

**APPLICATION FOR REVIEW OF
DECISION OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE
OR COUNTERVAILING DUTY NOTICE**

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

to publish : ☒ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

OR

not to publish : ☐ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application;
- provides reasonable grounds for the decision not being the correct or preferable decision; and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

- ☒ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).
- ☒ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.
- ☒ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.
- ☒ Full description of the imported goods to which the application relates.
- ☒ The tariff classification/statistical code of the imported goods.

- ☒ A copy of the reviewable decision.
- ☒ Date of notification of the reviewable decision and the method of the notification.
- ☒ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.
- ☒ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Signature: _____

Name: Zac Chami

Position: Partner - Clayton Utz Lawyers

Applicant Company/Entity: Nippon Steel & Sumitomo Metal Corporation

Date: 22 / 12 / 2014

APPLICATION FOR REVIEW - INVESTIGATION INTO THE ALLEGED DUMPING OF HOT ROLLED STRUCTURAL STEEL SECTIONS EXPORTED FROM JAPAN, THE REPUBLIC OF KOREA, TAIWAN AND THE KINGDOM OF THAILAND

1. Executive Summary

- 1.1 We act for the Nippon Steel & Sumitomo Metal Corporation (**NSSMC**).
- 1.2 By this application, the NSSMC seeks review of the decision of the Parliamentary Secretary to the Minister for Industry (**Minister**) on 20 November 2014 to impose anti-dumping measures in respect of the Hot Rolled Structural Steel Sections (**HRS**) exported from Japan, the Republic of Korea, Taiwan and the Kingdom of Thailand (**Decision**).
- 1.3 Nippon submits that the Decision is not the correct and preferable decision under the Customs Act (**Act**) by reason of the following issues identified in the Anti-Dumping Commission (**ADC**) Report No. 223 (**Report 223**):
- (a) errors in the assessment of material injury; and
 - (b) misconstruction of the discretionary nature of section 269TG, and of the considerations relevant to the exercise of that discretion.
- 1.4 The Review Officer is requested to review the recommendations in Report 223 and accepted by the Minister in the Decision. NSSMC submits that it would be appropriate for the Review Officer to recommend that the decision be vacated and replaced with a declaration that NSSMC's (sole) export was non-injurious. Alternatively, it is submitted that a zero rate of dumping duty should be applied against NSSMC.

2. Application particulars

2.1 Names of applicant: Nippon Steel & Sumitomo Metal Corporation

2.2 Contacts within organisations:

Organisation	Contact details
Nippon Steel & Sumitomo Metal Corporation	Mr Yoh Nakayama 6-1 Marunouchi, 2-Chome Chiyoda-ku TOKYO 100-8071 JAPAN nakayama.de3.yoh@jp.nssmc.com

2.3 Representatives: The details of the representatives acting in respect of this application are as follows:

Clayton Utz, Lawyers	Contact: Zac Chami Address: Level 15, 1 Bligh Street, Sydney NSW 2000 DX: DX 370 Sydney
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A copy of the authorisation for the representatives is contained at **Annexure A** to the Application for Review lodged on 4 December 2014.

3. Description of goods

3.1 This application concerns HRS exported from Japan, the Republic of Korea, Taiwan and the Kingdom of Thailand. In Report 223, the goods included in the application were described as follows:

"Hot rolled structural steel sections in the following shapes and sizes, whether or not containing alloys:

- *universal beams (I sections), of a height greater than 130mm and less than 650mm;*
- *universal columns and universal bearing piles (H sections), of a height greater than 130mm and less than 650mm;*
- *channels (U sections and C sections) of a height greater than 130mm and less than 400mm; and*
- *equal and unequal angles (L sections), with a combined leg length of greater than 200mm.*

Sections and/or shapes in the dimensions described above, that have minimal processing, such as cutting, drilling or painting do not exclude the goods from coverage of the application".

3.2 Goods excluded from the application were:

- *"hot rolled 'T' shaped sections, sheet pile sections and hot rolled merchant bar shaped sections, such as rounds, squares, flats, hexagons, sleepers and rails; and*
- *sections manufactured from welded plate (e.g. welded beams and welded columns)."*

3.3 The following additional information provided by the applicant concerning the nature of the goods was extracted in 3.3.1 of Report 223:

"In Australia the goods are commonly known as universal beams, universal columns, universal bearing piles, parallel flange channels and both equal and unequal angles. Universal columns typically have their web lengths similar to their flange lengths, whereas universal beams typically have longer webs than flanges. In some other countries the term "H beams" applies to both universal beams and universal columns and the term "I beams" denotes tapered flange beams.

The common grades of steel that the goods subject to this application are sold to are grade 300 and grade 350. The minimal yield stress of the grade 300 refers to 300 Mega Pascals (MPa) and the minimal yield stress for grade 350 is 350 MPa.

The type of alloys that may be incorporated into the HRS steel sections include but is not limited to boron (typically with a boron amount above 0.0008 per cent or chromium above 0.3%). For clarity, the inclusion of alloy(s) is limited to the shapes and sizes identified above.

*The majority of the goods that are subject to this application are manufactured to comply with or exceed the requirements set out in AS/NZS 3679.1:2010 Structural steel Part 1: Hot-rolled bars and sections.
Imported goods are mostly quoted to AS/NZS 3679.1, but if not will generally be quoted to an international standard that stipulates nominal yield strength of 300 Mega Pascals (MPa)."*

4. Tariff classification

4.1 The following tariff subheadings and statistical codes are presently relevant:

Product	Tariff subheading	Statistical codes
Channels - U and C sections	7216.31.00	30
Universal beams - I sections	7216.32.00	31
Universal column and universal bearing piles – H sections	7216.33.00	32
Equal and unequal angles – L sections	7216.40.00	33
Other alloy steel	7228.70.00	56

5. Notification of the reviewable decision

NSSMC was notified by email of the Decision on 20 November 2014. A copy of the Decision is at **Annexure B** to the Application for Review lodged on 4 December 2014.

6. Statement of reasons for believing that the reviewable decision is not the correct or preferable decision

Errors in the assessment of material injury

Failure to isolate extraneous and internal structural considerations

6.1 Sections 269TG(1) and (2) of the Act establish that the publication of a dumping notice can only be made in instances in which the Minister is satisfied that the goods for which the notice is published are dumped, and because of that dumping:

"...material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered" (emphasis added).

6.2 In order to make a positive determination under section 269TAE(1) that *material injury* to Australian industry has been or is being *caused* or, is threatened or, would or might have been caused, the analysis must be based upon positive evidence that is objectively verifiable and defensible. This is set out under section 269TAE(2AA) of the Act, which clearly states that a determination with respect to injury pursuant to section 269TAE *"must be based on facts and not merely on allegations, conjecture or remote possibilities"*.

6.3 In the present case, NSSMC respectfully submits that the analysis of material injury and causation was flawed. Report 223 did not adequately demonstrate how the issue of causation was established to the exclusion of extraneous factors and internal structural considerations.

6.4 In our submission of 2 December 2013, we set out the requirements for proper consideration of extraneous factors under section 269TAE(2A) (as reflecting Article 3.5 of the Anti-Dumping Agreement). In order to conduct the assessment, it is necessary to separate and distinguish the injurious effects of extraneous factors from the injury caused by dumped imports.

6.5 It is submitted that in Report 223, the ADC failed to do so. Its consideration of extraneous factors was notably underdeveloped. At 9.9.4 of the Report, the ADC acknowledged that it had received numerous submissions that the primary cause of injury to the applicant had been volatility associated with the appreciation of the Australian dollar and declining demand in the Australian HRS market. Moreover, it accepted that *"the weakening of demand for HRS following the global financial crisis, coupled with the appreciation of the Australian dollar over the injury analysis period has impacted upon [the applicant]'s economic performance"*. However, no credible attempt was made to isolate the effect of those extraneous variables from the analysis. It is submitted that in this regard, the ADC failed to give *"proper, genuine and realistic consideration"* to an issue that was clearly material to the investigation.¹ Rather, the ADC appears to have simply relied upon the pricing model utilised used by the applicant in concluding that material injury had been established.

6.6 Such reliance does not adequately address discretionary and structural factors within the dominion and control of the applicant. The ADC's findings regarding price injury were heavily dependent upon its acceptance of the pricing structure adopted by the applicant. That pricing structure was said to involve an import parity pricing (IPP) system adjusted by application of a price premium. It should be emphasised that no volume injury was claimed by the applicant, which, to the contrary, was able to *increase* its market share during the relevant period. Although the ADC appears to have assumed that adoption of an alternative model *"may"* have resulted in lost sales volume and market share, no real analysis of this position was undertaken.²

Classification errors

6.7 The Australian market is not [REDACTED]

6.8 NSSMC's [REDACTED] Australian customer and end user during the period was [REDACTED]

6.9 The Review Officer will note, with reference to the transactional supporting data provided (see exhibit B4 to our client's exporter questionnaire response and related documentation provided to the ADC) that sales of the goods made [REDACTED]

6.10 The [REDACTED] standard is not identical to AS/NZS³ standard 350L0 in terms of the physical/metallurgical tolerances that define each code. Each code is produced in accordance to a distinctly different set of standards.

6.11 As the Review Officer will be aware, standards are applied within the industry to provide assurances of maximum/minimum characteristics - which are directly correlative to end-use demands. To this end, the current AS/NZS standard requires that, if an exporter intends to market and sell products to the AS/NZS standard, they must first be certified as being compliant with AS/NZS standard production requirements and, once this is achieved, print an identified mark by rolling (the "roll mark") on the products sold.

6.12 Our client's production of [REDACTED]
[REDACTED] [confidential P/certification information]

¹ See, for example, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470.

² See 9.5 of Report 223.

³ AS/NZS 3679.1:2010 at page 11 and table 11 and 12 at page 17.

- 6.13 The fact of our client [REDACTED] [confidential P/certification information]
- 6.14 OneSteel manufactures products to the current AS/NZS standard. It does not offer product coded to [REDACTED]. This dissimilarity is in our view a weighty consideration for the matters discussed, namely no market demand and no material injury.
- 6.15 In the respectful submission of NSSMC, the above issues warrant reconsideration of the recommendations made by the ADC.

Exercise of the discretion

- 6.16 Section 269TG of the Act states that the Minister *may* declare that section 8 of the Dumping Duty Act applies to like goods where those goods have been dumped in a way that causes material injury. The decision to impose duties is therefore clearly a discretionary matter, and it is our submission that on this occasion that discretion should have been exercised in our client's favour. This is for the following reasons:
- (a) in the present case, NSSMC engaged in a [REDACTED] transaction that was captured within the period of investigation. The transaction constituted less than [REDACTED] percent of the market,⁴ and was premised upon a specific and non-continuous set of circumstances. It is unreasonable to suggest that this [REDACTED] transaction could have materially injured the domestic market in any way;
 - (b) in Report 223, the ADC considered that the *"volume of exports of the GUC for each individual exporter is an irrelevant consideration when considering the cumulative effect of injury"*.⁵ We respectfully disagree, and submit that this finding misconstrues the discretionary nature of section 269TG. This feature of the report alone is sufficient to warrant its reconsideration;
 - (c) in the above circumstances, to attribute NSSMC with an *"all other"* rate of duty on the basis of a singular transaction would be an unreasonable and punitive imposition. It does not advance the purposes of the legislation, and unduly restricts the ability of an overseas supplier to enter the market on a lawful and competitive basis in the event that it should wish to do so at some point in the future;
 - (d) It is trite that anti-dumping measures are not to be used as surrogate protectionisms. The importance of genuine competitiveness in supply chains to the construction industry, and the broader economy, should not be disregarded. This is particularly so where the *"industry"* against which injury is to be considered is constituted by one self-interested market participant.
- 6.17 Having regard to the above matters, it is submitted that it would be appropriate for the discretion under section 269TG to be exercised in favour of NSSMC. No dumping duty should be imposed in these circumstances.
- 6.18 However, the Minister does not appear to have been alerted to, let alone considered the exercise of, the discretion in section 269TG.

7. Conclusion

⁴ The Report noted that the Australian market for HRS during the 2013 financial year was approximately 365,000 tonnes: 5.5 of Report 223. [REDACTED]

⁵ 9.12.2 of Report 223.

- 7.1 NSSMC contends that the Minister has erred in accepting the ADC's recommendation in making the Decision. The Review Officer is requested to review the recommendations in Report 223 and accepted by the Minister in the Decision.