the end of the particular importation period in which the goods the subject of the application were entered for home consumption" and that "the importer contends that the total amount of duty payable … is less, by a specified amount, than the total amount of interim duty that has been paid …" (emphasis added)

41. Once again, the duty must have been paid.

42. Section 269V also provides that an application must contend that the total amount of duty payable is less by a specified amount than the total amount of interim duty that has been paid. Not only could that interim duty not have been paid prior to it being assessed on 16 April 2016, but the amount could not have been known and hence it would be wholly impossible to stipulate a specified amount by which the duty payable should be lesser in value.

43. That is supported by s 269W(1)(b), which requires in the application, information confirming the amount of interim duty paid.

44. Under s 269X(5) on the basis of information provided and any other relevant information, the Commissioner must provisionally ascertain in relation to each consignment to which the application relates, each variable factor relevant to the determination of duty payable on the goods under the Dumping Duty Act and provisionally calculate the amount of duty payable. Section 269X(6) only allows the Commissioner to make recommendations to the Assistant Minister after such analysis, as to whether the interim duty paid is less than, equal or greater to the total duty payable. If interim duty paid was a higher amount, then a refund would be recommended.

45. Section 269Y(4) indicates that if goods are subject to a dumping duty notice and interim duty is paid but no application for assessment is lodged, interim duty is taken to be the duty payable. Importantly, it deems that the variable factors are as originally determined. Anti-circumvention provisions discussed below, have no similar deeming provision.

46. Given that it is a final duty that is the duty validated under Australia's international obligations, the implication of these assessment provisions is that after interim dumping duty is assessed and paid, the relevant importer can seek identification of the correct amount of final duty via the assessment provisions, but if they choose not to do so, the amount paid is deemed to be the correct final duty.

47. Section 269YA(2) then provides that the Commissioner must reject an application if the Commissioner is satisfied that it does not contain everything it must contain under subsections 269W(1) and (1A). That would include information as to the amount of interim dumping duty paid and an assertion as to a differing amount believed to be payable. An application without payment would have to be rejected. An application made before any interim duty assessment, can obviously not indicate to what degree the claimed duty payable is less than the amount paid.

48. These provisions make it abundantly clear that the first thing that must happen is that interim dumping duty be paid.

49. It is also clear that no interim duty can be paid until it is assessed. No such duty could be assessed until the Assistant Minister made her decision on 17 March 2016. Duty can then only be assessed once a relevant officer with appropriate power, considers which method of calculating interim duty is to apply as per Regulation. That officer must then make calculations in relation to the relevant imports. The only argument to the contrary in relation to calculation, is to suggest that once the Assistant Minister makes a decision to revise the original dumping duty notice, the methodology outlined in that notice applies automatically. For reasons outlined below, that is argued to be unreasonable and an inappropriate interpretation of the legislation.

50. In any event, it is uncontrovertible under any approach to statutory interpretation applicable in Australia, that these provisions require an

assessment of interim duty which is then paid and application for an assessment within a stipulated time period. In terms of the imports over which interim duty is sought to be collected, in the circumstance of the Assistant Minister's decision, that would be all historical imports going back to 5 May 2015. Such a calculation must be undertaken subject to the above comment and in all cases, a demand for interim dumping duty must then be made on the relevant entity seen to be liable. A letter purporting to demand interim duty was sent on 15 April 2016, purporting to claim interim duty as from 5 May 2015.

51. Most importantly, that could not now be challenged under the assessment provisions of the Australian legislation for much of the relevant period.

52. Even if the recent claim for interim dumping duty was paid forthwith, s 269W stipulates that an assessment application can only be made within six months of a recent particular six month importation period as calculated from the time of the original notice. The aim is to divide the year into two six month blocks, and give the importer a further six months after the end of each block, to make an assessment application. The six month blocks are calculated from the date of the original dumping notice. The original notice first applying dumping duty to non-alloy goods was promulgated on 5 August 2013 and was designated to apply as from the following day. Hence the six month blocks for this product are first, from 6 August 2013 until 5 February 2014 following, and thereafter from February to August in that year and then August to February.

53. If the claim dated 16 April 2016 was paid immediately, this would mean that the last permissible time period in relation to which one could make such an assessment application after payment of the duty, would accordingly be the period from 6 August 2015 to 5 February 2016, with an application being permissible until 6 August 2016. That would mean the entire period from 5 May 2015 to 5 August 2015 is not available for duty assessment. Payments in relation to that period could not allow for a refund, no matter how excessive the interim dumping duty determination.

54. Even the following six month period between August 2015 and February 2016 technically available for an assessment application up until 5 August 2016, raises problematic commercial issues, given this current application for Review, the time that ADRP can take to consider it, the time the Assistant Minister has to consider the ADRP's Report and possible court proceedings if the Assistant Minister's findings are not overturned. There is no certainty that the Assistant Minister will be in a position to make a decision based on the ADRP Report by 5 August next. Once again, if the interim dumping duty has not then been paid, that further six-month period of August 2015 to February 2016 is also not available to be considered under the assessment regime.

55. The Commissioner might contend that such amount could now be paid to protect the relevant importer's right at least in relation to the period from August 2015 to February 2016. Yet to now pay that amount with a view to protecting the assessment rights over the latter period, does nothing in relation to the 5 May 2015 to 5 August 2015 period which covers the majority of the

imports purportedly subject to retrospective duties. Furthermore, the amount being sought as interim dumping duty is, as demonstrated below, somewhere between (confidential – excessive amount) times more than the 2.6% duty that should at most be applicable, 2.6% being the dumping margin calculated in the original dumping investigation. The cashflow considerations of such an excessive interim duty amount, merely to protect a technical right to assessment, are a serious commercial impediment to do so, given that the interim dumping duty claimed, inclusive of GST is something in the order of (confidential – excessive amount), whereas a figure of 2.6% of the total import price paid, would be considerably less than (confidential amount) of that amount.

56. The Commissioner's Final Report notes my comments that a retrospective duty backdated to 5 May 2015 would not allow for duty assessment for much of the period between then and now. The Final Report states that the Commissioner subsequently published a note acknowledging this issue. The Report states that the relevant note indicated that its suggested deadline of 4 February 2016 "was advised to be inflexible, but the Commission committed to providing importers that applied within that timeframe an opportunity to provide further information in support of their application if the measures were applied retrospectively." (Final Report page 59)

57. This comment makes no sense whatever. As noted above, an importer can only make an application for a refund of interim duty paid if such interim duty was in fact paid. No duty could be paid on circumvention goods until such time as the Assistant Minister made a decision to retrospectively include circumvention goods in a 2013 Notice that did not cover such goods. That decision was made on 17 March 2016 and came some time after the suggested "inflexible" deadline of 4 February 2016, by which time the Commissioner sought to invite interested parties to seek assessment. Hence it is impossible to understand what the Commissioner is talking about and in any event, it cannot be a valid proposition in law.

58. On a number of occasions, I have urged the Commission to explain the legal basis of their suggestion, without success. I indicated that it was problematic to try and explain the flaws in the Commissioner's logic in this Review application without being able to understand what that logic purports to be.

59. In an email to the case officer, Mr Maevsky of 4/4/16, I hypothesised that their intent perhaps was to ask importers to seek assessment on goods other than the circumvention goods, that is, non-alloy goods. I stated in that regard:

> "I remind you that my client never imported non-alloy at dumped prices between May and August, so could hardly have sought an assessment. You cannot assess a duty that was never paid or payable. As you know, your system flags dumped pricing. There was no flag….
>
> In any event, as indicated, my client did not import at dumped prices. It could not read your mind before the ADN and even if it could and you in fact have some legitimate theory as to how assessments on non-alloy can relate to alloy products made dutiable long after import, the anti-

> dumping law cannot demand that someone intentionally dump to protect their interests."

60. Similar comments were made in a letter to the Assistant Minister on 4/3/16 where I said:

> "While there are many matters I object to, for the purposes of this letter, the central concern is the recommendation in the SEF for retrospective duty and the concurrent formal notice by ADC dated 16 December 2015 headed 'Duty Assessment', No. 035 found in EPR 290. That formal notice follows the published SEF calling for retrospective duty to 5 May 2015 in relation to my client.
>
> The notice was no doubt published because the Commission recognised the implications for duty assessment were you to accept the retrospective recommendation. As you are aware, the normal process is to apply interim dumping duty and then allow interested parties to apply for variations to the two factors, being normal value and export price, to take account of the then current circumstances, to arrive at a final duty.
>
> The formal notice No. 035 indicated that importers affected by a retrospective application in the notice, must lodge an application for duty assessment by 4 February 2016 to protect their assessment rights.
>
> I immediately wrote to the Commission indicating that this formal public notice made no sense and was clearly contrary to the statutory provision dealing with assessments. It is very clear when one looks at s 269V of the Customs Act, that no-one can apply for a duty assessment without paying interim duty. No-one can pay interim duty until you decide one way or another whether it should be imposed. Hence the notice is meaningless, misleading and clearly wrong in law. I urged that it be removed and revised and replaced with a workable process, but for whatever reason, this has not occurred.
>
> …
>
> It would be wrong in law as it would be contrary to the principles espoused in the High Court case of *Malika* where the Customs Department wrongly sought to interpret a different provision as requiring a pre-payment before valid assessment of one's rights in court. While the circumstances are different, the High Court's approach to principles from cases such as *Bropho*, where challenge rights should not be removed without clear legislative directions to that effect, would still prevail."

61. No response has been received from either. Given the refusal of the Commissioner to provide particulars, I can only continue to seek to hypothesise in this application as to possible reasons he and the Assistant

Minister are relying upon, although for the above reasons, that is highly difficult to do.

62. The Commissioner might well have seen as relevant, variable factors calculated on other duty assessments (or for that matter, other anti-dumping cases or review applications). Nevertheless, the relevance of such information does not alter the legal requirements, in order, of first there being an assessed interim duty on the circumvention goods, then payment of that duty, and then an application for duty assessment brought within 12 months of any shipment where some reduction in interim duty is sought. Stated differently, information from another assessment inquiry, may be relevant to a later assessment inquiry, but only where the latter is brought properly.

63. The issue is not what the Commissioner can consider, but when an assessment application can be made in relation to the circumvention goods in issue.

64. As noted above, perhaps the Commissioner was advocating an assessment application on any goods that were at that time within the original notice ie, non-alloy goods. That could only occur if there was indeed an importation of such goods and if that importation occurred below the applicable ascertained export price. Where my clients are concerned, there were no such importations as noted in my correspondence above. Hence, that was not possible even if that was valid in law.

65. As I also noted, it cannot be a correct view of the law that an importer should have to consciously dump, so as to entitle itself to the right to seek an assessment. Even if that was expected, it still cannot obviate the need for a distinct assessment application on circumvention goods to follow the above statutory requirements.

66. For the same reason, even if such imports of non-alloy goods at low export prices had occurred, there can be no legal basis for such an application pertaining to non-alloy goods as invited in the Notice, to apply to different alloy-based circumvention goods over a time-period not covered by a valid assessment application.

67. This bizarre circumstance has arisen because the Commission, without reasoning, has advocated a retrospective duty backdated to 5 May 2015 and, whoever is responsible for assessing interim dumping duty, has on a preliminary basis, used the first of three available methods on which to do so or felt bound to do so, leading in my clients' case as noted, to a potential assessment somewhere between (confidential – excessive amount) times higher than the 2.6% duty that should at most be applicable.

68. Alternatively, the Assistant Minister was not invited to consider this issue in the Commissioner's Report and failed to consider modifying the means of calculating interim dumping duty for goods subject to unassessable retrospective duties, as is a matter to be considered under s 8 *Customs Tariff (Anti-Dumping) Act* 1975.

69. It is appropriate to explain why the interim dumping duty is asserted to be excessive. Under the *Customs Tariff (Anti Dumping) Regulations* 2013, Regulation 5 stipulates that one method is the combination of fixed and variable duty methods. This is the method that underpins the recent claim dated 16 April 2016. This adds the difference between ascertained export price (AEP) and normal value (in our case 2.6%) together with the difference between actual export price and last ascertained export price.

70. The ascertained export price determined in 2013 was (confidential amount). Current world prices are about (confidential amount) per tonne lower, so this amount per tonne would have to be paid as interim dumping duty on each and every tonne, plus 2.6%, rather than simply the 2.6% itself, which would only be about (confidential amount) per tonne if applied to current export prices and about (confidential amount) per tonne if based on the AEP.

71. An alternative is the floor price duty method. Here one would look at the difference between the export price of the particular goods and the ascertained normal value.

72. A third method is the *ad valorem* duty method. Here the method is to work out the difference between the ascertained export price and ascertained normal value and express that as a proportion of the export price as ascertained and apply it to the export price of the particular goods to obtain the interim dumping duty payable. This must surely be the method that should apply, given the inability to seek assessment and thereby determine a proper final duty. This is the only method that seeks to equate to that anticipated final duty.

73. The Assistant Minister's determination simply changed the goods' description in the original notice and does not address this issue. It does not separately designate a method of calculating interim dumping duty for the circumvention goods. Changes to the regulation dealing with the calculation of interim dumping duty were promulgated prior to the original dumping Notice. Both the Commissioner and the ultimate decision-maker, needed to turn their minds to determining the appropriate method of calculation of interim dumping duty to be publicised in such Notice.

74. The Commissioner's Final Report (page 59), goes on to note my correspondence of 3 February 2016, noting the terms of s 269V and noting further that my client had paid no duty on circumvention goods and hence had no standing to apply for a duty assessment. The Commission does not indicate in its Report whether it agrees or disagrees with this legal assertion. All it states is as follows:

> "The Commission provided no further advice to interested parties on this matter. However, the Commission notes that importers that paid duty on non-alloyed galvanised steel would have standing to apply for a duty assessment on <u>those</u> goods. The Commission considers that the note clearly indicated the Commission's intention to undertake duty assessments on both the goods and the circumvention goods if requested to do so by an importer, and that its willingness to accept additional information would provide affected parties with an

> opportunity to pay any interim duty liability arising from the retrospective applications of the measures and – if appropriate – seek an assessment of the final duty payable (emphasis added)."

75. This makes no sense. The Commission can only undertake duty assessments on circumvention goods if an application as to the latter is made consistent with the legislative prescription. Hence the Commission's recommendation of a retrospective duty was based on its erroneous view that an assessment on circumvention goods would somehow be possible if applications were made on different goods by 4 February 2016.

76. The Assistant Minister accepted that erroneous advice and adopted that decision. For all of these reasons, it cannot be a correct or preferable decision to impose a retrospective duty, not capable of assessment, based on the most excessive methodology of determining interim dumping duty, with no means to then determine a more accurate final duty, being the only form of actual duty mandated by Australia's international obligations.

77. It is inconceivable that either the Commissioner or the Assistant Minister would have recommended retrospective duty backdated to 5 May 2015 if they believed instead that interim duty would not be capable of being refunded under the assessment regime. Interim duties are not final duties and are not validated as such either by the Australian legislation or the Anti Dumping Agreement. They are nothing more than a rough and ready prepayment, pending an analysis of the correct amount of final duty. To the extent permitted in law, an interim duty only becomes an effective final duty if an importer does not avail itself of an entitlement to seek assessment. A decision by the Assistant Minister in a time frame that denies an importer an ability to seek such as assessment, cannot lead to the relevant deeming of a final duty for the purposes of the taxing Act, the *Customs Tariff (Anti-Dumping) Act* 1975.

78. It follows therefore that any action that only imposes an interim duty and prevents a determination of a final duty, cannot be consistent with the *Customs Tariff (Anti- Dumping) Act* and is hence contrary to Australian law and inconsistent with Australia's international obligations under the Anti Dumping Agreement.

79. Hence the Assistant Minister's decision to impose retrospective duties is not the correct one and/or is not the preferable one by reason of being an unassessable imposition of interim duty, calculated on the most disadvantageous and unrealistic basis. It is not the correct or preferable decision to simply allow the original method of calculating interim duty that was only ever intended to be prospective and assessable, to then apply to retrospectively taxed goods where that amount cannot be assessed.

80. The unreasonableness of the amount is compounded by the failure to reconsider the variable factors, which is discussed separately below.

81. ADRP should hence recommend at the very least, that the operative date of any revision to the duty, only be prospective as from a revised decision by the

Assistant Minister, if and only if such a decision is otherwise permitted, a proposition which is disputed.

82. In the alternative, the Assistant Minister should be directed to reconsider the variable factors and attempt to assess an interim duty equating to a likely final duty if there is to be any back-dated applicability, although there should be no backdating prior to a point in time where assessment challenges can be made.

There are insufficient policy grounds in support of a retrospective duty even in respect of a challengeable period

83. The Final Report gives no reasons in support of retrospective application even if the above problem of unchallengeability could be overcome (which it cannot). The SEF (page 71) suggested that the justification for a retrospective duty is:

> "To ensure any alteration to the original notice provides an effective remedy to the injurious effect caused by the circumvention behaviour …"

84. There is no outline of any findings of fact and reasoning to support this assertion of an effective remedy in the SEF.

85. Importantly, if the aim is to remedy the injurious effect, then a retrospective duty should only be set at a level no more or less than that which would be necessary to obviate the injury. Both the legislation and Australia's international obligations require the decision-maker to consistently consider whether a duty less than the dumping margin would be sufficient to obviate the injury. As noted above, because a retrospective duty was backdated to a time where it would be impossible to seek an assessment of the interim duty, the amount purportedly claimed is somewhere between (confidential amount) times the maximum likely final dumping duty without any potential to consider the lesser duty policy that allows for a duty less than the maximum dumping margin.

86. In addition, if the aim is to remedy injurious effects, one would need to then consider those injury effects. There either is or is not injury to the Australian industry from the importation of a circumvention good. There has been no analysis of that issue, yet the above justification is based on injurious effect.

87. In any event, retrospective duties do not alter historical injury. Whether or not an importer pays a retrospective duty or not, this can have no commercial impact on the historical profitability or otherwise of the Australian industry concerned. Hence the policy reasoning is illogical.

88. Most importantly, the applicant for the original dumping duty could have sought to describe the goods in its original application to include alloy products. It chose not to do so. More recently in its anti-dumping applications, it describes goods more broadly. Where the applicant chose to only target a particular type of product with a particular classification, persons who manufacture products under a differing classification who are nonetheless

subject to anti-circumvention provisions, should not be faced with unchallengeable retrospective duty except in exceptional circumstances. It is not the correct or preferable decision to force them to do so.

It is also wrong to apply retrospective duty on goods ordered before the minor modification regulation came into force

89. The regulation in relation to slight modification came into effect on 1 April 2015. The circumvention application was made shortly thereafter on 5 May 2015. It is unreasonable to apply retrospective duty based on a circumvention application brought a few weeks after the commencement of the relevant Regulation, when there would have been forward orders already contracted for. The Commissioner should certainly not recommend any retrospective duty in relation to goods already committed at a time where traders could not have known of the nature of the regulatory amendment.

90. The most significant concern in this regard is the fact that my clients habitually order goods some (confidential amount) days before they are expected to land in Australia. This would mean that the first orders after the application for anti-circumvention duty of 5 May 2015, that would have known of such application, would have been made somewhere around (confidential date). That would mean that all shipments which arrived between (confidential dates), would almost certainly have been ordered before the relevant Regulation was promulgated and known. Importations between (confidential dates) could easily have also fallen into this category. As indicated above, there is a problem in applying retrospective duty to that period, given that it would be out of time to seek assessment of interim duty paid. Added to that is the fact that most if not all imports from that period, were based on contracts that predated the Regulation. The Regulation could not have been intended to apply excessive and unchallengeable duty, to imports that could not have contemplated the provisions in the proposed Regulation. Customs laws throughout the world, including Australia, commonly have in transit provisions to deal with that concern. This is a further reason why the decision to apply retrospective duty cannot be seen to be the correct or preferable one.

91. It is also perverse that the relevant investigation period supposedly justifying a retrospective duty is between 1 July 2011 and 31 March 2015. During that entire period, there was no Australian legislation providing that slight modifications to those imports could be subject to retrospective duty. To base conclusions of intent on importing behaviour during that period, setting that period as a benchmark, is unfair in so far as it forms the basis of an unchallengeable retrospective duty.

It was wrong to recommend a retrospective duty after advising that there were no circumstances seen that would warrant that approach

92. The persons responsible for preparing the report to the Assistant Minister met with my clients in July 2015 and stated in response to a specific question, that retrospective duties are only proposed in exceptional circumstances and that they did not see exceptional circumstances in this case.

93. While new developments could in some circumstances allow a change in that position, importantly, the key factor relied upon by the Commissioner in recommending retrospective duty was simply the import pattern. This data was well known to the relevant officers at the time of that meeting and would have been one of the first areas of analysis by them. There is certainly no subsequent information that would further support a retrospective duty. None is contained in the Final Report. To the contrary, scientific evidence presented by the Commission's own expert and by others, showed that there are complex issues as to functionality and use. Hence, the purported conclusion of intentional avoidance by reason of the import data alone was weakened by subsequent investigations.

94. There being no new factors that supported a retrospective duty after the meeting, my clients were entitled to rely on those comments when making commercial decisions. A contrary final determination is hence not a preferable one.

Any retrospective duty, if valid, should only be based on a re-assessment of variable factors and proper consideration of the methodology to best determine interim duty

95. In my letter to the Assistant Minister of 4/3/16, I stated:

> "As an alternative, should you wish to consider any retrospective duty, it should only be a fair and relevant amount, which could only be known after you call on the Commission to investigate the variable factors that would apply to your determination. As you know, you have the power to do so under s 269ZZL, and are entitled to take other information into account, in particular current market circumstances as per s 269ZDBH."

96. A retrospective decision that ignores undeniable changes to the variable factors, based on an unchallengeable interim assessment, cannot be the correct and preferable one.

The scope of the recommended change to the Notice is too broad

97. Bluescope's initial application sought to cover all alloy goods, albeit in language that was difficult to follow. It must be immediately obvious to any investigator that there can be a whole range of permutations of alloy components, with ever increasing amounts of alloy material and that at some point, it must be difficult or impossible to describe this as a mere minor modification. This was clear to the Commission from the outset. In the Consideration Report (page 10), as to the breadth of the request covering all alloys, the Commission stated that it will take this into consideration when making the final recommendation

98. The Commission subsequently sought to deal with this problem in a simple fashion through the SEF, by proposing a limitation of the alteration of the original notice to boron alone. The logic was that an anti-circumvention determination should address the actual form of circumvention. In my clients' case, that was the addition of boron without the addition of other alloy

components. The logic would then be that if they imported more elaborate products, these should be looked at on a case by case basis.

99. BlueScope subsequently submitted that such a limitation would encourage exporters to use other alloys to further circumvent. That indeed was a matter considered by the Commission at the time of the SEF. It noted at that time that further anti-circumvention applications could be made in such circumstances, which in turn could be backdated.

100. Notwithstanding that view in the SEF, in his Final Report, the Commissioner has now accepted BlueScope's submission and recommended an amendment to the effect that any amount of any alloy in any configuration, should be caught by the notice when Yieh Phui is the exporter. That was accepted by the Assistant Minister.

101. It is inappropriate for the Assistant Minister to now make such a determination absent an analysis by the Commissioner of all such possible configurations of alloy material. If the Commissioner had considered such permutations and concluded that all would be minor in nature, that might have justified such a conclusion. That would be impossible, however, as it would be contrary to the Commissioner's exact findings, in particular in relation to Bao Australia and his acceptance that certain alloy configurations provided by that company, have different end uses.

102. Stated differently, to conclude that boron steel alone has a similar or identical end use to non-boron steel (which is denied), says nothing about whether other permutations of alloy would similarly have the same end use. Such a conclusion is erroneous in process and also leads to the commercial outcome that Yieh Phui can never export any permutation of alloyed goods, without invigorating dumping duty, no matter the end use requirements of a particular customer and no matter the particular specifications in any contractual order.

103. The Commissioner acknowledges the latter argument at Final Report page 56, noting the concern about the restriction on an importer's ability to conduct legitimate trade. The Commissioner acknowledges that this may occur but concludes "that there is no other practical means of preventing further circumvention activity occurring that would not have this effect." (Final Report p 59)

104. This comment makes no sense. The Commissioner acknowledges that the impact of his decision is, for example, that Yieh Phui cannot compete to service Bao Australia's customer that the Commissioner acknowledges should not be subject to a circumvention notice. Hence he acknowledges that his proposal prevents Yieh Phui from engaging in activities that should not be subject to this determination. It makes no sense to say that there is no practical means of preventing further circumvention activity. It would not be a circumvention activity if Yieh Phui sought to service such customers that are not intended to be caught. Hence the Commissioner has provided no identifiable or valid reason for refusing to advocate a cut-off between minor and more than minor changes in the notice.

105. Furthermore, the fact that the Commissioner finds it difficult in practice to define a cut-off, does not mean that a cut-off does not inherently exist. At some point in time, the addition of more and more alloy material will change the composition of goods. That is the conclusion found by the Commissioner and supported by all evidence, including that of Professor Dunne. There is no justification in recommending a notice that catches goods that should not be caught, by reason of the assertion that there is no practical means of formulating a dividing line (a proposition that is itself not supportable). A decision of that nature by the Assistant Minister cannot be the correct or preferable one.

106. Most importantly, the Commissioner accepted that there was conflicting scientific evidence. Even though he did not consider this determinative in deciding as to whether there was a minor modification, it also needs to be considered in terms of the scope of any notice. For example, in the Commissioner's analysis (Final Report para 6.5) he confirms that at the time of the SEF, the position was construed narrowly, focusing only on addressing the specific instances of circumvention activity. He again states that he "accepts that boron-alloyed galvanised steel is used for reasons other than avoiding the anti-dumping measures imposed on the goods." (Final Report p 56) It is clear from the commentary at Final Report page 57, that the Commission found itself with conflicting assertions about the value of boron alone. It concludes as follows:

> "Accordingly, the Commission sought to test these assertions and to establish whether a particular proportion of boron, a particular end use or some other particular description of the steel (such as production treatments like quenching and tempering) might be able to be specified in the original notices such that any 'legitimate' trade might be unaffected." (p 57)

107. Such an approach should not only occur to determine whether the notices might be restricted in some manner, but should also have been undertaken to determine whether there was in fact more than a minor change. That is discussed further below.

108. In any event, having admitted the need for further analysis, the Commission goes on to refer to inadequate advice from an expert witness. The advice is inadequate for two key reasons as noted below. The first is simply that the Commission failed to ask the expert appropriate questions. The second is because the expert is not sufficiently independent, being an emeritus professor at the University of Wollongong which is the lead member of a consortium funded to a significant degree by the applicant in this case. Importantly, when this was made known to the Commission, it wrongly rejected the factual assertion.

109. The Commission admits that based on Professor Dunne's report, other alloying elements may have varying practical effects on steel products. It is hard to then understand the Commission's conclusion that Professor Dunne's report demonstrates that it is impractical to alter the original notices to refer to boron in a defined proportion. It states as follows (Final Report page 57):

> "In particular, the Commission notes that an importer of alloyed galvanised steel would have access to limited information regarding these parameters and would be unable to readily assess whether the imported goods are subject to measures defined in these terms."

110. This makes no sense. The parameters that importers would have would be the stipulation in the relevant Notice if some cut-off point was delineated and commensurate specifications in their contracts. They would then be able to order goods outside of those defined parameters with impunity. Goods imported within those parameters would be dutiable.

111. Furthermore, that comment says nothing about the appropriateness of such parameters to distinguish between minor and more than minor modifications. The Commission itself has found that as the degree and composition of alloy increases, a point may be reached where it can no longer be said that there is a mere minor modification. That is the Commission's conclusion in relation to Bao Australia. Having found that in regard to that importer, there can be no justification to deny similar scientific propositions as being applicable to the future commercial decisions of other exporters for all or any potential customers.

112. In addition to concluding that it would be difficult if not impossible to define a cut-off point, the Commissioner has also been persuaded by BlueScope's arguments that any cut-off would encourage circumvention. In that regard, the Commissioner makes the alarming statement (Final Report page 58) that having obtained evidence from co-operating exporters, it has been able to conclude "that the boron was added for the purpose of slightly modifying the goods in order to avoid the anti-dumping measures set out in the original notices." It is not clear to what extent the subjective intent of an exporter is relevant and if so, how the Commissioner formed that adverse conclusion in relation to Yieh Phui when the latter asserted to the contrary that boron was added to deal with strain age hardening.

113. The Commissioner goes on to suggest that "some aspects" of BlueScope's arguments were persuasive and concluded that it would be an unusual outcome if exporters engaged in a particular circumvention activity "could simply employ a different alloy to continue avoiding the measures." (Final Report p 58) This simply presumes that the relevant exporters at all stages in the past and in the future have no other aspiration than to avoid an anti-dumping measure. It again ignores the fact that the recommended amendment denies those exporters the opportunity to compete legitimately for the supply of products that the Commissioner has found to be outside of the proper ambit of this investigation.

114. The Commissioner then effectively relies solely on the import data to conclude that "circumvention activity is a commercially attractive response for some market participants." (Final Report p 58)

115. Alarmingly, the Commission states that it "notes the significant discrepancy between the interim dumping duty payable by importers on the goods subject to measures, and the comparatively inexpensive additional cost of boron or

other alloying elements that currently enables an importer to avoid those measures." (Final Report p 58) To concentrate attention on interim dumping duty and not final duty is particularly alarming. Where Yieh Phui is concerned, the dumping duty found was 2.6%, a mere 0.6% higher that the *de minimus* level where no dumping duty would be applicable. As noted above, 2.6% of the current export price would be something in the order of (confidential amount). The cost of boron is something in the order of (confidential amount). There is no significant discrepancy when the cost of the current product is something in the order of (confidential amount) per tonne. It has been noted above that utilisation of the most excessive means of calculating interim dumping duty, would apply well over (confidential amount) per tonne as interim duty. That would be based on a decision by a bureaucrat to employ that method, rather than a method that seeks to equate to the 2.6% dumping margin found in relation to Yieh Phui. It is then perverse to conclude without evidence, that the dominant motivation of importers is to avoid an excessive interim dumping duty that was not at that point calculated, and which could more properly have been expected to try to equate to a fair level of final dumping duty.

116. In that respect, the Commission is in error in its presumption about the level of interim dumping duty even if that was the appropriate measure, as there are three methodologies noted above, permitted under the relevant Regulation. As noted, subsequent to the Assistant Minister's determination, the Commission has in fact written to interested parties on 16 April 2016, proposing interim dumping duty under the highest possible methodology. If instead the third methodology was employed, this would roughly equate to the original dumping duty as found in 2013.

117. It is impossible to understand how and why the Commission or other officers considered the highest possible methodology in determining a supposed discrepancy and then concluding as a result, as to the subjective motivations of persons involved based on the excessive calculation they themselves came up with.

118. For all the foregoing reasons, the decision to revise the original notice to cover any combination of alloy at any level for any customer whether present or future, is not the correct or preferable one.

The Assistant Minister has failed to consider the exercise of the discretion to address the variable factors

119. Section IV below argues that a failure to consider normal value, export price, injury and causation, renders the Assistant Minister's decision as inconsistent with Australia's international obligations and inconsistent with the provisions of the relevant taxing statute, namely the *Customs Tariff (Anti-Dumping) Act* 1975. In that section, it is noted that the Commissioner takes a different view, as indeed has ADRP on a previous occasion. While this application contends to the contrary in that Section, that legal argument would be moot if ADRP accepted that the Commissioner and the Assistant Minister at least had discretions to consider such matters, failed to do so, and that to fail to do so

rendered the ultimate decision not the correct or preferable one. This section deals with that contention.

120. As was demonstrated above, the retrospective decision means that an inflated interim dumping duty is being assessed that cannot be challenged under the assessment regime that itself allows variable factors to be reconsidered at the request of the importer. It cannot be the case that Australia is allowed to impose an anti-circumvention duty in circumstances where no-one has either the right or obligation to consider whether variable factors have changed between the time of the original dumping duty notice and the time of the circumvention decision.

121. At the very least, if the Assistant Minister does not have an obligation to consider variable factors under a circumvention application, she has a discretion to do so. Given the Assistant Minister's wish to accept the recommendation for retrospective duties backdated to 5 May 2015 when the importer cannot seek assessment of the bulk of the imports, the only reasonable response would be for the Assistant Minister to undertake that variable factor analysis as part of the decision-making process on the anti-circumvention application. The only reasonable means to exercise that discretion would have been to consider the variable factors in deciding on the desirability or otherwise of a retrospective duty, and determining what the fair and reasonable amount of interim dumping duty would be based on a proper assessment of variable factors, if such retrospective decision were to prevail.

122. Such a residual discretion is clear from an analysis of the circumvention legislation. It is clear from s 269ZDBG(2)(b) that the Commissioner may have regard to any other matter that the Commissioner considers to be relevant to the inquiry. Section 269ADBH(2) indicates that the recommendations of the Commissioner to the Assistant Minister may include the types of alterations that are to be made to the original notice.

123. The Assistant Minister also has a broad discretion to consider relevant matters over and above those contained in the Commissioner's Report. Section 269ZDBH(1) states in that regard that the Assistant Minister may alter an original notice "(a)fter considering the report of the Commissioner and any other information that the Assistant Minister considers relevant …".

124. The better view is that the Assistant Minister must consider relevant matters required under Australia's international obligations, in particular the Anti Dumping Agreement. As was noted by the High Court in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, a bureaucrat with a discretion has an obligation to consider Australia's international obligations unless it is clear from the legislation that the domestic legislation does not purport to give effect to such obligations. The latter cannot be the case with regard to these provisions, where the legislative history states clearly that they are intended to be consistent with Australia's international trade obligations.

125. Importantly, subsection 269ZDBH(2)(d), in relation to measures applied to existing importers where they were the subject of the original notice, expressly

allows for the specification of different variable factors in respect of one or more of those exporters. While this does not mandate the consideration of such different variable factors, it at least supports the argument that there is an obligation on the Assistant Minister to at least consider whether the variable factors have differed and to make a determination as a result. In turn, that obliges the Commissioner to consider that issue in his Report to the Assistant Minister.

126. Other elements show the need to consider such factors. As noted in the Customs Tariff (Anti-Dumping) Regulation 2013, in dealing with a new method for working out the amount of interim dumping duty, the Regulation states as follows:

> "It should be noted that all these methods for working out the amount of interim dumping duty payable on particular goods are subject to the 'lesser duty rule'.
>
> Under the 'lesser duty rule', the Assistant Minister must have regard to the desirability of fixing a lesser amount of duty where the non-injurious price is less than the normal value."

127. At the very least, if analysis of normal value and export price is not required as a primary element in a circumvention application (as is argued in Section IV), the fact remains that the assessment regime is intended to allow for the variable factors to be reassessed at the instigation of the importer concerned. If the Australian Government sought to argue that it complied with its international obligation to only impose any form of anti-dumping duty after the potential for consideration of these issues by reason of the importer's entitlement under the assessment regime, it follows as a matter of course that if a retrospective duty is imposed in a way that prevents such an assessment, the defence as to compliance with international obligations cannot possibly be maintained.

128. It is thus clear that the Commissioner, the Assistant Minister and ADRP may call for consideration of different variable factors.

129. This is also clear from *Final Report No 241 – Certain Aluminium Extrusions – China* and ADRP Report No 21, where the Panel agreed that the Assistant Minister has a discretion under s 269ZDBH(2)(d) to specify different variable factors. The Panel Report considered that the Assistant Minister should exercise such discretion in the context of the particular circumvention activity being reviewed, (ADRP Report paras 83 and 84), although ADRP saw limitations to this, discussed further below.

130. In this instance the Assistant Minister cannot have given any attention to this issue and hence has failed to make an appropriate or preferable decision underlying the imposition of interim dumping duty.

131. In cases such as this, a proper consideration of this discretion should oblige the Assistant Minister to consider whether a retrospective interim dumping duty under the highest permissible method of calculation should be applied without

a concurrent re-evaluation of variable factors. Such an approach is wholly unreasonable in giving rise to an uncontestable interim dumping duty between 10 to 30 times higher than an amount of final dumping duty that might be predicted in the current economic climate.

132. Notwithstanding the above provisions and concerns, the Commissioner stated in the Final Report (p 20) that he need not address these issues. The SEF (p 25) stated that there is no requirement to consider variable factors, but that "it may be possible to include an assessment of the current level of variable factors in the context of an anti-circumvention inquiry … (but) in the case of this inquiry, it was determined this assessment would not be undertaken."

133. Nonetheless, it appears that the investigating officers thought that it may be possible in some circumstances to consider variable factors, but chose not to do so on this occasion. No clear reasoning was provided and no valid reasons would be possible in the context of an unchallengeable retrospective interim dumping duty based on the most excessive calculation method.

134. For that reason, the Assistant Minister's decision is not the correct or preferable one for the additional reason of the failure to consider and review variable factors. Either a recommendation should be made to revoke the amendment to the notice or at the very least, recommend that the Assistant Minister, based on advice of the Commission, now review those variable factors over the relevant period and importantly, seek only to impose an interim dumping duty that is subject to the assessment regime or if legally permitted, is otherwise calculated as close as possible to a reasonable final dumping duty.

135. In support of this contention, it is clear that the Commissioner and the Assistant Minister have to hand sufficient material to make it clear that historical variable factors were unrealistic and would lead to unreasonable levels of interim dumping duty. That issue is discussed in the following section.

Inconsistent applications and the impact of Investigation 249 findings and claims that dumping must be proven

136. If consideration of these matters is merely a question of discretion, that discretion was inappropriately exercised when a decision was made to wrongly treat as irrelevant, data from other inquiries that naturally would be of sufficient relevance to this inquiry. Alternatively, such data, coupled with the Commission's knowledge from each and every steel inquiry it has engaged in over recent years, would guarantee that the Commission could only conclude that current normal values would be far below the levels assessed in the original dumping enquiry, that ascertained export prices determined at that time would also be grossly inflated and that non-injurious prices would be equally grossly inflated.

137. In my submission of 7 August 2015, I had alluded to an admission by BlueScope in Investigation 249 in support of this contention. This was in relation to an application for duties on this same product whether alloyed or

not, but which were exported from different countries to this inquiry, namely Vietnam and India. The admission was to the effect that "exports from Taiwan have continued, albeit at levels that are understood to be non-dumping …".

138. I also asserted that having terminated the investigation in relation to goods from Vietnam and India under that investigation, it would be unrealistic to validly accept current world market figures in that matter in support of that conclusion, but then allow a circumvention case on the product in issue in this case, so as to render alloyed goods subject to unrealistic historical dumping factors not applicable in the current market.

139. In respect of the admission in relation to Taiwan, all that the Commissioner's Report says is that the Commission considers that the statement by BlueScope "is not fulsome evidence that the anti-dumping measures are no longer necessary or that alloyed steel exported from Taiwan has not been involved in a circumvention activity." (emphasis added) (Commissioner's Final Report p 19)

140. The issue is not whether it is "fulsome" evidence but whether it is indeed relevant evidence. That has to be the case if the applicant itself makes such a concession. If there is then no evidence provided to the contrary, then the proper conclusion should be that the application is not made out in asserting continuous material injury from dumping.

141. Alternatively, it should encourage a reassessment of variable factors. In that context, my post SEF submission of 25 November 2015 indicated that at the very least, evidence of inconsistency in statements or findings between investigations, is a matter worthy of proper investigation by the Commissioner. That submission stated:

> "22. … If the submission is that the applications are inconsistent, that is not an assertion that either one is fulsome evidence. It is an assertion that the inconsistency is a matter for further investigation by the Commission."

142. That proposition is simply not addressed in the Commissioner's Final Report. The Commissioner instead makes the observation that the concession related to non-alloyed galvanised steel and not to the alloyed circumvention goods. Even that is inaccurate as the application in Investigation 249 was stated to relate to "flat rolled iron or steel products (whether or not containing alloys) …" (Application in Investigation 249, page 11). It is clearly a grave procedural error for the investigator to be unaware that Investigation 249 in fact covered alloyed as well as non-alloyed goods, and thereby wrongly rejected its findings.

143. The Commissioner should have taken note of his own clear findings in a range of cases that make the incontrovertible finding that steel prices have come down significantly since 2013. Hence he must know for certain that the variable factors have shifted significantly since that time. No-one could begin to contend to the contrary who has any experience of this industry. The Assistant Minister would also well know the adverse effect on the Australian

economy of the drastic falls in iron ore and coking coal prices, which in turn, have led to a commensurate drop in all steel prices.

144. To seek to distinguish between alloy and non-alloy goods as to presumptions of dumping was also inconsistent with the Commissioner's findings in relation to trade patterns in this case. If as in the current case, the Commissioner believes that all non-alloyed sales simply shifted to alloyed sales with the addition of modest amounts of boron (which is denied), then all other commercial factors ought to have remained the same, including the commercial reasons for costings and selling prices. As my post SEF submission noted:

> "27. The SEF goes on to say that in any event, such an admission by Bluescope that non-alloyed galvanised steel was exported at non-dumped prices, cannot lead to conclusions about alloyed products. This makes no sense in the context of the data that you have relied upon in your SEF. Part of your conclusion is based on your assertion that alloyed imports have largely replaced non-alloyed imports. If Investigation 249 only considered a minor amount of non-alloyed imports from Taiwan, that is unlikely to have caused material injury. In any event, you are also well aware of the cost differences of incorporating boron. You are aware of the cost factors and the pricing of both non-alloy and alloy products. Once again, an admission by Bluescope that even non-alloyed product was not dumped, must at least raise a strong hypothesis that this may be so with the alloyed products as well.
>
> 28. A further reason why the findings in investigation 249 would be clearly relevant is that ADC has found that the alloyed goods are more highly priced than the non-alloyed, with the cost of boron being passed on to the end user. If the non-alloy exports at lower prices were not being dumped, then it is highly unlikely that alloy goods would be dumped.
>
> 29. That is further impacted upon by the fact that ADC has purported to find that Yieh Phui has very little alloy sales domestically or to third parties. Whether that is true or not, it supports the hypothesis that there would not be dumping of alloy at a time that there would not be dumping of non-alloy.
>
> 30. To conclude as you have that the Commission cannot be satisfied that non-alloyed galvanised steel is no longer dumped without conducting a review of the variable factors, ignores the quite proper adjudicatory approach to accept an admission of fact against the interests of the applicant. To do so would perhaps not be enough to overturn the original dumping decision, but could easily be enough to show that on balance, the applicant has not made out a sufficient case on circumvention.

> 31. In any event, the Commission has treated this as an irrelevant fact and has engaged in an erroneous logical process as a result. (Confidential name) asserts in his email of 23 November 2015 that '(t)he findings in Investigation 249 are not relevant.' If that is truly the view of ADC, it is inconsistent with the comments in the SEF that at least suggest that it may be a relevant factor in some cases, but was not considered to be so on this occasion."

145. The Commissioner's Final Report goes on to say that the Commissioner cannot be satisfied that non-alloyed galvanised steel is no longer dumped without conducting a review of the variable factors but that "there is insufficient evidence that one of more of the variable factors relevant to non-alloyed galvanised steel exported from Taiwan may have changed for it to seek (under subsection (269ZA(3)) a Parliamentary Secretary-initiated review of these measures at this stage." (Commissioner's Final Report p 20) That misunderstands the proposition from my above quote. I was not simply raising it for the purposes of having a Parliamentary Secretary-initiated review. I raised it to show that there was prima facie and relevant evidence that the current goods are unlikely to be dumped and that this should be considered before a recommendation could be made for an anti-circumvention duty to apply. The Commission has failed to address this, other than by arguing that no attention needs to be given to these factors.

146. The Commission goes on to suggest that findings about whether goods from Vietnam and India have been dumped, provides no indication of the situation in Taiwan. It concludes "the assessment of the variable factors of export price and normal value in that investigation is specific to those countries and not to Taiwan." (Final Report p 20) As a general principle, it is fair to say that conclusions as to dumping from one country do not automatically apply to other countries. The difference in this sector is as noted above, the uniform trend to lower steel prices from all suppliers, given the reduction in input costs, notably iron ore and coking coal, no matter what steel product is involved. In such circumstances, all of the steel cases that the Commission has dealt with in recent years have painted a uniform picture in that regard, which once again should lead it to have the utmost confidence that the variable factors underpinning the circumvention goods have most certainly changed significantly since 2013.

147. In any event, my submission was not to the effect that a finding in respect of one country inherently applied to a different country. It was that an admission by BlueScope in relation to the very country subject to the circumvention inquiry, coupled with the Commission's experiences in all other cases, has to be relevant to this inquiry. The related submission was that the Commissioner and Assistant Minister had enough evidence that the variable factors are likely to be different, to invite the Assistant Minister to at the very least consider her power to evaluate and possibly vary such factors under s 269ZDBH(2)(d).

148. Even the applicant contends for the relevance of findings in Investigation No. 249. The application asserts that the Commission indicated it was satisfied that the industry manufactured like goods to circumvention goods and refers to

Investigation No. 249, Australian Industry Verification Report, September 2014.

149. Finally, the Commission's approach is also unfair to co-operative exporters. As noted in my post-SEF submission:

> "34. Finally, the failure to consider the findings in Investigation 249, where Yieh Phui has at all times been a co-operative exporter, even places it at a disadvantage to the way the Commission has dealt with Angang HK which did not respond to inquiries in this investigation. Yet the Commission notes (SEF p 45) that it considered information on the file gathered from and verified with Angang HK and its affiliates during Investigation 190a and 193a."

150. For the above reasons, it was wrong to conclude that this material was irrelevant. A decision that ignored a relevant concession by the applicant and relevant findings in a range of cases, cannot be seen as correct and preferable.

Section I conclusions

151. For the above reasons, a decision that applies an uncontestable retrospective duty, over a scope of goods that must at some point involve more than minor modifications, without any analysis of variable factors and the appropriate means to calculate interim duty, cannot be seen as correct and preferable.

SECTION II

152. Section I purported to show that even if there were other factual grounds to support some anti-circumvention determination, the ambit, date and method of calculation were not correct or preferable. This Section seeks to show that there were also fatal flaws in the assessment of factual matters. The Commissioner and in turn the Assistant Minister have failed to properly assess crucial facts in the investigation.

153. Here the most significant concerns are the Commissioner's failure to properly address scientific questions; the failure to directly investigate end use, particularly as to the claimed concern for strain ageing and the value of boron additives in that regard; and, the tendency to bypass factual findings on a number of the stipulated factors, by continual reference to trade patterns alone.

The Assistant Minister's decision is not the correct or preferable one as the Commissioner failed to address key scientific questions or failed to adequately evaluate the scientific evidence before the Commissioner

154. There are four elements of concern where scientific questions are concerned. The first is the failure to investigate the science prior to the publication of the SEF. The second is the failure to adequately deal with or address the scientific evidence presented on behalf of responding parties. Such evidence included

documents from Yieh Phui showing historical complaints about strain ageing and their own testing in response to that. There was also a failure to properly consider evidence from the Gleeble newsletter produced by the University of Wollongong, suggesting the benefits of boron. The third is the decision to seek such evidence from an expert only after the SEF, without adequate notice to interested parties, preventing them from seeking sufficiently detailed and adequately tested contradictory evidence in a timely fashion. Related to that was the decision to accept the expert's report procedurally, when placed on the public record on 8 January 2016, significantly more than 20 days after the publication of the SEF on 5 November 2015. Finally, there were two fundamental errors in relation to the scientific report sought by the Commission. The first was the inappropriate and insufficient questions posed to the expert and secondly, the decision to select an expert that could not be seen as sufficiently independent from the applicant, given the latter's strong financial support for a research hub, the lead partner of which is the expert's university.

155. An application for anti-circumvention duty based on an allegation that a change in physical composition of a product is no more than a minor modification, must give significant attention to the claimed different attributes between non-alloy and alloy products. To fail to adequately address this is to fail to consider the key claims of importer and exporter interests, as against the key factor relied upon by BlueScope, being trading patterns. There cannot be a correct or preferable decision based on an inadequate evaluation of this central issue of concern. The individual elements of the inappropriate treatment of this scientific question are addressed in turn below.

The relevance of scientific evidence

156. Up to and including the SEF, the Commissioner simply relied on the arguments from interested parties and sought no independent evidence to resolve conflicting scientific assertions.

157. While he did not seek any corroborating evidence until he sought the views of Professor Dunne, nevertheless he has acknowledged the relevance of these scientific issues. In the Final Report, the Commissioner notes the use of boron to deal with strain ageing. The Commissioner notes that we presented studies showing the beneficial impact of boron, particularly during the continuous annealing process.

158. The Commissioner then notes a BlueScope submission purporting to refute the scientific claims presented by the exporter and importers in this current case.

159. If the Commission had undertaken a proper analysis of the alleged benefits and concluded in the affirmative that they were present (and the onus should be on the applicant to demonstrate the contrary, there being no evidence on which it sought to do so), the next question is whether that factor, alongside the other relevant factors leads to the better conclusion that alloyed goods are more than a minor modification of non-alloyed goods. At the very least, it has to be seen as a highly relevant factor and hence should be investigated

accordingly. As the following sections demonstrate, such investigation was inadequate or non-existent.

The Commission failed to investigate the scientific issues prior to the publication of the SEF or thereafter in a meaningful fashion

160. As noted above, the Commission effectively formed its view in the SEF without feeling the need to resolve the differing scientific assertions. While that alone is not a determinant that the ultimate conclusion is in error, it is impacted upon by other problems, being the fact that an expert report was sought after that time without adequate notice to other persons, where the expert was not sufficiently independent of the applicant and was asked irrelevant questions. These aspects are discussed in sub-sections below. This section deals with the way the Commissioner sought to resolve the material before him before he embarked on such an investigation.

161. The Commissioner had erroneous assertions from the applicant about the approaches in other jurisdictions, which we refuted. The application suggests that there had been numerous investigations by the US administration for almost two decades in relation to the addition of Boron in steel products exported from China to the US "to evade or avoid anti-dumping measures …". Given that the applicant's consultant presumably researched such cases, the application ought to have noted that in the *Cut Steel* case from Japan, the US DOC held that this was not a circumvention activity. Most importantly, to suggest that the mere addition of Boron constitutes an avoidance activity without a consideration of the impact on the product and the behaviour of all relevant person is wholly erroneous.

162. The Commissioner was presented with details of this DOC finding by me, "that there are commercially and metallurgically viable reasons for the addition of Boron in the context of the Continuous Annealing Process ('CAP')." It concluded that for producers or corrosion-resistant carbon steel who use CAP, "the addition of Boron is not 'immaterial' to the performance characteristics of the final product." My clients trade in CAP produced goods.

163. The Commissioner also had submissions from interested parties that it sought to resolve. Where BlueScope's submission is concerned, the arguments fall into two main categories. The first group of comments suggest that because BlueScope is not asked to add boron and does not do so, there is no reason for Yieh Phui to do that. That cannot be a relevant argument as to the scientific benefits or otherwise of the addition of boron so as to deal with the claimed concern of strain ageing.

164. The second group of arguments involved BlueScope addressing its view of the science of strain ageing. The Commissioner notes that BlueScope admits the claim that adding boron to minimise strain ageing "is technically correct" but notes that Bluescope argues that this is incomplete on the basis that the levels in Yieh Phui's alloyed steel are metallurgically insufficient to achieve the intent of controlling stretcher strain. BlueScope's main argument was that because the boron can affect nitrogen causing stretcher strain, but does not control carbon, which also has the same effect, boron alone is not effective.

BlueScope also asserted that strain ageing is essentially a visual blemish and there is no technical or other requirement for commercial quality forming or structural grades to be free from or have reduced stretcher strain. BlueScope also argued that non-strain ageing or minimal strain ageing is only required for low strength formable galvanised steel grades which require a special steel type known as interstitial free steel that eliminates both carbon and nitrogen. Finally, BlueScope asserted that the only time boron alone is beneficial is for special grades, mostly in relation to automotive uses.

165. The Commissioner's Final Report to the Assistant Minister gives no reasoning as to how he resolved the scientific disagreement between Yieh Phui and the importers on the one hand and BlueScope on the other. All it states is as follows:

> "The Commission has compared the alleged circumvention goods to the goods subject to the original notice and found alloyed galvanised steel and non-alloyed galvanised steel are likely to be substantially interchangeable, have the same end use and each fulfils similar customer preferences and expectations." (Final Report page 38)

166. That is problematic for a range of reasons. The Commission itself has no basis to compare the relevant goods without scientific evidence. To merely state that something is "likely" to be "substantially" interchangeable, does not indicate whether the Commission does or does not agree with the alleged benefits claimed by the exporter. To fail to do so does not then allow the Assistant Minister to give adequate weight to that issue.

167. The important question that the Commissioner should have asked is whether strain ageing would be a problem for customers who carry large inventory in depressed economic times and if so, whether the addition of boron between 20-30 ppm would have material benefits as compared to the added cost called for by the addition of boron. Importantly, while the cost of added boron as found by the Commission is low, that is not essentially a negative factor even though the Commission seems to think so. The desirability or otherwise of changes to composition must always be determined on a cost-benefit basis. The lower the cost to make an improvement and the more the benefit thereby achieved, the more justifiable commercially the change in the product formula.

168. Hence, it should properly be concluded that the scientific debate was crucial and that this could not be resolved simply by analysis of the competing submissions of interested parties. Alternatively, if reliance was placed on such submissions, the only valid conclusion could be that the applicant had not satisfied its burden of refuting the scientific benefits.

The wrong questions were asked of the expert

169. No doubt with a view to such concerns, the Commissioner then resolved on some unspecified date, to seek the advice of a metallurgist, Professor Dunne (the Dunne Report). It is clear that his report has been influential in terms of the Final Report. That is highly problematic. Most importantly, that report is largely irrelevant to this inquiry as Professor Dunne was asked the wrong

questions, most likely questions relevant to a different enquiry as to a HSS case. Even then, in the only part of his report that addresses the scientific issues relevant to this enquiry, he makes comments actually favourable to the exporter's claims.

170. This was noted by lawyers acting on the exporter's behalf, Appleton Luff Pte Ltd, in a submission of 16 February 2016, stated:

> "We note that while Professor Dunne's report discussed the metallurgical effects of boron-added steel in general, this report did not address in particular the strain ageing effect resulting from the production process as the one Yieh Phui has and how the addition of boron may decrease the undesired strain ageing effect. Nonetheless, Professor Dunne's report did suggest that the addition of boron with certain boron may degrade the strength and toughness of the steel (and thus decrease the strain ageing effect), which supports Yieh Phui's past production experiences on boron-added galvanized steel.
>
> It has been Yieh Phui's production experiences that after the cold-rolling, annealing and the rest processes, the steel becomes tougher gradually during the storage time after production is completed. This means the yield strength and yield point elongation of the steel both increase and make the product tougher and less formable. This is known as the strain ageing effect.
>
> The addition of boron in the galvanized steel shipped by Yieh Phui to Australia was to resolve the undesired strain ageing effect.
>
> As Yieh Phui explained in its initial questionnaire response in this inquiry, the addition of boron helps minimizing the undesirable effect of nitrogen, as boron has strong affinity for nitrogen and boron would react with nitrogen to form boron nitride, even with a minute quantity of boron addition. The decrease of nitrogen as a result helps minimizing strain ageing of steel and consequently enhances the ductility and formability. Furthermore, the addition of boron minimizes the adverse effect caused by aluminium nitride, which then results in a lower level of strength making the steel more formable.
>
> More importantly, Professor Dunne's report supports Yieh Phui's observations and experiences that boron assists in offsetting the strain ageing effect. In his report, Professor Dunne stated:
>
> > *'Boron can be an extremely useful alloying addition to steels because of its potential to act either as a powerful hardenability-promotor or an effective scavenger of unwanted N, C and O from solid solution. However,* ***the concentration of B has to be carefully limited to prevent formation of B-containing compounds that can degrade the strength and toughness of the steel****.'*

> Indeed, Professor Dunne's report recognized that the addition of boron would result in the formation of B-containing compounds such as boron nitride as Yieh Phui explains above, which would degrade the strength and toughness and therefore, decrease the strain ageing effect.
>
> The addition of boron in order to degrade the strain ageing effect is well known in the steel industry. In this inquiry, Yieh Phui has repeatedly emphasized that this effect is also known even to [BlueScope, the applicant of this inquiry]. Yieh Phui's sale of boron-added galvanized steel to (confidential) manifests that the boron-added galvanized steel does have its own commercial significance which is distinct from the boron-free galvanized steel. (Confidential) This transaction also supports the metallurgical effects explained by Yieh Phui that the level of boron used by Yieh Phui did result in a lower level of yield strength of steel, and an enhanced formability. Unfortunately, the Commission has not properly investigated in this throughout the entire inquiry."

171. I reiterated this concern in two emails to Mr Maevsky. The first on 3/2/16 stated:

> "I would also like to understand why you have a report from Prof Dunne for two separate enquiries. My investigations make it clear that his report simply does not speak to the age and strain hardening arguments presented by our supplier and responded to by Bluescope. His report is irrelevant and you would need a report that addresses the issues in our enquiry. I would be happy to discuss this also."

172. The second on 11/2/16 stated:

> "As my earlier submissions noted, you needed to understand functionality issues to be reasonable in any assessment of minor or more than minor changes. Having belatedly accepted that by seeking the Dunne report, it would be improper to rely on an irrelevant report to underpin your earlier SEF that eschewed the need for any such scientific analysis. It was also problematic that you had not warned people that you were seeking advice, so we could do so contemporaneously."

173. I also tendered an expert's report that confirmed the irrelevance of the Dunne report. Professor Alan Crosky School of Materials Science and Engineering UNSW stated, in an email of 9/2/16:

> "I would like to advise that the report by Professor Dunne which you provided to me does not address strain-age hardening and, as such, does not address the competing arguments about strain-age hardening."

174. The following are the specific reasons why the questions asked of Professor Dunne were largely irrelevant and decidedly sub-optimal. This has again been confirmed by Professor Crosky.

175. Professor Dunne's report provides background and theory on the properties of steel and the use of alloying materials in sections 1 – 8 of his report.

176. Section 9 then provides specific answers to the questions posed by the Commission. This review lists each question and then provides commentary on the suitability of the question and impressions of the answer provided. The following are the specific questions posed and my responses.

> 1. What effect does the addition of boron have on HSS galvanised (flat rolled steel?
>
> *This question is quite general and does not ask for consideration of:*
>
> *- the different processes that might be used in manufacture or*
>
> *- the intended use of the Boron alloyed steel supplied by YP.*
>
> *- the final use of the steel and processes that the steel may undergo after manufacture [The effect of welding post manufacture is a topic that was addressed in sections 5, 6 & 7.2.] There is no discussion of the effect of bending processes needed after manufacture.*
>
> *- the influence of other alloying materials and how they might affect the use of Boron.*

177. The answer provided assumes the processes used, and the composition of the steel, would result in the addition of Boron increasing the hardenability of the steel and potentially making welding of the steel more difficult. The answer makes no mention of the points raised in section 7.3, about improving the performance of highly formable sheet steels. This makes it clear that an understanding of the required downstream processes, as well as the steel manufacturing process used, are both important in determining the suitability of the use of Boron. The answer also does not consider the potential for "age" hardening to affect the steel properties and how Boron might influence them.

178. Alarmingly, as the attached observation of Professor Crosky is concerned, it seems more likely than not that Professor Dunne completely misconstrued this question. This would be based on the way he read the acronym "HSS". Whatever view he took, was irrelevant for this particular inquiry. For those commonly involved in the trade in steel products, HSS refers to hollow steel sections. If that was the proper view to be taken on this question, both the question and the answer have no relevance to a different product, being zinc coated galvanised steel. More alarmingly, Professor Crosky's observations suggest that for academic researchers, HSS instead refers to high strength steel. Such a reading would be particularly problematic if it underpinned Professor Dunne's report, given that the exporter in this case claims that the addition of boron is to <u>lower</u> the strength of the steel, to promote formability under conditions of age straining and has nothing to do with using boron to add to the strength of the steel.

2. At what point or in what proportion does the addition of Boron have a measurable impact on the performance characteristics of HSS and galvanised steel? What are these effects?

   This question does not consider how other inputs – other alloy materials, carbon & nitrogen content for example – and the manufacturing processes, affect the final product characteristics. It seems to wrongly assume that the effect of Boron is not influenced by other processing variables.

   The answer provided discusses the minimum quantity of boron needed to obtain a hardening effect. It does not identify a maximum range and does not refer to the quantities mentioned in 7.3 when referring to forming sheet steel. In any event, a hardening effect is not what is contended for by the exporter.

3. To what extent do these effects differ according to the processes used to manufacture the product (such as quenching and tempering)?

   The answer provided assumes the "processes used to manufacture the product" are processes used by the steel purchaser, not the downstream processes of the steel manufacturer. As such it seems the question could be considered ambiguous. The answer provided contains much useful information. It does focus on low yield strength, high ductility product and how it would be affected. It does not make any mention of the use of Boron as a potential way to improve ductility – as mentioned in 7.3 – which may be required as a result of "age" hardening.

4. Are there any end use applications of HSS and Galvanised steel that contain Boron above 8 ppm concentration where the end use is different before and after the addition of Boron (i.e. where non Boron goods would not be suitable?)

   This question seems to focus on the end use, which is determined by the properties of the steel manufactured. The use of Boron is one of a number of possible ways to achieve the required end properties.

   The answer provided gives one example of how the use of Boron would change the finished product.

5. What are these applications, and what are the physical characteristics of the steel necessary to meet the requirements of these applications? For example, can these be determined by the level of Boron, the particular production process required (such as Quenched & Tempered) or by some other characteristic not present in the non alloyed steel (such as an improved tensile strength).

The answer provided is a good response to a poorly phrased question. The applications determine the properties of the steel required and therefore produced – using a wide range of processes. The answer reiterates the points mentioned previously about Boron increasing the tensile strength of steel when used in the way described. Again the point about Boron being able to improve the ductility of steel in certain situations is not mentioned, which is the only relevant question in this case.

6. Are there any other factors which the Anti- Dumping Commission ought to consider to achieve its objective of not disrupting legitimate trade in alloyed steel HSS or alloyed galvanised steel?

The answer provided refers to the various types of steel applications identified in section 7. It confirms the point that Boron can improve the performance of deep draw steels by improving their ductility but again makes no mention of "age" hardening and how its effects might be mitigated.

Summary

It is unlikely that the questions or the answers provided are intended to address the specific issues of the case in question.

It appears they are intended to provide general background that might assist in the case in question. If that is the case then the relevance of the questions and the associated responses must be questioned as there are key technical matters that were not raised by the questions or addressed by the responses. It appears that – as described above - some matters that were raised in the earlier theoretical sections of the report have not been used in the responses provided.

179. Professor Crosky observes as follows:

I notice in the report by Professor Dunne that Questions 1, 2, 4 and 6 which were asked of him by the Anti-Dumping Commission contain the acronym HSS which is not defined. I read this to mean high strength steel and I wonder whether Professor Dunne did also since most of his report concerns the effect of boron on quenched and tempered steels and such steels are categorised as high strength steels. In addition, Questions 3 and 5 state "such as quench and tempering" and "such as quenched and tempered" in questioning the effect of processing, further suggesting that the questions relate to quenched and tempered steels, which as noted above are categorised as high strength steels.

I understand from information provided by Professor Waincymer that the steels of concern in this matter have yield strengths in the range of 250-450 MPa. As such they would not be categorised as high strength steels. They would also not be quenched and tempered.

The reasons for addition of boron to quenched and tempered steels are quite different to the reasons for boron addition to the steels which are the subject of this matter.

I now understand that in the present matter the acronym HSS refers to hollow steel sections. While most of Professor Dunne's report focuses on high strength quench and tempered steel, in Section 7.3, he briefly addresses "highly formable sheet steels" and notes that boron addition is one means of obtaining "extra deep drawing capacity", i.e., increased ductility. He refers to these steels as extra deep drawing steels and states that they are a "third class of steels", which, in the context of the document, indicates that they are a different class to quenched and tempered steels. The steels which are the subject of this matter would fit into Professor Dunne's "third class of steels".

Commission officers wrongly refuted the assertion that the research centre funded by BlueScope had in fact found that boron was beneficial in certain circumstances

180. If an independent expert report is to be sought, the expert should be truly independent. That was not the case, although no assertion is made in this submission as to actual bias. Instead, the concern is with reasonable apprehension of bias when insufficient attention is given to this by the relevant bureaucrat. Of particular concern is that person's erroneous conclusion that this was not even an issue.

181. The Commission had been provided with evidence that a research hub, supported by BlueScope, centred on the University of Wollongong, was the place where the Commission's expert had worked. As noted below, I also provided evidence that this research centre had found boron to be beneficial in certain circumstances, a factor also ignored by the Commissioner.

182. The following extract from my post SEF submission of 25 November 2015, shows an erroneous rejection by (Confidential name), a Commission officer of the concerns as to independence raised by me.

> "121. More alarming again is the reference to relevant evidence in (Confidential name) email of 23 November 2015. In terms of the Gleeble newsletter he states '(t)he Commission has been provided with no evidence indicating any relationship between the research centre and Bluescope. The only evidence provided has been one edition of the Gleeble newsletter which visited the Bluescope Steel metallurgy centre.' Whether one questioned Bluescope, the Gleeble newsletter editors, the University of Wollongong or engaged in simple Internet searches, one would readily find that the research is a joint venture between the University, Bluescope (and other steel manufacturers) and the Australian Research Council and now called SteelHub. At the very least, a simple question to Bluescope about the article's validity would have uncovered the relationship.
>
> 122. In any event, it is the evidence and not simply the relationship that is crucial. The point to the relationship is that Bluescope

could be expected to receive and review the newsletters of a research centre that it in part funds. If it does so and states to you that no amount of boron alone has any value, contradicted by its own independent research centre, on what basis does it suggest the contrary to you?

123. If on simple investigation you found that the people speaking to you were in ignorance of the findings reported in Gleeble, that undermines the quality of their assertions. If they were aware of that information and hid it from you, that undermines their veracity. In either event, you then have before you an independent scientific assertion in an article to compare to any other evidence presented. You know that there are numerous articles extolling the benefits of alloys. You would then compare that to the evidence provided by Bluescope itself, ideally not limiting yourself to their mere assertions from their internal staff. At the end of the day, you need some objectively justifiable means to distinguish between conflicting scientific assertions between Yieh Phui's internal staff and Bluescope's internal staff. Independent studies placed under your nose ought to be a clear mechanism to do so.

124. It is also disconcerting that (Confidential name) intimates that the Gleeble material was not considered of significance. To say that the Commission considered Bluescope's submissions on the public record, is no answer to the question of whether the Gleeble material should have been seen as relevant and either accepted on its face, or accepted as the basis for a simply inquiry to Bluescope. To ignore a relevant fact and ignore a relevant line of inquiry, cannot be saved by simply saying one looked at other things, particularly when those things were only submissions of the applicant."

Conclusion as to scientific evidence

183. A decision in a case, where the key argument presented by exporter interests is that boron has key scientific benefits, should adequately assess those claims. Because the Commissioner never sought such evidence in time; never gave other parties notice to allow them to seek such evidence in response to or contemporaneously with the Dunne Report; asked the wrong expert; asked the wrong questions; and failed to give sufficient weight to the favourable comments in the Dunne report, cannot be the correct or preferable one.

The Assistant Minister's decision was not the correct or preferable one as it wrongly determined that differences between the original goods and the circumvention goods were merely minor

184. Section IV below, asserts that the Assistant Minister has erred in that there cannot be a minor modification under Regulation 48(2)(b) unless it can be said that there has been a change to the circumvention goods. This has never occurred.

185. Even if that could be overcome and the Assistant Minister would be entitled to consider Regulation 48(3), the individual and collective conclusions in that regard by the Commissioner, relied on by her, were erroneous. Given that the onus should be on the applicant and the Commissioner to demonstrate the need for the retrospective anti-circumvention duty, the correct decision should have been to reject the application in its entirety. Alternatively, the Assistant Minister should have called for a further and proper investigation.

186. A proper analysis of the reasoning under Regulation 48(3) shows inappropriate conclusions as to several factors; a failure to consider all relevant factors; and a decision that is not the preferential one when all factors are taken into account, in particular, the scientific evidence as addressed in the previous section.

187. The following sections first deal with the Commissioner's treatment of the individual factors required under Regulation 48(3) and then concludes with an overall assessment of the Commissioner's determination under that sub-regulation, when all investigated factors are to be properly looked at together.

Physical characteristics

188. The approach that the Commissioner took to the analysis of physical characteristics is crucial, given that this is one of two factors under Regulation 48(3), alongside end-use, where the exporter's claim of the benefits of boron to reduce the strain ageing effect, must be considered and evaluated.

189. The Final Report shows that instead, the Commission took an inappropriately narrow view of physical characteristics. The Commission Report notes that variations in alloy would not be able to be determined by simply looking at the product and that the goods in the circumvention goods "appear identical". (Final Report para 4.2.3 page 27) That is not what is important in terms of physical characteristics. A physical characteristic involves all physical elements and not just visual perceptions.

190. Furthermore, in my post SEF submission, I made the point that composition is identifiable from the mill certificate provided in each case (post SEF submission 25/11/15, para 105). The Commissioner simply does not address this in his Final Report.

191. The Commission observed that when it examined Yieh Phui's boron content it found "some" were only marginally above 8 ppm, while others showed levels substantially higher "though at no time were these levels close to that seen for exports of alloyed galvanised from another supplier, which the Commission is satisfied was a specialised steel for automotive components." (Final Report p 33) The latter is an irrelevant factor, clearly taken into account by the Commissioner. At no stage was it suggested that Yieh Phui's goods were specialised steel for automotive components, hence they did not need to meet the required levels for such purposes. At all times, Yieh Phui and the importers indicated that boron had been added to deal with the age and strain hardening effect that otherwise applied to non-alloyed galvanised steel. That is the allegation that needed to be analysed.

192. The Commission's approach to Yieh Phui's circumstances should be compared to the way it dealt with exports from Bao Australia in relation to a precision component. It concluded that "the level of alloys present were well above the minimum levels of alloy required to be classified as an 'alloy steel' …". The Commission has not properly addressed the fact that for Yieh Phui, the boron content was generally three times above the minimum level. Here again it should have concluded that these were "well above the minimum level …".

193. The Final Report also fails to properly concentrate on the exporter's submissions as to physical differences. The Commissioner merely states that Yieh Phui's exporter questionnaire response did not address claims as to the physical differences between its alloyed and non-alloyed galvanised steel. (p 33) Subsequent submissions by Yieh Phui made it clear that the difference is the boron, typically at (confidential amount) ppm, introduced to deal with the strain ageing effect, and which had other claimed benefits that needed to be tested. In my post SEF submission of 25 November 2015 I noted as follows:

> "112. In any event, Yieh Phui noted other beneficial differences in production processes with alloyed HRC, such as thinner scale, easier trimming, fewer defects and ease of cold rolling. In view of the above, it is not clear how the SEF concludes that the physical characteristics are similar.
>
> 113. This misunderstands the nature of a 'characteristic' as opposed to a component. The physical difference is the addition of boron at whatever level that occurs. The difference in characteristics is a separate question, which must consider the impact of the additive, and not simply its chemical nature and volume.
>
> 114. It is troubling that the SEF concludes (p 35) that the Commission has compared the relevant goods and considers that the physical characteristics of both goods are similar, the main difference being the presence of boron at levels at or above 8 ppm (but not at levels of specialised automotive steel). No-one has ever suggested that the physical composition is different, other than the addition of boron. Once again, characteristics are different to composition. A characteristic is a quality, not a component.
>
> 115. To properly analyse the quality, the Commission should consider what the quality difference if any would be at a mere 8 ppm, what it presumes was a difference for specialised automotive steel and what would be the situation where something in the order of three times the minimum was the norm for Yieh Phui's exports.
>
> 116. The confusion between physical differences and characteristics is evidenced by the comment at p 40, where under the heading

> of physical differences, reference is made to characteristics. No indication is given as to how the Commission came to the conclusion as a result of competing assertions of Yieh Phui, Wright Steel and CITIC on the one hand and Bluescope on the other, that the alloyed galvanised steel did impact on the physical characteristics of the relevant product. The Commission concludes that it has had little to no impact after only consulting Bluescope. No tests were made and no reference in the SEF is made to the independent literature provided to it.
>
> 117. To also make the comment that it is not at levels seen in specialised automotive steel, implies that such levels may be appropriate characteristic differences. That being the case, there is surely a need to consider whether a lesser level can still have sufficiently distinct physical characteristics. Without analysing the qualitative differences, the Commission cannot make a scientifically meaningful conclusion either way."

194. Not only has the Commission itself failed to consider these matters, but as noted above, it also failed to invite its expert, Professor Dunne, to directly address these claims.

Manufacturing processes

195. While the Commission noted that manufacturing processes would be similar between alloy and non-alloy goods, importantly, that would also be so for the automotive components that were seen as constituting more than a minor modification. Hence this should not be an influential factor.

End use

196. The Assistant Minister's decision was not the correct or preferable one as it was taken without due consideration to end use.

197. The Final Report suggests that "the assessment of whether an activity has occurred examines whether the end use of the circumvention goods is the same as before the slight modification …" (Final Report p 16). The Commission notes (Final Report p 42) that it relied on information from Yieh Phui, other suppliers and exporters, importers and BlueScope as well as knowledge from previous investigations.

198. Most importantly, it states "(e)nd use is disputed by the interested parties, and the Commission notes that it has obtained no definitive evidence from any party that would demonstrate which is the better view." (Final Report page 42)

199. This logic is then used to rely primarily on the trade patterns to justify the application of a duty.

200. As noted above in relation to the analysis of physical characteristics and in relation to the assessment of scientific allegations, the Commissioner has

failed to adequately assess the key scientific issues. Such issues in relation to physical characteristics also overlap with this factor of end use. This is because the exporter's contention is that the key physical characteristic is improved response to strain ageing, which aids effective end use by persons who carry inventory for lengthy periods or who purchase steel from those who do so.

201. Where end use was considered as a separate factor, what is clearly absent is any investigation of actual end users. At no point in time has the Commission in fact directly investigated end use with any relevant entities. An investigatory body directed to consider end use should investigate end users.

202. Discussions with BlueScope, which by definition does not service the end users of the producers of the circumvention goods, cannot be relevant direct evidence in that regard. When the Commission is told by Yieh Phui of the benefits to end-users holding inventory, it has no right to reject Yieh Phui's assertions simply based on BlueScope's assertions to the contrary, without seeking confirmation from relevant end-users.

203. My response to the SEF urged the Commission to investigate actual end-use. It also urged the Commission to consider end-use not only in the context of products developed, but also in the context of the processes by which they are developed, in particular dealing with strain age hardening. My submission was as follows:

> "5. The second key reason why the inquiries have been unreasonable, is in relation to your predominant conclusion that the end use of the goods did not change. It is clear from the public record that you have made no objective inquiries as to end use of these goods, but have instead, relied primarily on either advice from Bluescope, or import statistics, or a combination of both. This is contrary to what you know to be the case, where my clients sell to stockists, who sell to multiple clients for a range of end uses, some which have particular concern for strain hardening, particularly stockists in depressed times. It is inappropriate to ignore this reality and consider import statistics alone, as these are a separate factor to end use under the relevant Regulation. To conflate two relevant factors, would be to erroneously ignore the distinction that Parliament sought to make and fail to make sufficient and independent evaluations of each.
>
> 6. Concentrating on Bluescope's own assertions as to end use is also erroneous, as it does not have direct knowledge of the end use of the imported products both before and after the application of the dumping duty notice. By definition, it cannot know the use to which these goods are put by customers of my clients. Once again, there are indeed numerous end users who purchase from numerous stockists, the latter being particularly concerned with strain hardening.

> 7. A conclusion of fact based on end use, without any direct investigation of end use, must be a fatally flawed inquiry process."

204. The Commissioner has also misunderstood the comment by Yieh Phui when it suggests (Final Report p 42) that Yieh Phui submitted that there is no difference in purpose or end use and that this is a slightly different view of the market to the one held by its main customers, being my clients. Given Yieh Phui's later submissions, its questionnaire response was clearly talking about ultimate end use where there is no strain ageing concern. At all times it argued for differing properties and uses in terms of strain ageing.

205. The Commissioner is also wrong to conclude (Final Report p 39) that "most parties agree that both alloyed galvanised steel and non-alloyed galvanised steel exported by Yieh Phui are interchangeable …". It is certainly conceded that if strain ageing is the key concern, and if steel is used promptly so that the strain ageing effect does not occur, goods are often interchangeable. That ignores the reality of the current commercial climate and the claimed reason for adding boron. Many intermediate suppliers in current depressed economic circumstances, find that contracts are cancelled or delayed for liquidity reasons. Additionally, they are forced to carry a greater range of stock to entice customers to use their services. The longer that stock sits idle, the more the strain ageing effect subsequently applies. Promptly manufactured and formed goods are indeed more likely to be interchangeable, but goods that have long sat on the inventory floor are claimed to be different.

206. By failing to directly investigate end use in the context of this claimed advantage of boron, the Commissioner has simply failed to adequately investigate a key issue. Having failed to adequately investigate a key issue, there is no basis on which the Commissioner could reject the claim. Hence the recommendation to the Assistant Minister that effectively ignores the claim cannot support the correct or preferable decision if that is adverse to the party claiming benefits from added boron.

207. The Commissioner needed to make a determination as to the alleged difference between product supplied immediately for forming, and product that would sit for some time in inventory. Whether that is considered in terms of physical composition, utility or end use, that is a relevant factor and the central scientific issue relied upon by those opposing this application.

208. The problematic approach to consideration of end use is compounded by the way the Commissioner then uses the conflicting assertions in his final assessment. As noted above, the Commissioner states:

> "Although end use is a relevant factor to consider, the Commission does not consider that any one factor alone will determine whether the circumvention goods have been slightly modified. End use is disputed by interested parties, and the Commission notes that it has obtained no definitive evidence from any party that would demonstrate which is the better view. The Commission considers that a consideration of all of

> the factors considered to be relevant is the most appropriate approach." (Final Report p 42)

209. There is nothing objectionable in considering that all factors must be looked at, but the prior comments are clearly in error. No-one has to provide "definitive" evidence. The Commissioner must take a view on conflicting evidence and provide reasons for that view to the Assistant Minister. The Commissioner needs to undertake appropriate investigations. To fail to even speak to any end user is clearly problematic.

210. That is exacerbated by the way the Commission dealt with the confidential information discussed below, which showed (confidential).

211. The failure of the Commissioner to provide a reasoned conclusion on this issue is suboptimal and gave no basis for the Assistant Minister to make a final determination. That is particularly so given that the Commissioner has accepted that "customers have requested goods which minimise the strain ageing effect due to longer shelf life resulting in a non-alloyed galvanised steel being more difficult to process." (Final Report p 39) The Commissioner notes that there are conflicting views as to the effects of the addition of boron in such circumstances.

212. It is then hard to understand the Commissioner's next line of reasoning. He admits that "there may be some benefit to the addition of boron to minimise the strain ageing effect of steel that has been stored for long periods allowing for easier use …". (Final Report p 39) Nevertheless, the Commissioner goes on to state that this is not likely to be a new problem arising contemporaneously with the dumping notice. It is inappropriate for the Commissioner to seek to undermine the validity of the science in this way. The Commissioner can quite properly consider the change in trading patterns as a relevant argument suggested by the applicant to be favourable to its position. That cannot indicate one way or another, whether a contemporaneous depressed economic climate has made strain ageing a more serious concern than previously existed.

213. It is also the case that all interested parties are entitled to consider all elements under a cost-benefit analysis, both the cost of adding boron, the likely benefit, and the duty implications. If one product is demonstrably better than another and comes with a lower duty rate, there is no reason for the Commissioner to ignore the benefits. Stated more simply, the timing of a change cannot be relevant to the scientific value of the change.

214. The Commissioner has also erred in concluding that because BlueScope asserts that it has not seen any request for reduced strain ageing, that this somehow diminishes the requests made to Yieh Phui. Either the latter are valid or not. The Commissioner has no valid basis to accept an unsubstantiated assertion by BlueScope over an equally unsubstantiated assertion by Yieh Phui. Where the latter is concerned, however, the Commissioner was not dealing with an unsubstantiated assertion but was instead in possession of contemporaneous documents raising this as a concern. The Commission has ignored this material in its Final Report.

215. Other problems arise from the failure to consider direct evidence of end use. The Assistant Minister may also exempt goods from interim dumping duty and dumping duty if satisfied that like or directly competitive goods are not offered for sale in Australia for all purposes on equal terms under like conditions having regard to the customs and usage of trade. If the Commissioner had analysed actual end use, he would have identified that this could apply to at least one customer of the importer that cannot purchase from BlueScope.

Manufacturing costs and selling price

216. The Commissioner concluded that the extra cost of boron would represent a very small percentage of the purchase price of alloyed HRC. That is not disputed. It also noted that the premium for boron charged by Yieh Phui was also a small percentage of the total selling price. It is nevertheless not accurate to then state that this is "a small to negligible impact …" (Final Report p 35) (Confidential) dollars per tonne is still (confidential) and is not negligible.

217. Furthermore, as noted above, to understand the overall value of a shift in product requires an overall cost-benefit analysis. A large benefit at a low cost would always be a desirable initiative. A low cost in such circumstances is not evidence of an avoidance intent. A large benefit at a low cost is a valuable commercial aspiration, not an avoidance activity. Hence low cost per se should not be a key factor and cannot be considered without an analysis of the commensurate benefit.

218. Importantly, evidence before the Commission was also to the effect that the full cost was passed on to Wrightsteel's customers. No mention was made of this in the Report.

Marketing and distribution

219. In my post SEF submission of 25/11/15, I made the point that if strain aging is the concern, marketing and distribution analysis needs to concentrate on the way <u>end-users</u> are dealt with. As I stated:

> "129. More disconcerting is the fact that the SEF concentrates in terms of channels of marketing, trade and distribution on Yieh Phui. If CITIC and WrightSteel have an exclusive agency for Yieh Phui products in Australia, then concentrating on that part of the chain will always be the same, whether the product is inside or outside of this application. The real question is marketing, trade and distribution to <u>ultimate end users</u>, particularly as end-use seems to be the matter of greatest significance to the Commission's ultimate findings. The failure to properly investigate this is a clear failure of the investigation process.
>
> 130. It is thus not clear what is the relevance in this context of the reference to Yieh Phui's response that its own sales process remained the same. Once again, that has to be so as it exports

> to its exclusive agents in Australia. End use is not determined by these companies, but instead, by the end customers."

220. Hence, to fail to evaluate distribution in this context ignores the central claim on behalf of the exporter.

Patterns of trade and export volumes

221. The Commissioner found patterns of trade that suggested that shipments of alloyed galvanised steel replaced shipments of non-alloyed galvanised steel. He concludes:

> "This suggests that alloyed galvanised steel and non-alloyed galvanised steel are likely to be substantially interchangeable, have the same end use and each fulfils similar customer preferences and expectations." (Final Report p 33)

222. While the Commissioner is entitled to consider the data discretely, he should not form such a broad conclusion from one element alone, but should instead consider all factors, particularly the express requirement to consider physical capabilities and end use, that must surely go toward the validity or otherwise of the Commissioner's immediate conclusion about interchangeability, particularly for customers concerned with strain ageing.

223. Stated differently, customer preferences and end use are best determined by a discussion with customers. Patterns of trade before and after a duty can certainly raise a hypothesis as to the motivating impact of the dumping duty, but that would then at most be a factor to evaluate against the other stipulated factors. To simply conclude from that data that other key factors demonstrate no physical change, is a failure to properly analyse those other factors. Most importantly, it undermines the potential to understand when and why traders would undertake a cost-benefit analysis of the relative merits of alloy versus non-alloy goods.

224. The Commissioner's conclusion also ignores evidence before him from Yieh Phui's submissions, to the effect that customer complaints about strain ageing had occurred around the time of the original dumping duty, at which time Yieh Phui sought to experiment with a modified product. If around the same time, customers are becoming concerned about strain ageing and also about a dumping duty, shifts in trade patterns can be explained by one or the other, or by a combination of the two. The Commissioner has simply ignored the legitimate concerns of customers. That flaw flows inevitably from a failure to directly consider end use when faced with equivocal evidence on other factors. Instead, the Commissioner keeps coming back to trade patterns as the core reason for the Commissioner's adverse decision.

The Commission's summary of its findings and conclusions

225. The Commissioner needs to independently consider the 13 relevant factors, and any others that are relevant, and only then put any conflicting arguments

together, and form an overall conclusion with reasons as to the degree of modification that is found.

226. Section IV below deals with the Commission's assertion that it did not need to consider all of the stipulated factors expressed within the relevant Regulation. It seeks to show that the Commissioner was in error in that conclusion, which undermines his Final Report and the decision in due course by the Assistant Minister.

227. Nevertheless, it is noted in that section that the Commissioner asserts in the alternative that he did indeed consider each of the relevant factors other than tariff classification. That is not a correct assertion, in particular when the Commissioner's analysis of each factor is carefully considered in terms of the investigatory actions it took (and indeed failed to take as noted), and the way he erroneously made conclusions about some factors, simply by reason of his consideration of trade patterns.

228. Most importantly, he did not in fact engage in any investigation of the conflicting scientific assertions which are central to this dispute. He has made no express conclusion about Yieh Phui's assertion that it began to produce alloyed goods in response to customer complaints about strain ageing. Instead, the Commissioner essentially relied on patterns of trade and export volume. I do not deny the relevance of that data but the Commissioner needed to consider whether it was a coincidence that these events occurred contemporaneously or not.

229. As noted in my post SEF submission of 25 November 2015:

> "100. At p 31, the Commission seems to suggest that it considered twelve of the thirteen factors listed in Regulation 43 and indeed notes the thirteenth factor being the different tariff classification. Hence, taken at face value, it suggests that the Commission has considered all thirteen of the relevant factors.
>
> 101. At p 33, the Commission concludes that as a result of analysing patterns of trade, the relevant goods are 'likely to be substantially interchangeable, have the same end use and each fulfils similar customer preferences and expectations.'
>
> 102. Once again, the Commission has looked to one factor alone, namely patterns of trade and used that to conclude about other distinct factors that it asserts that it examined, namely end use, customer preferences and expectations. It is palpably obvious on the face of the public record and the SEF, that the Commission has made no effort to directly investigate end use, customer preferences or expectations. These matters are addressed individually below."

230. Alarmingly, the reliance in the Report on trade patterns should be contrasted with the assertion of (confidential name) in an email of 23/12/15. He states:

> "Further, in relation to points 1 and 2 above, the Commission notes that the SEF outlines the conflicting evidence on whether the addition of boron to steel is beneficial or not, but notes that even if there is this benefit, the evidence presented does not alter the fact that the end use of the goods that have been slightly modified is the same before and after the modifications (regardless of whether there is benefit provided by boron in this application or not). The question of end use is the key determinant (subsection 48(2)(c) of the Regulations) in finding whether a circumvention activity has occurred."

231. Section above dealing with end-use, instead shows that the Commissioner saw this as equivocal.

232. Relying unduly on trade-patterns is problematic for a range of reasons. For example, if a local manufacturer was importing the relevant steel sheets to then make purlin in Australia and decided after the dumping duty to import fully made purlins, the dumping duty may in part have motivated the change in commercial activity, but this is irrelevant to determine whether a finally made up purlin is more than a minor change to a flat sheet of galvanised steel, which must unassailably be true. I again quote from my post SEF submission of 25/11/15:

> "150. It is also remarkable to conclude as the Commission does (p 41) that Bluescope and importers of non-alloyed galvanised steel are likely to be supplying the same end users over the same periods. The Commission has ignored the different distribution chains and the important role of stockists as customers from my clients, who would face the biggest problem with long held inventory in times of depressed demand. The Commission seems to be asserting that if Bluescope says it does not have a problem or a need with its customers, one can therefore conclude that Yieh Phui does not either. That is not a reasonable investigative process where Regulation 48 requires the Commission to consider the imported goods and not Bluescope's business model.
>
> 151. In that sense, (confidential name) states '(t)his question of end use is the key determinant (subsection 48(2)(c) of the Regulations) in finding whether a circumvention activity has occurred.' As you would be aware, the Regulations do not stipulate that one of the thirteen factors is in fact the key. It would be an improper fettering of the Commission's duties and discretions to presume that in all cases, end use is the key determinant, ignoring other relevant factors or downplaying their significance.
>
> 152. If instead, the Commission took the view that end use is the key determinant on this occasion, it would need to have a reason for that and articulate it in the SEF so that parties may respond and so that the Parliamentary Secretary can form her own view whether to accept the recommendation or not.

153. Even if you were entitled to consider end use as the key determinant, that should suggest a wholly different method of investigation in that you could not simply rely on Bluescope's assertions that end use by customers who did not buy their product from Bluescope was all the same, whether alloy or not.

154. You have thus made a conclusion of fact without investigating that fact. You invite the Parliamentary Secretary to support that conclusion of fact without providing her with the benefit of the results of any investigation."

Conclusions under section II

233. For the foregoing reasons, an analysis of the required factors that is based on inadequate scientific analysis, which fails to directly analyse end-use in the context of strain ageing, and which in substance ignores factors with conflicting assertions and relies in effect on trade patterns alone, is not a proper investigation. A decision by the Assistant Minister in reliance on that sub-optimal analysis cannot be the correct or preferable one.

SECTION III

234. This section deals with procedural errors that undermine the correctness or appropriateness of the Assistant Minister's determination. It overlaps in part with Sections I and II in so far as they also addressed certain procedural flaws as sub-sets of the substantial analysis in those sections.

235. At the outset, it is noted that ADRP takes the view that mere proof of procedural error, irregularity or unreasonableness, does not necessarily undermine the Assistant Minister's decision. The argument in that regard is that because the statute requires an analysis of whether the decision is the correct or preferable one, this connotes merits review. While it is clear that the form of analysis by ADRP is not the equivalent of judicial review before the Federal Court, nevertheless it is also not clearly merits review as occurs in the Administrative Appeals Tribunal. This is so for a number of reasons. Most importantly, it is open to ADRP to recommend that certain matters be reinvestigated. That must allow for circumstances where certain investigatory processes are sufficiently poor in relation to a key element, that it cannot be said that the Assistant Minister's decision is correct or preferable.

236. Individual procedural flaws are addressed separately, but should be evaluated collectively, alongside the concerns raised in the other three Sections.

The Commissioner wrongly dealt with confidentiality

237. The Assistant Minister's decision was not the correct or preferable one as it failed to take into account relevant confidential material provided on behalf of exporters and importers. In addition, responders to the application were unfairly disadvantaged by reason of the fact that the applicant was not required

to present adequate non-confidential summaries of its own supposedly confidential material. Hence the Commission's response to confidentiality was internally inconsistent and adversely affected respondents.

The Commission wrongly ignored confidential information (confidential)

The Commission states (Final Report p 42):

> "A specific request was made for the addition of a minute amount of boron by the purchaser which was for the purpose of reducing the yield strength of the galvanised steel."

238. As to this confidential material, the Commissioner asserts that the party to whom the evidence refers is unable to defend itself and accordingly, the Commissioner does not consider that he can have regard to this evidence. (Final Report p 42)

239. It is contrary to ADA and the Australian legislation to simply ignore all confidential information for that reason. If a non-confidential summary is possible, it is required to be produced and published before such information can be considered. No such summary is required if it cannot be generated in a non-confidential manner. The fact that non-confidential summaries are not obligated if they cannot possibly be articulated in non-confidential form, cannot mean that such material is then ignored. If that was the intent, the Anti Dumping Agreement and the legislation would have said so. Quite to the contrary, they indicate that there are circumstances where non-confidential summaries need not be provided.

240. In all circumstances, the Commissioner must take relevant information into account. By all means, he may consider the weight to be given to evidence where an opportunity is not given to a relevant party to refute it by reason of confidentiality. That is no reason for rejection.

241. In this case, the Commissioner was given access to the actual order documents from (confidential).

242. Furthermore, the Commissioner could have investigated this with "the party to whom the confidential evidence refers" without disclosing the confidential evidence. The Commissioner could simply have asked (the party), "did it or any related party ever put boron into products of this nature?" If the answer was yes, then the Commissioner could have explored that directly with (the party). If the answer was no, and the Commissioner believed that it should not rely on Yieh Phui's assertion without other parties having a right to respond, it should have made this clear to Yieh Phui and asked it whether it was willing to waive confidentiality.

243. Most disconcertingly, Yieh Phui itself, the claimant of confidentiality, expressly indicated in a submission that such questions should be asked. The Yieh Phui submission by Appleton Luff dated 25/11/15 stated:

> "We also request the Commission to investigate further by requesting (the party) to provide explanations as to Yieh Phui's sale of boron-added steel to (the party)mentioned above."

244. Appleton Luff had previously submitted on 30/10/15:

> "First of all, we would like to bring your attention to a set of sales documents of (confidential) provided in Exhibit 1 of this submission, which involves one sale transaction of boron-added galvanized steel made by Yieh Phui to (confidential). This sale was made by Yieh Phui to (confidential), before the imposition of anti-dumping measures. This transaction involved a product of [AS 1397 G450] for which (confidential) specifically requested addition of boron of more than (confidential) into the galvanized steel purchased from Yieh Phui. In addition, (confidential) specifically requested that the yield strength of this product not to exceed (confidential), a requirement which is unusual for a typical boron-free product of [AS 1397 G450] specification.
>
> This transaction manifests several key points which are crucial for this anti-circumvention inquiry. First, the boron-added galvanized steel does have its own commercial significance which is distinct from the boron-free galvanized steel because it serves special purposes and utilizations in the market. Otherwise, (confidential) would not place an order specifically requesting for it.
>
> Second, [AS 1397 G450] under the Australian Standard requires a <u>minimum</u> yield strength of [450] MPa and gives no cap on it because [G450] is intended as a grade with higher yield strength and thus a minimum requirement on the yield strength is made to ensure this product does generate the yield strength an end user expects. (Confidential)'s special request on the maximum yield strength in the above-mentioned transaction implies that a lower yield strength for a [AS 1397 G450] product was expected, and such expectation was a result of the addition of boron into the galvanized steel."

245. I also expressly suggested that (confidential) be asked this question, in paragraph 20 of my post-SEF submission of 25 November 2015, extracted below.

246. Hence it is simply incorrect to exclude consideration of this information on the alleged grounds that a party against whose interests the information is provided, is denied an opportunity to respond, the latter being an erroneous assertion by the Commissioner.

247. Furthermore, to accept the presentation of confidential information by Yieh Phui and my clients, accept the justification I provided for not producing non-confidential summaries, but then reject the information in toto, is unreasonable behaviour by the Commissioner and excludes from the Assistant Minister's consideration a most fundamental and relevant consideration.

248. Alarmingly, the above justification in the Final Report is quite different to the justification presented by one of the investigating officers when discussions were held during the investigation. This was addressed in my post SEF submission of 25 November 2015 which first outlines and responds to a different reason underlying the SEF as postulated by (confidential), a Commission officer.

> "8. (Confidential)'s response dated 23 November 2015 to my email inquiry of 20 November 2015, states '(t)he purchase of boron-alloyed product by (confidential) in another market is not relevant to these inquiries.'
>
> 9. (confidential)
>
> 10. The Commission was given confidential data showing that (confidential), ordered boron added steel from my clients' own supplier, Yieh Phui, (confidential). The only difference between the two products is in the zinc coating, which has a different Australian standard requirement. The boron has no relevance to that part of the product.
>
> 11. The Commission has ignored the fact of the boron purchases by (confidential), considering it to be irrelevant. For that reason, the Commission would not have made any investigations in relation to the data, in particular inquiring of (confidential).
>
> 12. To fail to consider this fact is a breach of the Commission's obligations under Regulation 48(3). To fail to even deal with this in the SEF and in due course, perhaps fail to deal with this in the advice to the Parliamentary Secretary, would place her in violation of that regulation, should positive findings be recommended and accepted.
>
> 13. (confidential)

Confidentiality and inadequate non-confidential summaries by the applicant

249. In my submission of 7 August 2015, I noted the requirement of a full opportunity to defend one's interest and the entitlement to non-confidential summaries per ADA Articles 6.2 and 6.5.1. The Final Report states "it is unclear to the Commission as to what confidential information in the application Wrightsteel is asserting has been redacted by BlueScope but has not been replaced by a sufficiently detailed non-confidential summary thereof." (Final Report p 21) The Commission opines that if this relates to the discussion of the 13 factors per subsection 48(3) of the Regulation, there was not in fact any redacted information. The Commission thus considered the non-confidential version of the application to be sufficiently detailed.

250. This is remarkable given the express comment in Consideration Report No 290 page 8 which indicates that the application contains a confidential attachment containing market intelligence as to the claims of interchangeability, end use and physical characteristics.

251. Furthermore, no non-confidential summaries were provided as to the redacted material on pages 12 and 13 of the application. The redacted material is meaningless without any legitimate attempts to explain what the assertions relate to. At the very least, the particular person against whom motives have been alleged, should be appraised of the evidence on which BlueScope relies, such evidence being kept confidential from other interested parties. Remarkably, in the second-last paragraph on page 12 of the application, one would guess that the redacted material relates to Taiwan and Yieh Phui Enterprise Co Ltd simply because it has the lowest dumping margin.

252. These matters were made clear in correspondence. In a submission of 14/8/2015, I stated:

> "The redacted material at pg 12 makes it hard to analyse BLS assertion as to proof of motivation, but it would be likely that whatever they assert, this would be applicable to their own purchases or boron added product for the El Salvador market."

253. In my email to Mr Maevsky of 20/11/15, I stated:

> "I also cannot see any reason for BLS to have been allowed to redact key figures from its submission of 11 September. Here for the first time it appears that it might seek to assert the level that might differentiate between minor and more than minor changes. These are figures from published studies so how did you accept them as confidential? How can I respond without knowing that data?"

254. My concern as articulated in my post SEF submission of 25 November 2015 was as follows and at that stage, related primarily to a <u>subsequent</u> BlueScope submission, not the initial application:

> "43. The Bluescope submission of 11 September 2015 purports to speak to this, albeit for no discernible reason, via redacted references to figures, where the figures are not about anybody's commercially confidential data, but simply are an assertion on a general level about the role of boron in galvanised steel. Whatever figures were contained under the redactions should have been part of the original application. If Bluescope was able to justify those figures, so be it. If respondents such as my clients were able to convince you to the contrary, then the application would fail. …
>
> 57. Once again, the redacted submission of 11 September last, finally proposes some kind of a cut-off, albeit a cut-off I am not allowed to see. While we almost certainly would disagree with any cut-off proposed by Bluescope, nevertheless, it makes no

> sense for you to propose a notice that includes even more alloy than the cut-off that it proposes in that submission. Yet this is what you have done. If instead, you wish to consider Bluescope's proposed cut-off, as noted above, that should not be redacted as it could not possibly be confidential material as it does not relate to anybody's own commercial behaviour, but was instead a hypothesis as to general scientific validity. …
>
> 97. At p 29, the SEF states that it is unclear what my submission alludes to regarding confidentiality in the application.
>
> 98. The reference to the submission of 7 August 2015 was not as to claimed confidentiality, but was instead, a claim as to the lack of any evidence whatever in relation to most of the relevant thirteen factors as outlined above.
>
> 99. As noted above, however, Bluescope's submission of 11 September has redactions that cannot possibly be seen by the Commission as confidential. That submission seems to assert what level of boron is important for certain features of any particular goods. Such a statement as to scientific composition cannot on any view be confidential. Assertions as to composition can only be confidential if they relate to the particular compositions of certain corporations who do not wish their compositions to be known. That is not what Bluescope purported to assert in its submission of 11 September."

255. I then received the following response from Mr Piper on 23/12/15:

> "The Commission is satisfied that the resubmission dated 22 October 2015 contains only redacted information which is confidential. You may respond to or submit your own version of the levels redacted from that submission if you consider this to be beneficial to your case."

256. Once again the Final Report simply repeats comments from the SEF without even addressing these arguments that directed the Commission's attention to BlueScope's redacted material, including that within its submission of 11 September 2015.

257. Importantly, the 11 September submission deals with some possible cut-off. It is a most serious procedural flaw to deny interested parties the opportunity to comment on such a proposed cut-off. It was also a flaw not to ask the Commission's expert, Professor Dunne, about the viability of that cut-off or allow other interested parties to have their own experts test that proposal.

258. There also seems no reason for BlueScope to have validly claimed confidentiality as to a proposed cut-off in terms of alloy content. The Commissioner should not have accepted that claim of confidentiality and/or should have ensured that an appropriate non-confidential summary was provided. Confidential material should only relate to such things as

commercial details of a proprietary nature of the applicant. It should not relate to a proposed cut-off that should make its way into the final Ministerial determination. The problematic approach to these scientific questions was discussed more fully above.

Nature and scope of the inquiry as a parallel endeavour

259. The Final Report indicates that due to the identical nature of the goods and the alleged circumvention activity, the Commission conducted a number of inquiries in parallel. That is not problematic per se, but given potentially different compositions of steel and different amounts of boron and other additives, the goods in each inquiry cannot be presumed to be identical. A procedural problem then arises if evidence in relation to one form of goods or activity was applied without proper consideration to differing goods and activities. This has been the case as to the report of Professor Dunne which answered questions inappropriate for this inquiry as noted above.

An unfair inquiry period was selected

260. As noted above, it was inappropriate for the Commissioner to consider an inquiry period that predated the relevant anti-circumvention regulation. This is particularly so given the Commissioner's propensity to make conclusions on subjective motivation, without considering all relevant factors, concentrating predominantly instead on trade patterns. As noted above, the period of some 75 to 90 days after the application for anti-circumvention duty would have involved importations into Australia, based on contracts that predated the anti-circumvention application, and in most cases, predated the Regulation that would have at least even allowed for such an application.

261. In my submission of 7/8/15, I commented as follows:

> "The Notice initiating this inquiry states that the alleged circumvention goods to be considered will be those exported between 1 July 2011 and 31 March 2015. It should not be proper to consider importations that all occurred prior to the relevant Regulation, in considering whether they are in compliance or to impose duties based on imports at a time prior to existence of the Regulation purporting to grant the relevant taxing power. Australia would again be in breach if it adopted this approach."

SECTION IV

262. This section deals with arguments that regardless of permissible factual determinations, there is no legal basis for any variation to the original notice.

There was a wrong application of law as per Regulation 48(2)(b), as these goods were never changed

263. The Assistant Minister is only entitled to determine that the original dumping notice be amended if each and every element of Regulation 48(2) is satisfied. The opening words of Regulation 48(2) stipulate that the relevant circumvention circumstance "is that all of the following apply;". The Assistant Minister cannot have been satisfied that each element of Regulation 48(2) was satisfied. In particular, the Assistant Minister was wrong to conclude that Regulation 48(2)(b) has been satisfied.

264. The Commissioner must begin by identifying the circumvention goods per Regulation 48(2)(a). They have identified such goods as alloy goods. They must then ask the question required under Regulation 48(2)(b) whether "before that export, the circumvention goods are slightly modified;". (emphasis added) The question is whether those circumvention goods, which are defined in the application as being alloyed steel, were modified at all and if so, whether the modification was slight or more than slight. Here it is simply the case that there was no modification whatever to those alloyed goods. They were produced that way from the outset.

265. Stated differently, a decision to buy more expensive goods that are in a different tariff classification, even if motivated by the lack of dumping duty on those goods (which is denied), cannot properly be said to be goods "modified in order to avoid anti-dumping duty".

266. The Commissioner has as a result also failed to properly apply Regulation 48(2)(c). This stipulates that "the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;". (emphasis added) Given that the circumvention goods were not in fact modified at all, this cannot be satisfied.

267. Putting that to one side, the comparison of use or purpose, if it was somehow allowed to compare alloy and non-alloy goods, must be said under the Regulation, to be "the same", not substantially the same or commonly the same. Yet the Commission has not concluded to that effect.

268. For similar reasons, Regulation 48(2)(d) cannot be satisfied as the first part of the phrase "had the circumvention goods not been so slightly modified", is not satisfied as the circumvention goods themselves were not changed in any way.

269. The only way around this problem of construction is to not see the "circumvention" goods as being alloy goods, but instead somehow see them as non-alloy goods. If that interpretation was permitted, contrary to plain meaning, it would not save the Commissioner's analysis as it would then prove fatal under Regulation 48(2)(e) as on that view of the circumvention goods, they would in fact be subject to s 8 of the *Customs Tariff (Anti Dumping) Act* 1975, which prevents the application of Regulation 48.

270. This is not a mere technical argument. On plain meaning, the intent of Regulation 48 should properly be seen as being to deal with goods that have

been made in a form that would be subject to duty but are then modified before export with a view to taking them outside of the dumping duty notice. An example would be a dumping duty notice on unpainted steel, where the steel is then painted. Unpainted steel as first made, would be subject to duty if exported, but is then modified to avoid it.

271. If instead, commercial traders manufacture different products from the outset, such products either need to be considered afresh, or need to be considered in terms of whether they come within the scope of the original dumping duty notice.

272. Given that Australia's circumvention regime goes further than most other countries, well beyond the proposed but rejected circumvention rules for the WTO in the Dunkel Draft, and given the clear intention that Regulation 48 complies with Australia's international obligations, it should not be the case that different parts of Regulation 48 are given differing interpretations in terms of the meaning of "circumvention goods" in order to somehow have them apply to newly manufactured goods that were never subject to dumping duty.

273. There are other flaws in the Commissioner's approach. When considering Regulation 48(2)(c), the Commissioner's Report simply refers back to the previous discussion in relation to s 48(2)(b). This renders Regulation 48(2)(c) otiose. That cannot be valid.

274. There is also a further flaw in relation to the consideration of Regulation 48(2)(d) as to whether, in the event that the circumvention goods had not been slightly modified, they would have been subject to the original notice. The Commission notes that there are a number of TCOs in relation to these goods. The Commission clearly has not investigated these TCOs to see whether the circumvention goods would be covered or not. The Commission simply "considers it is likely that the vast majority, if not all, of this alloyed galvanised steel did not qualify for such an exemption, and hence would have been subject to the original dumping duties notice had they not been slightly modified." (Final Report p 41) The applicant and the Commission have a probative burden to deal with each of the relevant elements before a positive conclusion in favour of a circumvention duty could apply. The Commission has clearly failed to look at the TCOs, which it could do quite simply to determine whether on the face of those instruments, Yieh Phui goods could be covered or not.

275. The Commission should be required to undertake each element of the required analysis. To instead hypothesise that "the vast majority" and perhaps all might not qualify for such an exemption is not a determination as to whether this has occurred or not. Importantly, one key customer requires goods that cannot be supplied by the applicant. There can be no injury caused by dumping in relation to products not capable of being produced by the domestic industry.

The Assistant Minister's decision fails to make the required analysis of normal value, export price, injury and causation and hence is not a correct or preferable decision consistent with Australia's international obligations and is not justifiable under a proper construction of the relevant legislation

276. The Assistant Minister wrongly failed to consider known changes in the variable factors, namely export price and normal value when considering the Commissioner's report. Section I argued that at the very least, the Commissioner should have examined such factors under discretionary powers to do so. Alternatively, the Assistant Minister should have called for a further investigation in that regard.

277. More fundamentally, the better view is that a consideration of these factors is required in all cases where an attempt is made to impose a tax under s 8 of the *Customs Tariff (Anti-Dumping) Act* 1975, notwithstanding views to the contrary by the Commissioner and ADRP itself.

278. There are three reasons why the authorities must consider these factors afresh as part of a circumvention application. The first is based on the plain meaning of the relevant legislation, in particular the taxing statute being the *Customs Tariff (Anti-Dumping) Act* 1975.

279. The second argument is that to the extent that the statute is unclear on this question, the intent behind it was to be compliant with WTO obligations. The WTO Anti-Dumping Agreement (ADA) would require such a consideration and hence the Australian legislation should be interpreted accordingly.

280. The third reason is that to the extent that the Australian legislation allows for an anti-circumvention duty without revisiting export price and normal value, it is in violation of Australia's international obligations.

281. As to the first, the Constitution requires discrete taxing Acts from those dealing with related logistical matters. The relevant taxing Act is the *Customs Tariff (Anti-Dumping) Act* 1975.

282. Section 7 of that Act indicates that duties of Customs are imposed in accordance with this Act. The section imposing dumping duty is s 8. Section 8(2) imposes dumping duty calculated in accordance with s 8(6). Section 8(6) provides that the dumping duty payable "on goods the subject of a notice is an amount equal to the difference between the amount that the Minister ascertains to be the export price and the normal value of those particular goods …". A lesser amount is possible under s 8(6)(b) where a non-injurious price has been ascertained.

283. No final dumping duty is thus permitted without ascertainment of the export price and the normal value of the particular goods the subject of the notice. The particular goods the subject of the retrospective notice, are alloyed steel. There would be no dispute that the Minister did not engage in any new analysis of export price or normal value of such goods.

284. The taxing statute also requires calculation of interim dumping duty. Section 8(5) states that the Minister must, by a signed notice, determine that the interim dumping duty payable on goods the subject of a notice … is an amount worked out in accordance with the method specified in that signed notice. The notice signed on 17 March 2016 does not refer to a method for calculating interim dumping duty.

285. The Assistant Minister might argue that anything not signified in her most recent notice is taken to be as articulated in the original notice, but the first question is whether she considered this issue and if not, why not. In particular, s 8(5B) stipulates the principles to be followed in specifying the method of calculation. The Assistant Minister must surely be expected to have regard to these principles when she determined to apply a retrospective duty on alloyed goods. Even if she ultimately came to the same conclusion as in the original anti-dumping inquiry, this should happen after she has considered the alternatives and concluded as to which would be the most appropriate in the circumstances.

286. This is supported by s 8(5BB) which indicates that the regulations must prescribe the methods for working the amount of interim dumping duty. Section 8(5BE) indicates that s 8(5BC) does not limit the matters that may be referred to in those methods. The above view that the relevant notice must outline how interim dumping duty is to be calculated is also supported by s 8(5C) which stipulates that if the Minister signs a notice under subs (5), the Minister must cause a copy of that notice to be published on the Commission's website. The only notice published on the website makes no reference to interim dumping duty methodology.

287. Nothing in the Customs Act, which sets out the method of calculating export prices and normal values, alters this analysis. For example, there is nothing in the circumvention rules in the Customs Act that deems the export price of the circumvention goods to be the same as the export price as found within the original notice. This is to be contrasted with the assessment provisions in s 269Y, which deems an interim duty to be the final duty if an importer does not seek to make an assessment application.

288. Section 269ZDBH sets out the Minister's powers in relation to a circumvention inquiry. Sections 269ZDBH(2)(d) and (e) provide that the modifications may specify different variable factors. Variable factors are export price and normal value. The Minister cannot possibly make such a determination of different factors without at least considering them and in turn, ought to be advised by the Commissioner as to whether such changes would be appropriate. Nothing in this language purports to take away the requirements in s 8 of the *Customs Tariff (Anti-Dumping) Act* or deem them to be satisfied.

289. Even if there is no reference to a consideration of the variable factors in the circumvention provisions themselves, the Commissioner's approach in this case contemplates that he would wish that an assessment process be permissible. Section 269X(5) relating to that process, makes clear that the Commissioner must provisionally ascertain each variable factor in relation to

each consignment as a basis of the recommendation to the Minister. That is supported by s 269Y requiring the Minister to ascertain the variable factors.

290. The view that export price and normal value must be considered is further supported by s 269TG which notes as a gateway to a declaration, that s 8 of the *Customs Tariff (Anti-Dumping) Act* applies to certain goods, that the export price of like goods is less than the amount of the normal value of those goods and because of that, material injury to an Australian industry is caused or threatened. Once again, nothing in this language purports to take away the requirements in s 8 of the *Customs Tariff (Anti-Dumping) Act* or deem them to be satisfied.

291. Section 269T(4E) is also relevant. It states that a reference to variable factors relevant to the conduct of an anti-circumvention inquiry is a reference "to the normal value, export price and non-injurious price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice." Variable factors are defined in s 269T(4D) as to normal value, export price and non-injurious price. This would not alter the above analysis as there is still the power of the Minister to alter the variable factors.

292. Section 269ZZ indicates that the Panel is to have regard to the same considerations as the Minister. Hence the Panel should consider the variable factors in the same way as the Minister ought to have done so.

293. The above analysis of the Australian provisions also needs to be considered in context of the gestation, being the intent by the government to comply with Australia's international obligations under the WTO. Here again, it is necessary to consider the complete absence of empowering provisions in relation to circumvention duties, under ADA. The lack of provisions dealing with circumvention in ADA is even more telling when considered in relation to the negotiating history. WTO negotiations require consensus for changes to the law. While key members such as the US pushed for circumvention rules during the Uruguay Round of Trade Negotiations leading to the establishment of the WTO, these were not accepted. Furthermore, when the then Director-General proposed a compromise draft based on what he felt was a possible compromise position in the context of the then negotiation impasse, it did include a circumvention proposal in Article 12 of the draft ADA but this was then rejected in the final form. Even more tellingly, the proposal in the Dunkel Draft only covered the more blatant forms of circumvention and did not cover physical modification or newly constructed products and hence did not seek to provide a test as to when such a modification or new formula was minor in nature.

294. Most telling for present purposes, the Dunkel Draft provisions required evidence of dumping and evidence that the extension of the measures to the components was within the scope of the definitive anti-dumping duty in order to prevent the injury with regard to the like product.

295. As such, the Australian framework and the Commissioner's recommendation may amount to a breach of the ADA. Australia may be in breach of the following Articles:

- Article 18.1, which prohibits members from imposing anti-dumping measures unless the ADA rules complied with;

- Article 18.4, which requires members to take all necessary steps to ensure that their domestic laws, regulations and administrative procedures conform with WTO rules;

- Article 11.1, which provides that an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury; and

- Article XVI:4 of the WTO Agreement requires Members to ensure the conformity of their laws, regulations and administrative procedures with their obligations under the WTO Agreement, including its Annexes.

296. In my submission of 7 August 2015, I made the point that anti-circumvention provisions may not be consistent with the WTO Anti-Dumping Agreement, but if permitted, needed to be consistent with the preconditions mandated therein. The Commissioner disagrees with this view of the law as indeed has ADRP.

297. The Commissioner seeks to refute the proposition based on ADA provisions by indicating that Articles 5.2 and 5.8 of ADA only relate to an Article 5.1 investigation to determine the existence, degree and effect of any dumping and do not apply to an application for an anti-circumvention inquiry, which no provisions in the ADA specifically address. (Final Report p 29)

298. The latter observation is technically correct in highlighting the complete lack of anti-circumvention power in ADA, but merely strengthens the concern. The Commissioner fails to address the fundamental question of whether an anti-circumvention duty may be applied in circumstances other than those permitted under ADA. Such a view would clearly be contrary to Article 18.1 of ADA.

299. ADRP has also rejected the position contended for on the basis that the circumvention provisions do not require this, and instead a separate assessment regime and review regime allow for variable factors to be reconsidered. In ADRP Report No 21, the Panel rejected the argument that in addition to altering the export price pursuant to s 269ZDBG(1), the Minister should also have specified different variable factors for the normal value and the non-injurious price for the exports, this being required to allow a fair comparison. The Panel agreed that the Minister has a discretion under s 269ZDBH(2)(d) to specify different variable factors. The Panel Report considered that the Minister should simply exercise such discretion in the context of the particular circumvention activity being reviewed. In the Panel's view in such circumstances, it would not be appropriate to review the duties already imposed. Instead, the power to review the variable factors was the way to deal with that issue. (paras 83 and 84)

300. This reasoning is problematic for three reasons applicable in this case. The first is the systemic argument that no duty, whether anti-circumvention or otherwise, can be justified without discrete attention to the variable factors.

301. The second concern in this case is that by reason of the fact that the Assistant Minister has resolved to apply a retrospective duty, the assessment regime does not apply to a significant period within that retrospective time-frame, which in turn is the period where the bulk of imports in issue occurred.

302. Thirdly, the separate Review regime cannot apply retrospectively to shelter a retrospective anti-circumvention duty.

303. Dealing with the first issue, to determine the validity or otherwise of an anti-circumvention duty absent consideration of normal value, export price, material injury and causation, the proper approach is not to consider what is not said in anti-circumvention provisions, but instead, to consider what possible legislative basis there can be for a duty in these circumstances. It does not suffice to simply identify differing evaluation regimes, only some of which expressly refer to variable factors. Stated simply, a valid tax must be based on the provisions in the relevant taxing statute.

304. As noted above, it is not possible to justify a tax absent such analysis under the *Customs Tariff (Anti-Dumping) Act* 1975. No changes to that Act have been validly effected by the express circumvention provisions.

305. As noted above, the taxing statute clearly requires attention to be given to normal value, export price, injury and causation. As further noted above, the anti-circumvention provisions do not expressly attempt to override these requirements and do not provide any deeming provisions in that regard.

306. Nothing to the contrary can be implied from the legislative history of these provisions. Australia's anti-circumvention provisions arose as part of the Australian Government's response to the Productivity Commission's report into the Australian anti-dumping system. The Government's response was publicised in a June 2011 report, "Streamlining Australia's Anti-Dumping System". When proposing an anti-circumvention regime, it stated:

> "This framework will be developed by the government in consultation with the Forum and informed by a consideration of the anti-circumvention regulations of comparable overseas administrations. Implementation will most likely require legislative amendment, and will be consistent with Australia's international trade obligations."

307. The fact that Australia's legislation should be interpreted to be consistent with WTO obligations is also supported by the very title of the relevant regulation, namely the *Customs (International Obligation) Regulation* 2015 (emphasis added). The title demonstrates Parliament's intent.

308. A number of important principles flow from this history. First, the government's intention was that the provisions be consistent with Australia's international trade obligations. These can be found under the ADA, requiring

sufficient proof that export price is less than normal value and that such dumping thereby causes material injury to a domestic industry.

309. The lack of any express reference to anti-circumvention rights in GATT 1994 or ADA is particularly telling in the context of Article 18.1 ADA which stipulates as follows:

> "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

310. It is also telling that the WTO Appellate Body in the case of *US-Bird Amendment*, held that an anti-dumping duty that followed each and every element in properly analysing the presence of dumping and an amount of duty, nevertheless fell foul of WTO obligations because the government handed over the duty to the domestic industry when this was not expressly permitted in GATT 1994 or ADA.

311. It is thus clear from the language of ADA and the jurisprudence in cases such as *US-Bird Amendment*, that no anti-dumping action, whether targeted at circumvention or otherwise, can occur without meeting the requirements of ADA. No additional remedies, not contemplated by ADA are permitted.

312. The second important principle is that whether valid or not, the required legislative amendments to incorporate an anti-circumvention regime were made to the *Customs Act* but no amendment was made to the taxing provision, namely, the *Customs Tariff (Anti Dumping) Act*. This gateway taxing provision continues to require injurious dumping as a gateway to the imposition of both an interim and final duty. Stated simply, a tax cannot be validly imposed if it does not meet the gateway requirements in the taxing Act.

313. Furthermore, while Regulation 48 *Customs (International Obligations) Regulation* 2015 is the central provision in issue, it gives no indication as to how it should be integrated with s 8 *Customs Tariff (Anti-Dumping) Act* 1975, and related provisions and discretions found within the *Customs Act* 1901.

314. Importantly, a mere Regulation cannot take away statutory preconditions in a taxing Act.

315. It is appropriate to consider the Commissioner's Report in that context. The Commissioner's Report concludes that the test in Australian law to determine whether a circumvention activity has occurred does not require consideration as to whether the circumvention goods have not been dumped or have caused material injury (Final Report p 20). While that is true as to the discrete definition of a circumvention activity, as noted above, that does not answer the question of whether there is any power to impose a dumping duty (whether through circumvention or otherwise) under the only relevant taxing statute, namely the *Customs Tariff (Anti-Dumping) Act*, without proof of matters that such Act states to be the preconditions, namely a finding of export price less than normal value with material injury thereby caused.

316. It is simply impossible to rely on a taxing power that has express preconditions without giving consideration to the presence of those conditions.

317. That is also supported by the statutory provision allowing for Regulations. The Explanatory Memorandum for the Amendment Regulation indicates that the authorising Act is the *Customs Act* 1901. Section 270 of that Act allows the Governor-General to:

> "… make regulations not inconsistent with this Act prescribing all matters which by this Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to this Act …"

318. Giving effect to an Act does not involve changing the Act. As to matters permitted to be prescribed, that allows for a new category of circumvention as occurred with Regulation 48, but this can only change s 269TG if that is so permitted, which is not the case.

The Commission wrongly believed that it did not need to address each of the designated factors

319. Regulation 48(3) stipulates that the Commissioner must have regards to any factor he considers relevant and includes 13 factors. A proper interpretation of this regulation must mean that each and every relevant factor must be considered. That is the only interpretation consistent with WTO jurisprudence in relation to anti-dumping, where the WTO Appellate Body looked at the way a myriad of factors needed to be considered in injury determination.

320. This position was presented in submissions but was rejected by the Commissioner. The Final Report states as follows in relation to Regulation 48(3):

> "The Commission notes that this is a non-exhaustive list of factors and that the Commission may consider any of those factors. The Commissioner is not required to consider all of those factors or to limit his consideration to only those factors. The Commission therefore considers that an application can be valid even though it does not address all of the factors under subsection 48(3) of the Regulation."

321. I would agree that the list of factors is non-exhaustive, but a proper interpretation should be that a reasonable bureaucrat should turn his or her mind to each of the designated factors as a minimum requirement, unless any are irrelevant on the facts, and then consider what other matters might be worthy of consideration given that the list is in fact non-exhaustive. Because subsection 48(3) states that "the Commissioner must compare the circumvention goods and the good the subject of the notice, having regard to any factor that the Commissioner considers relevant, including any of the (stated) factors," this must mean that the Commissioner must determine which of the 13 are relevant and in that positive event, properly consider them. The language does not give the Commissioner a broad discretion to ignore a factor that would otherwise be relevant.

322. The Assistant Minister in turn, needs a Report that has addressed and investigated each reasonable and relevant factor, so that she can make an overall assessment in the likely event that different factors may point to different conclusions.

323. To hold otherwise would mean that countervailing factors that might be relevant when the latter are adequately considered, would then be ignored by the Assistant Minister, simply because the Commissioner chose to ignore them. That cannot be Parliament's intent.

324. Hence the Commissioner was wrong in law to state that he is not required to consider all of those factors. He should be required to prepare a Report that will not leave the Assistant Minister exposed to a claim that she did not take into account all relevant matters in reaching a decision to adopt the Commissioner's recommendation in its entirety.

The Commission wrongly failed to address each of the designated factors

325. Given the above erroneous view in law, it flows therefore that the Commissioner was unlikely to address each factor to a sufficient degree.

326. It is appropriate to note here that the Commissioner's Report asserts that 12 out of 13 factors were nonetheless considered, although that is disputed below. The Commissioner's Report notes the final factor, tariff classification, and acknowledges that alloyed and non-alloyed steel falls under different classification. Hence the Commissioner seems to assert that it has considered every relevant factor one way or another.

327. This submission was addressed above after considering the Final Report's comments in relation to each of the relevant factors. The most important defects in the Commission's own behaviour were: first, to ignore scientific information up until the point of the SEF and only then seek the relevant scientific information without sufficient public warning, which cannot then shore up its earlier inadequacies in process; second, to refuse to directly investigate end-use and the relevance of the strain age effect to such use; and third, to continually rely on trade patterns when purportedly dealing with other factors.

CONCLUSION AND RECOMMENDATIONS

328. The Review Panel should conclude that there should be no amendment to the original dumping duty notice; that if any amendment should be made, it should not be broad enough to cover all alloyed steel with no delineation between minor and more than minor variations; and that any change to the notice should not be made retrospective to 5 May 2015.

329. Alternatively, a Review Panel per s 269ZZL can require the Commissioner to reinvestigate specific findings of fact and at the very least should do so.