Australian Government
Anti-Dumping Review Panel

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

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City
ACT 2601
P: +61 2 6275 5868
F: + 61 2 6275 6784
E: ADRP_support@customs.gov.au

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:...John Cosgrave.....

Position:...Solicitor.....

Applicant Company/Entity:

OneSteel Coil Coaters Pty Ltd.....

Date: 4 September 2013

MinterEllison
LAWYERS

APPENDIX A

Non-Confidential – For Public Record

Statement by OneSteel Coil Coaters Pty Ltd relating to the decision of the Attorney General under s.269TG(1) &(2) to publish Dumping Duty Notices applying to Aluminium Zinc Coated Steel exported from the People's Republic of China, the Republic of Korea and Taiwan.

INTRODUCTION

1. OneSteel Coil Coaters Pty Ltd (**CC**) is an interested party directly concerned with the importation into Australia of Unchromated Aluminium Zinc Coated Steel (**Unchromated Steel**) from Korea.

2. On 5 August 2013, the Attorney General (**Attorney**), pursuant to s.269TG(1) & (2) of the *Customs Act 1901 (Cth)* (**Act**), published dumping duty notices in the *Australian* Newspaper applying to Aluminium Zinc Coated Steel. It appears that the Attorney failed to publish those dumping duty notices in the *Gazette* as required by s.269ZI(1) of the Act. The consequences of that failure are that there is no valid declaration that s.8 of the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) (**Dumping Duty Act**) applies to Aluminium Zinc Coated Steel and consequently, that dumping duty has not been imposed on the goods.

3. This statement in support of our client's application now proceeds on the assumption that the failure to publish in the *Gazette* can and will be remedied.

4. The decision of the Attorney was based on Report No. 190 (**Report**) and adopted the recommendations in that report by the Commissioner of the Anti-Dumping Commission (**Commission**).

5. We request that, pursuant to paragraph 269ZZA(1)(a) of the Act, the Review Panel review the decision and certain essential elements of that decision and recommend to the Attorney under paragraph 269ZZK(1)(b) that he revoke the decision and substitute a new specified decision.

6. The grounds that support our belief that the Attorney's decision is not the correct or preferable decision and our request for revocation and substitution are set out in the following sections of this submission.

CONTENTIONS

7. In so far as the dumping duty notice of 25 July 2013 concerning Aluminium Zinc Coated Steel purports to apply to our client's imports of Unchromated Steel, we contend that it should be set aside for the following reasons:

   (a) in circumstances where, during the relevant periods, the Australian Industry producing Unchromated Steel did not sell the product to unrelated parties and did not offer the product for sale to unrelated parties on commercial terms, there were no reasonable grounds for the Attorney's expression of satisfaction that the exported goods imported by Coil Coaters had caused or were causing material injury to the Australian industry;

   (b) the Commissioner's failure, in recommending Ascertained Export Prices (AEPs) to the Attorney, to take account of significant raw material price reductions after the end of the investigation period, has resulted in the determination of inflated dumping margins and the preferable determination would be one that takes account of more recent price data.

   (c) the decision to express AEPs in US dollars rather than Australian dollars results in an increase in the floor price of GUC imports if the value of the Australian currency depreciates; the preferable decision would be to express AEPs in Australian dollars.

PRELIMINARY POINTS

8. It is well-accepted that "in some cases greater care in scrutinizing the evidence is proper than in others, and a greater clearness of proof may be properly looked for." [*Sodeman v The King* (1936) 55 CLR 192, 216 (Dixon J)]. It is also well-accepted that the gravity or impact of a decision is a good indicator of the type of case where the evidence should be more critically assessed and weighted [*Briginshaw v Briginshaw* (1938) 60 CLR 336]. The potential impacts of this case on Coil Coaters are grave because there is no Australian source of its essential manufacturing input at commercially realistic prices. In these circumstances we submit that it is critical that "greater care in scrutinizing the evidence is

proper ... and a greater clearness of proof may be properly looked for." [*Sodeman v The King* (1936) 55 CLR 192, 216 (Dixon J)]. The evidence in this case is discussed in more detail below, but it is Coil Coaters' contention that the evidence in support of those findings of the Commission that threaten our client's future manufacturing operations in no way meets the prudent standard for assessment that is required by the circumstances and consequences of this case.

9. The Appellate Body of the WTO has ruled that[1]:

> ...the term 'positive evidence' [in Article 3.1 of the Anti-Dumping Agreement]relates in our view to the quality of the evidence that authorities may rely on in making a determination

and went on to explain that:

> [t]he word 'positive' means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.

We submit that the findings of the Commission's report that impact Coil Coaters and relate to material injury and causation are not based on evidence that meets the standards set by the Appellate Body.

10. We specifically request that the Panel makes a recommendation on each of the elements of the Attorney's decision identified in this submission as incorrect or non-preferred. This is necessary to avoid the risk of the rights of review of an applicant being thwarted if the Review Panel, purporting to exercise the administrative equivalent of 'judicial economy', concludes that because of a proposed recommendation in relation to one or more findings it is unnecessary to address other findings challenged in the application. In the event that the Attorney rejects the recommendation of the Panel there is in effect no review of those other issues. In our submission this outcome would compromise the rights of review intended by the legislation and constitute a failure to meet the reporting requirements of s.269ZZK of the Act.

BACKGROUND

11. Coil Coaters is an Australian manufacturer of premium quality painted steel coil and sheet. Major product applications include roofing and walling, garage doors, rain water goods, commercial sheds and outdoor patios. The feedstock used in the manufacture of those products is Unchromated Steel and is one of the particular kinds of goods included in the

[1] DS 184: *US – Hot Rolled Steel*, para. 192

original goods under consideration (**GUC**) description set out in the dumping duty application of BlueScope Steel Limited (**BSL**) dated 30 August 2012. It is not disputed that the Unchromated product manufactured by BSL for sale to its affiliated company is a like product to that imported by Coil Coaters. It must be stressed, however, that application of all the usual 'closely resembling' tests for like goods clearly establish that Unchromated Steel is not a like product to the remainder of BSL's production and any observed injury related to that other production cannot be attributed to Coil Coater's imports. Consequently any consideration of alleged injury due to our client's imports must be conducted as a 'micro analysis' of the type described by the Commission in section 11.2.2 of the Report and confined to the impact if any on the economic performance of BSL's production of Unchromated product. If no material injury to that productive activity is established our client's imports must be excluded from the terms of any dumping duty notice published pursuant to s.269TG(1) and (2) of the Act.

12. The Unchromated Steel imported by Coil Coaters is a light oiled unchromated product. The significance of chromation of coil products is that it is a protective covering to the coil which identifies that the coil product has reached the final stage in its processing (other than roll forming) and is ready for end user use. By contrast, the Unchromated Steel which Coil Coaters imports is an intermediate product unfit for any commercial purpose other than as the key feed product for paint line facilities established to produce painted coil products. Consequently, the market for Unchromated Steel is quite separate from the market for the range of other products acknowledged by the Commission[2] to be included in the GUC formulated by the applicant. There is no other market for the product. There are four paint line manufacturers in Australia including BSL's affiliate which enjoys about 80% of the market. The remaining market is shared by Coil Coaters, two other local manufacturers and importers of pre-painted materials who account for about 15% of sales.

13. BSL does not dispute that apart from sales to related entities, who compete in the finished (painted) product market with Coil Coaters, other local manufacturers and pre-painted imports, it does not sell to domestic customers. However BSL has responded to occasional requests from Coil Coaters to provide quotations for supply of Unchromated Steel and did provide the Commission with details of one such supply quote. The key features of that quote and others that have been supplied to the Commission by our client are that the applicant is not only purporting to seek higher prices than those transfer prices charged to

[2] Report p.109

its own paint line facility but is also purporting to obtain a higher price for a manufacturing input than it charges to end users for the finished manufacturing output. In these circumstances it is unsurprising that evidence available to the Commission demonstrates that BSL's price quotations exceed prices of imported Unchromated Steel by several hundred dollars per tonne.

14. The Commission's response to this situation is as follows[3]:

> BlueScope provided details of a supply quote to OneSteel Coil Coaters that it believed demonstrated its offer was on reasonable commercial terms. The quote for supply was examined by Customs and Border Protection. the quoted price was compared to the manufacturing cost to produce the chromate unpainted product and the internal transfer price of the unchromated product from BlueScope to its paint line facility. The quote was also compared to the end user third party sales of the painted product by BlueScope to its customers. While the quote is higher than [for] chromated product lines that have undergone further processing, the increase in price despite less manufacturing process can be explained by market demand for the product and the fact that it is used to produce a much higher priced product (being painted aluminium zinc coated steel). That is, Bluescope has priced supply of the product according to its value in the market rather than the cost of production. This is an acceptable commercial practice

15. Maximising sale prices is indeed a normal commercial sales practice in the context of a genuine seller seeking to conclude a sale. The evidence suggests, however, that the applicant is deliberately proposing a price and other terms and conditions that it knows are completely uneconomic from the perspective of a potential purchaser. The applicant is not seeking the highest price that the market will bear, it is proposing a price that it knows is more than the market can bear. That the applicant has not priced its Unchromated Steel according to its value is demonstrated by the fact that it has not realized a single external sale to an unrelated party within Australia. That the applicant is pricing in this deliberate way for this market is also demonstrated by the fact that its prices for *chromated* coil to other businesses within the Arrium Group are substantially less than the prices for *unchromated* coil to Coil Coaters.

16. The applicant is a very substantial Australian manufacturing operation that can be assumed to be capable of identifying a course of action that optimizes commercial returns for its shareholders. The evidence before the Commission suggests that the applicant has chosen to forego sales of Unchromated Steel to potential domestic customers, who may compete with the applicant in the downstream market for finished painted materials, on the basis of a commercial judgment that any consequences of this action will be more than

[3] ibid, p.45

compensated for by increased returns from sales of painted coil. This is a choice that the applicant is entitled to make but it cannot then claim that import demand resulting directly from the exercise of that choice is the cause of any injury.

MATERIAL INJURY & CAUSATION

17. It is Coil Coaters' primary submission that imports of Unchromated Steel could not have caused material injury to BSL during either the injury investigation period or the immediately subsequent period up to 30 April 2013, when the Report was submitted to the Attorney, because there was no impact on BSL's chosen business model. Both injury and the materiality of injury are largely relative concepts[4]. In the case of Unchromated Steel, however, there is no relativity benchmark for assessment of injury because, both before and throughout the injury investigation period and subsequently, the applicant has not sold the product to unrelated local manufacturers. There is no evidence of deteriorating performance in BSL's sales of Unchromated Steel, a position which is reinforced by material presented to and gathered by the Commission that illustrates a static market situation. There has been no significant change in the volume of exports of Unchromated Steel from nominated sources during the investigation period and the applicant continues to enjoy a market share of about 95%. In the market for the finished product (painted coil), which the applicant has excluded from the description of the goods under consideration, the market share of the local producers other than the applicant is around 5% and any market share growth in this segment is attributable to imports of pre-painted product which now account for about 15% of the segment. The applicant's claim of injury due to allegedly dumped exports is inconsistent with this portrait of the market for Unchromated Steel and even if, contrary to the evidence, some detriment was found it could never be reasonably assessed as 'material'.

18. It is also clear that the applicant's overall claims in relation to causation in this inquiry and in other recently concluded and concurrent inquiries depend on its Import Parity Pricing (IPP) approach. Customs has emphasised this IPP policy as the alleged primary support for many of its recent causation findings (excluding, significantly, the automotive sector in the recent hot rolled coil case) and has done so again in the Report. Manifestly, however, the application of that IPP strategy cannot be extended to the market for Unchromated Steel as even Customs concedes in the passage quoted in paragraph 14 above that the

[4] Section 269TAE(1)(b) and (c).

quotations that the applicant has provided to potential Australian customers such as Coil Coaters bear absolutely no relationship to import prices for the product. In this context it is also noteworthy that the Report's description in section 7.3.2.2 of the offer made by BSL to Coil Coaters for Unchromated Steel was not a quotation based on IPP.

19. Secondly, the Commission has failed to consider any 'other factors' that may have caused any alleged detriment to the applicant's performance as a producer of Unchromated Steel. In addition to such obvious factors as the economic downturn, the restructure of the applicant's operations and the appreciation of the Australian dollar, the Commission must have regard to such critical elements as the impact of imports of pre-painted product and the trade restrictive practices of the applicant. The former issue is referred to above and the Commission has the relevant data required for a full assessment. The latter issue is covered by s.269TAE(2A) of the Act which stipulates that *...the Minister must consider whether any injury to an industry...is being caused or threatened by...restrictive trade practices of...Australian producers of like goods.* This provision reflects the requirements of Article 3.5 of the Anti-Dumping Agreement and - as the many parties to that agreement have diverse competition laws - the phrase 'restrictive trade practices' in the Australian context is to be given its common or ordinary meaning and is not restricted to any actual or implied construction of those words in national competition law. Thus, what appears to be a constructive refusal by the applicant to supply Unchromated Steel to Coil Coaters is a practice that patently restricts trade and causes self-injury to the applicant in its production of goods of that kind. There is no evidence that the Minister, or the Commission, gave any consideration to this issue as required by s.269TAE(2A).

20. We submit that, to the extent that they purport to apply to our client's imports of Unchromated Steel, the Attorney's determinations in relation to material injury must be set aside.

ASCERTAINED EXPORT PRICE

21. In the current matter the total amount of dumping duty payable on a consignment of the GUC is the sum of a fixed and variable amount. The fixed duty is expressed as a percentage of the actual export price of a consignment while the variable duty is the amount by which that actual export price is less than the AEP. Thus the AEP is essentially a floor price.

22. The AEP for each exporter is usually determined by the Minister by reference to the Commission's assessment of that exporter's average export price over the investigation period and was so determined in the present case. A recent exception to the application of that methodology was the decision of the Commission in Hot Rolled Coil Steel to use prices applying after the investigation period in calculating the AEP. The approach reflected a concern that because of substantial pricing volatility the application of a floor price based on out-dated data would not reflect commercial realities.

23. Coil Coaters supports the approach adopted in the Hot Rolled Coil case and submitted to the Commission, unsuccessfully, that a comparable situation in the present matter where the peak of the price cycle occurred in the investigation period should be addressed by calculating the AEP by reference to average prices applying in the subsequent 12 month period during which benchmark prices have fallen by more than USD100/t. The current anomalous floor price magnifies the impact of the measures to a level beyond that necessary to counter the alleged material injury to the Australian industry and unfairly impacts downstream businesses needing access to manufacturing inputs at contemporaneously competitive prices.

24. Coil Coaters submits that the preferable decision would be to revise the dumping measures by recalculating the AEP to reflect more recent price trends.

AEP CURRENCY

25. Without any explanation the Attorney has departed from more common practice in the present matter and expressed the AEP in US dollars rather than Australian dollars. As a result, following a significant decline in the value of the Australian dollar, the floor price has increased by almost 15% in the past twelve months. While this unfairly penalises importers and users of products subject to dumping duties, the reverse can occur in the case of an appreciating Australian dollar causing an erosion of the value of dumping measures to Australian manufacturers.

26. We consider that the only equitable policy approach is to always denominate an AEP in Australian dollars. Such an approach would also reflect one of the key objectives of anti-dumping regulation – to raise prices to a level that removes all or some of the material injury caused by dumped exports. The statutory measure of that level is the non-injurious price (**NIP**) which is defined in s.269TACA of the Act. The calculation of an NIP is based on an assessment of what price level could be achieved in the Australian market by an

Australian industry in the absence of dumped exports. The basis of that calculation is, therefore, an amount in Australian dollars and equity demands that the applicable floor price should be expressed in the same currency.

27. We submit that the preferable decision would be to determine the amount of the AEP in Australian dollars.

MINTER ELLISON

Contact: John Cosgrave Direct phone: +61 2 6225 3781 Direct fax: +61 2 6225 1781
Email: john.cosgrave@minterellison.com
Partner responsible: Russell Miller Direct phone: +61 2 6225 3244
Our reference: 26-7715595

MI [illegible] LAW 2007

Attachment to Application by OneSteel Coil Coaters Pty Ltd – 4 September 2013

Name, Street, Postal Address and Form of Business

OneSteel Coil Coaters Pty Ltd
Level 40, 259 George St, Sydney NSW 2000
GPO Box 536, Sydney, NSW 2000

Company

Name, title/position, telephone and facsimile numbers and email address of a contact within the organisation

Mark Nicholls
Senior Legal Counsel Marketing and Regulatory
OneSteel Manufacturing Pty Ltd
t.+61-8-8110-0203
m. +61-419-887-848
f. +61-8-8110-0299
NichollsM@onesteel.com

Name of consultant/adviser representing the applicant and a copy of the authorisation for the consultant/adviser

John Cosgrave
Director Trade Measures
Minter Ellison Lawyers

[illegible] Level 40, 259 George St, Sydney NSW 2000 T: 02 9250 6888
ABN [illegible] GPO Box 536, Sydney NSW 2000, Australia F: 02 9251 3042

onesteel
coil coaters

29 August 2013

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

To the Anti-Dumping Review Panel,

This letter is to advise that Minter Ellison is authorised to act on our behalf in relation to the consideration by the Panel of the decision by the Attorney General to publish dumping notices applying to exports from the People's Republic of China and the Republic of Korea of Aluminium Zinc Coated Steel.

Kind Regards

Paul King
National Manager Coil Coaters

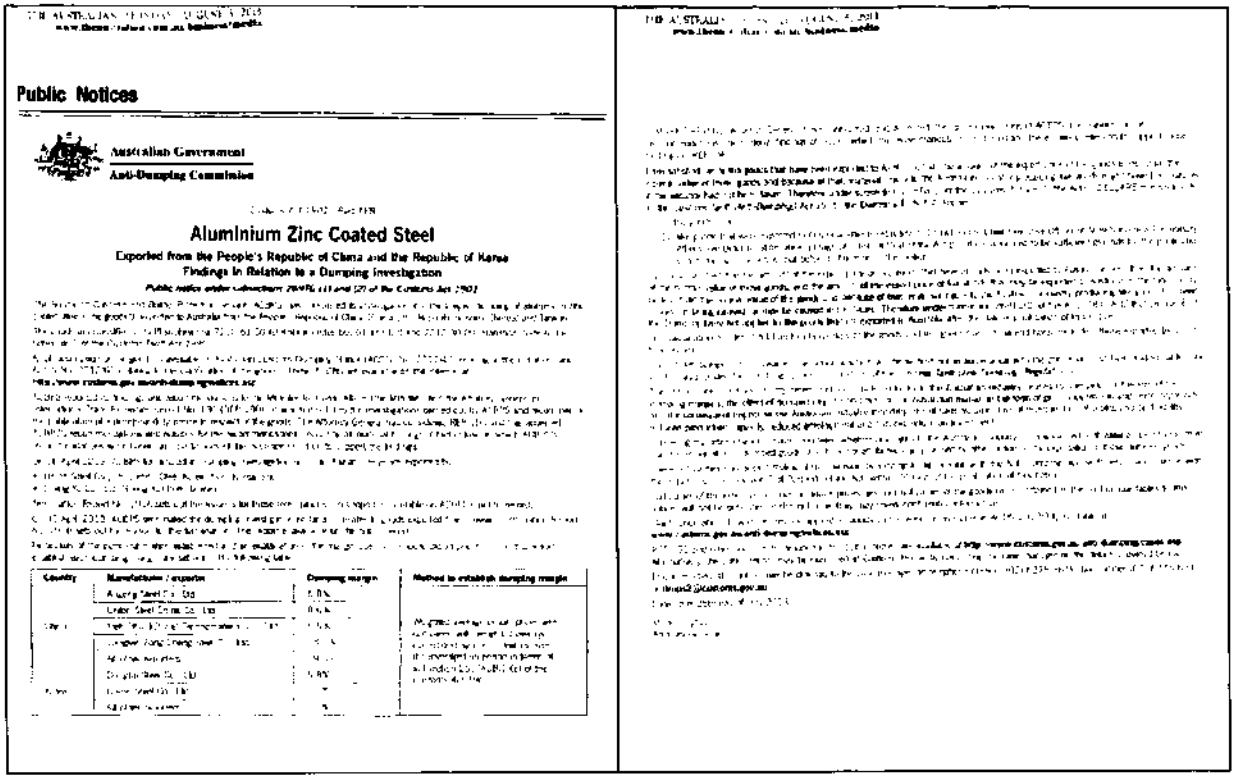
Full description of the imported goods to which the application relates

Aluminium Zinc Coated Steel being flat rolled products of iron and non-alloy steel of a width equal to or greater than 600mm, plated or coated with aluminium zinc alloys, not painted whether or not including resin coating.

The tariff classification/statistical code of the imported goods

Tariff subheadings 7210.61.00 (statistical codes 60,61,and 62)

A copy of the reviewable decision



Public Notices

Australian Government
Anti-Dumping Commission

Aluminium Zinc Coated Steel

Exported from the People's Republic of China and the Republic of Korea

Findings in Relation to a Dumping Investigation

Date of notification of the reviewable decision and the method of notification

5 August 2013 in the Australian Newspaper

A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision

The Applicant's reasons are set out in Appendix A to this application