Anti-Dumping Commission
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Mrs Joan Fitzhenry
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c/- ADRP Secretariat
Legal, Audit and Assurance Branch
Department of Industry, Innovation and Science
10 Binara Street
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By e-mail: ADRP@industry.gov.au

Dear Mrs Fitzhenry,

ZINC COATED (GALVANISED) STEEL EXPORTED FROM THE REPUBLIC OF KOREA, TAIWAN AND THE PEOPLE'S REPUBLIC OF CHINA

I write with regard to the public notice published on 25 May 2016 advising your intention to review the decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary) to publish a notice under s 269ZDBH(1) of the *Customs Act 1901* (the Reviewable Decision). The Reviewable Decision was published on the Anti-Dumping Commission (Commission) website on 18 March 2016, referred to in Anti-Dumping Notice No. 2016/23.

I understand that by 7 June 2016 the Commission had provided you with the Statements of Essential Facts (SEF) 290 and 298, the submissions made by interested parties, the Final Report (REP) 290 and 298, and any other relevant information (as defined in section 269ZZK *Customs Act 1901*).

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

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

Yours sincerely,

Dale Seymour
Commissioner
Anti-Dumping Commission

24 June 2016

Attachment A

I make the following submissions in response to the grounds set out in the notice published on 25 May 2016. These grounds are with respect to the consideration by the Anti-Dumping Review Panel (ADRP) of a reviewable decision of the Parliamentary Secretary and reported in REP 290 and 298.

a) The Parliamentary Secretary wrongly revised the original notice as from 5 May 2015

I note that subsection 269ZDBH(8) of the Act provides for when the Parliamentary Secretary's declaration can take effect in relation to an anti-circumvention inquiry. This date can be no earlier than the date of publication of the notice under subsection 269ZDBE(4) indicating that such an inquiry is to be conducted. Accordingly, in this inquiry the Parliamentary Secretary's declaration may take effect from no earlier than 5 May 2015, being the date on which the notice was published under subsection 269ZDBE(4).

As noted in the explanatory statement to the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015* (which originally introduced the slight modification of goods anti-circumvention framework), the purpose of section 48 of the *Customs (International Obligations) Regulation 2015* (the Regulation) is to address the practice of slightly modifying goods in order to avoid payment of anti-dumping and countervailing duties already imposed. Circumvention activity may result in the reduced effectiveness of anti-dumping measures as a trade remedy for Australian industry. This policy intention is supported by the drafting of subsection 269ZDBH(8), which permits the retrospective operation of the Parliamentary Secretary's declared alterations to the notice to address circumvention activity observed during the inquiry rather than just prospective circumvention activity. In my view, this approach provides the Parliamentary Secretary with the discretion to require an importer to pay the duties that they would have otherwise been required to pay *but for the circumvention*.

As was established in the original notice, the methodology for calculating interim dumping duty is an amount worked out in accordance with the combination of fixed and variable duty method. Accordingly, the Commission calculated the amount of duty that would have been payable on the circumvention goods at the time of their importation using this method, which has generated an outstanding liability (of which the Department of Immigration and Border Protection is now seeking the applicant's payment).

As noted by the applicant, the amount of interim dumping duty payable may be greater than the actual dumping margin at the time of export and the Act provides mechanisms to enable this amount to be refunded (following a duty assessment) or to be brought up to date as a result of changes in the variable factors (following a review of measures). These are the only mechanisms available under the Act to adjust the amount of interim and / or final duty actually paid by the importer.

The Commission recognised that there was a possible tension between the Parliamentary Secretary's discretion to declare that any alterations to the notice would have retrospective effect, the timing of that decision, and the right of importers to seek an assessment of final duty for the importation period of 5 February 2015 to 4 August 2015. The Commission therefore published a file note on 16 December 2015, which explicitly encouraged importers to apply for a duty assessment by the relevant due date (being 4 February 2016) and committed to providing applicants with a reasonable opportunity to provide additional information in support of their duty assessments in the event that the original notice was altered with retrospective effect.[1]

I note that the applicant has not applied for a duty assessment at any stage since the measures were imposed, nor has it sought a review of the measures applicable to the goods. I expect that the applicant would argue that this is a circular argument, as it did not consider that a duty assessment or a review of measures was necessary because it was not importing goods that were then subject to the measures. However, by definition, a circumvention activity occurs when an exporter or an importer has sought to avoid paying the relevant duty. By avoiding the duty, the importer has – by their own actions – put themselves beyond the scope of these provisions. If the Parliamentary Secretary decides that a circumvention activity has occurred and alters the relevant notice in order to prevent that activity, it seems unusual to me that an affected importer would then claim that the amount of duty that they have avoided ought to be recalculated prior to any payment of that duty.

I note that the Regulation did not take effect until 1 April 2015, and that the inquiry was initiated on 5 May 2015. I note the applicant's claims (expressed in paragraphs 92 to 94 of its application) that officers of the Commission intimated that retrospective duties may not be applied as there were no "exceptional circumstances" in this case. I am advised that the relevant meeting occurred on 17 August 2015, and that whilst the officers may have made such a statement, it was in the context that any decision as to retrospectivity would not be theirs to make. This meeting also occurred a little over three months prior to the publication of the Statement of Essential Facts (SEF), and that it is common for the views of the Commission and myself to evolve over time (including between the publication of the SEF and REP 290 and 298). Regardless, I consider that all affected parties were put on notice about the inquiry in the initiation notice published on 5 May 2015 and had opportunity to change their behaviour after that notification, or at any time during the inquiry, to lessen the impact of any resulting alterations to the original notice on them. I consider that my submission with regard to ground i) is also relevant in this context.

[1] The Commission published a similar file note concerning the anti-circumvention inquiry regarding hollow structural sections; one of the affected importers applied for a duty assessment as a result, notwithstanding that they have also applied to the ADRP for a review of the decision of the Parliamentary Secretary in REP 291.

b) The Parliamentary Secretary has failed to consider the exercise of the discretion to address the variable factors

I understand the applicant's argument to be that whilst the Parliamentary Secretary has a discretion to consider the variable factors in relation to a circumvention inquiry, the decision to impose the measures retrospectively should have required a reasonable decision maker to examine the variable factors.

In my view, this misunderstands the nature of a circumvention inquiry concerning the slight modification of the goods. As the circumvention goods would have otherwise been subject to measures if it were not for the slight modification, it is reasonable to conclude that the circumvention goods ought to be subject to the same variable factors as were examined in the original notice. As outlined elsewhere in this submission, there are other mechanisms available under the Act through which an affected party can seek to have the variable factors reviewed.

I note that at paragraph 85 the applicant notes that "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". I understand this to be a reference to the Parliamentary Secretary's mandatory consideration of the "lesser duty rule" in subsection 8(5)(b) of the *Customs Tariff (Anti-Dumping) Act 1975*. However, it is unclear how this is relevant to the ADRP's review in circumstances where the Parliamentary Secretary did not make a decision under that legislation.

c) There was a failure to consider findings in other investigations, particularly Investigation 249 and to consider whether current imports were being dumped

Division 5A of Part XVB of the Act does not oblige me to have regard to prior investigations before making a recommendation to the Parliamentary Secretary. I may have regard to any other information that I consider to be relevant to the inquiry (as per subsection 269ZDBG(2)(b)).

This matter was addressed in section 2.5.3 of REP 290 and 298. Investigation 249 relates to the Commission's examination of galvanised steel exported from India and Vietnam. Whilst I agree that findings in other investigations may be relevant, *Anti-Dumping Commission Termination Report 249* makes no findings of any kind with regard to goods exported from Taiwan because they were beyond the scope of that investigation; certainly, no findings were made which would corroborate the statement on which the applicant in the current review relies. Accordingly, I do not consider that Investigation 249 made any findings *as to dumping* which have relevance to REP 290 and 298.

In any event, as outlined elsewhere in my submissions in regard to ground i), I am not required to consider or determine as part of an anti-circumvention inquiry whether the goods are being dumped.

d) The Parliamentary Secretary'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 Commission

I note that section 5.3.2.2 of REP 290 and 298 (pages 36-38) sets out the competing claims of the interested parties with respect to boron-alloyed galvanised steel. In particular, the interested parties dispute whether there is demand in the market for boron-alloyed galvanised steel to address strain ageing (the chief reason put forward by the applicant and by the relevant exporter for the addition of boron to the goods). The further analysis undertaken by the Commission, and referred to on pages 39 and 40, sought to test the competing views by reference to broader trends in the market. My assessment was that the analysis tended to corroborate the claims made by BlueScope. Accordingly, I found the evidence of BlueScope concerning the uses of boron in the market to be more persuasive in terms of assessing whether the circumvention goods had been slightly modified. Having concluded that they were, and that therefore a circumvention activity had occurred (as per section 5.3.4), I was required to turn my mind to the most appropriate means of altering the original notices to address that activity. My reasoning on these matters is set out in section 6.5.

I note the concern raised in paragraph 178 of the application concerning the abbreviation "HSS". The Commission has subsequently contacted Professor Dunne to check whether he was using the abbreviation to denote "high strength steel" or "hollow structural section" – he has confirmed the latter.

I also note the various allegations raised by the applicant concerning Professor Dunne's independence. I observe that the applicant's comments on the substance of Professor Dunne's work are generally positive – the criticism is largely levelled at the Commission for asking, in the applicant's opinion, the wrong questions and for relying on an expert from a university with research links to BlueScope. In my view, these allegations have no basis – as outlined in section 6.5 and referred to above, I relied on Professor Dunne's advice insofar as it confirmed that it is not reasonably practicable "to alter the original notices to refer to boron in a defined proportion, galvanised steel intended for certain defined end uses or otherwise manufactured using defined processes in order to prevent further circumvention activity taking place."

e) The Parliamentary Secretary'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

and

h) There was a wrong application of law as per Regulation 48(2)(b) of the *Customs (International Obligations) Regulation 2015*, as the relevant goods were never changed

Subsection 48(2) sets out that a circumvention activity occurs if all of the following apply:

> a) goods (the **circumvention goods**) are exported to Australia from a foreign country in respect of which the notice applies;
> b) before that export, the circumvention goods are slightly modified;
> c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;
> d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;
> e) Section 8 or 10 of the *Customs Tariff (Anti-Dumping) Act 1975*, as the case requires, does not apply to the export of the circumvention goods to Australia.

The Commission's application of these paragraphs is set out in various sections of chapter 5 of REP 290 and 298.

Firstly, I consider that if circumvention goods are exported from countries which are subject to the original notice, then the requirements of 48(2)(a) have been met.

I note that the expression "slightly modified" is used in paragraphs 48(2)(b), (c) and (d) in order to determine if the "slight modification of goods" circumvention activity has occurred. In addition, to determine if a good has been slightly modified, paragraphs 48(2)(b) – (d) must be read in conjunction with section 48(3).

Various sections of chapter 5 of REP 290 and 298 set out the Commission's analysis of the degree to which the goods have been slightly modified by reference to the factors set out in section 48(3) (also see below, in my response to ground (f) of this review).

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

Accordingly, the physical characteristics of a steel product like galvanised steel (including decisions as to the choice of feedstock and therefore whether it is to become an alloyed or non-alloyed product) is a relevant consideration in determining whether the good has been slightly modified.

The addition of small amounts of boron or other alloys to the raw materials used to produce the circumvention goods is, in my view, a partial change to the production process of the goods subject to the original notice. This slight modification, in the instances identified in REP 290 and 298, is insignificant in that the slightly modified goods were sold to the same end users, for the same purposes, in the same circumstances and with no apparent change in performance or acceptance in the market and no substantive change in cost. Accordingly, I found that the use or purpose of the circumvention goods was the same before, and after, they were so slightly modified (as per 48(2)(c)).

If the circumvention goods had not been slightly modified by the addition of boron or other alloys to the raw material inputs, they would have been the subject of the original notice (as per 48(2)(d)), and (prior to the decision of the Parliamentary Secretary), section 8 and 10 of the *Customs Tariff (Anti-Dumping) Act 1975* did not apply to the export of the circumvention goods to Australia. As a result of the slight modification of the goods, certain exporters avoided paying dumping and countervailing duties. As noted above, the intention of the legislative framework is to address this very practice of slightly modifying goods in order to avoid the payment of anti-dumping and countervailing duties that would otherwise apply. I therefore recommended the decision which was accepted by the Parliamentary Secretary for the reasons set out in REP 290 and 298.

f) The Commission wrongly failed to address each of the designated factors

Subsection 48(3) of the Regulation states, inter alia, that the Commissioner must compare the circumvention good and the good the subject of the notice, *having regard to any factor that the Commissioner considers relevant, including any of* the following factors (emphasis added). It then lists a number of different factors.

In my view, the preferred construction of this provision is that it is an inclusive, non-exhaustive list of the factors that I may have regard to when comparing the circumvention goods and the goods subject of the original notice. This construction is supported by the explanatory statement to the amending regulation that first introduced the slight modification of goods circumvention activity, the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015*. The explanatory statement provides that:

> "Sub-clause (3) provides that in deciding if goods have been slightly modified for the purposes of sub-clause (2), the Commissioner may have regard to any factors considered relevant. These factors may include the non-exhaustive and non-mandatory list of factors set out at paragraphs (a) through to (m). No single factor will necessarily provide definitive guidance as to whether the circumvention activity has occurred or not."

My task in this subsection of the Regulation is to compare the circumvention good with the good that is the subject of the notice, and to have regard to any factor that I consider relevant to that exercise. I am not required to consider every factor in subsection 48(3) of the Regulation, nor am I required to give the same weight to each factor which is considered. The importance of each factor will be greater or lesser depending on the circumstances of the inquiry and the alleged circumvention activity.

Various sections of chapter 5 of REP 290 and 298 set out the Commission's analysis of the degree to which the goods have been slightly modified by reference to the factors set out in subsection 48(3) of the Regulation. Although all factors were examined, it is apparent that there was little if any difference between the goods and the circumvention goods with respect to physical differences, manufacturing cost and selling price, marketing and distribution or end uses. However, there were significant differences in patterns of trade and export volumes with respect to the differing tariff classifications of the alloyed and non-alloyed goods, which coincided precisely with the imposition of anti-dumping measures in the original investigation. Accordingly, I consider that each of the factors were considered to the degree required by the Regulation.

g) The Commission wrongly dealt with confidentiality

I consider that this matter was addressed in sections 2.5.4 and 5.3.3 of REP 290 and 298, which indicates that I did not ignore the confidential material that this part of the application refers to. However, I consider that this ground is based on the erroneous view that the confidential material was relevant to my consideration of whether a circumvention activity had occurred in relation to goods the subject of the original notice, by exporters who are subject to that notice.

The transaction to which the confidential material relates is not within the scope of the inquiry. I consider that my findings with regard to the existence of certain legitimate uses for boron-alloyed galvanised steel (and which did not circumvent the anti-dumping measures – see chapter 4 and section 6.5 of REP 290 and 298) make this ground redundant.

I note the claims raised by the applicant concerning the adequacy of the non-confidential summaries of submissions made by BlueScope. I remain satisfied that the information which was redacted in the public record versions of the relevant documents was confidential, and that the context in which it appeared made it possible for the other interested parties to understand the nature of the confidential information and to make their own submissions in response if they wished to do so.

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

Division 5A of Part XVB of the Act does not oblige the Commissioner or the Parliamentary Secretary to analyse the variable factors, injury or causation as part of an anti-circumvention inquiry.

I note subsection 269ZDBG(1)(c) of the Act. Under this provision, if I give the relevant Minister a report that recommends that the original notice be altered, that proposed alteration must be "because the Commissioner is satisfied that circumvention activities in relation to the original notice have occurred." In my view, this provision suggests that if alterations to the notice are recommended, those alterations should be targeted at the specific type of circumvention activity that has been observed in the inquiry.

The alterations available to the Parliamentary Secretary (if she decides to declare an alteration to the notice) are not prescribed by the Act. Subsection 269ZDBH(2) provides that "…the alterations may be of the following kind". The provision then provides a non-exhaustive list of possible alterations.

This view is supported by the inclusive, non-mandatory language in the explanatory memorandum to the bill that introduced this provision into the Act. The *Customs Amendment (Anti-Dumping Improvements) Bill (No. 3) 2012* notes that this provision "outlines the kinds of alterations that may be made to the original notice including …". Although this list includes the specification of different variable factors, in my view the correct construction of this provision is that it does not require the Parliamentary Secretary to consider this type of alteration in every anti-circumvention inquiry. The list contains a range of possible alterations that could be made, but the alterations are not limited to those in the list and nor is the Parliamentary Secretary required to consider making each possible alteration before making her decision.

As the Parliamentary Secretary is not mandatorily required to consider specifying different variable factors when declaring an alteration to a notice, and as I did not think this alteration was necessary to address the circumvention activity observed, I did not recommend that the Parliamentary Secretary specify different variable factors. Specifying different variable factors might be a more likely recommendation following an inquiry into a different type of circumvention activity other than a slight modification of goods inquiry, depending on the particular facts and circumstances.

As far as Australia's international obligations are concerned, there is no provision for anti-circumvention in the World Trade Organization's *Anti-Dumping Agreement*. In any event, as Commissioner I am required to comply with Australia's legislation. In my view, as I have set out elsewhere in this submission, that legislation provides the Parliamentary Secretary with the power to make the decisions and the relevant alterations to the notice that were made.

In conclusion, I am of the view that, having given due consideration to the matters raised by the applicant and addressed in this Attachment, the approach taken in the anti-circumvention inquiry and as outlined in REP 290 and 298 ought to be considered as being consistent with the relevant legislation and has resulted in the correct and preferable decision.