Australian Government

Anti-Dumping Review Panel

ADRP REPORT No. 21

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CERTAIN ALUMINIUM EXTRUSIONS EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

Review of a decision of the Minister for Industry to alter a dumping duty notice and a countervailing duty notice in relation to certain aluminium extrusions exported from the People's Republic of China following an Anti-Circumvention Inquiry.

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Introduction

1. The following Applicants have applied pursuant to s.269ZZC of the Customs Act 1901 (the Act) for review of a decision of the Minister for Industry (the Minister) to alter a dumping duty and countervailing duty notice in respect of certain aluminium extrusions exported from the People's Republic of China (China):
   Capral Limited (Capral)
   Opal (Macao Offshore Commercial) Limited (OPAL)
   PanAsia Aluminium (China) Limited (PanAsia)
2. The applications for review were accepted and notice of the proposed review as required by s.269ZZI was published on 10 April 2015. The Senior Member of the Review Panel has directed in writing pursuant to s.269ZYA that the Review Panel for the purpose of this review be constituted by me.

Background

3. On 19 March 2014, Capral lodged an application under s.269ZDBC(1) of the Act requesting that the Commissioner of the Anti-Dumping Commission (the ADC) conduct an anti-circumvention inquiry in relation to the dumping duty notice and countervailing duty notice published in respect of certain aluminium extrusions exported from China. The dumping duty notice and countervailing duty notice had originally been published in October 2010, but were subsequently amended as a result of a re-investigation following a review by the then Trade Measures Review Officer and Federal Court proceedings.[1]
4. The application by Capral was accepted by the ADC and on 14 April 2014 an anti-circumvention inquiry was initiated by the ADC[2]. An Issues Paper was published on 18 September 2014 by the ADC setting out matters being considered as part of the inquiry and submissions were invited and received in response.
5. The final report to the Minister was made by the ADC on 19 February 2015 (the ADC Report)[3]. The ADC recommended to the Minister that the Minister determine:
   - that the Identified Importers of the circumvention goods had engaged in circumvention activity by avoiding the intended effect of the duty within the meaning of s.269ZDBB(5A) of the Act; and
   - a different variable factor (a new ascertained export price (AEP)) in accordance with s.269TAB(3) of the Act for the goods exported by PanAsia, having regarding to all relevant information [4].

[1] *PanAsia Aluminium (China) Limited v Attorney General of the Commonwealth* 2013 FCA 780
[2] Anti-Dumping Notice (ADN) 2014/31
[3] ADC Final Report No. 241
[4] Section 1.2, pages 5 and 6 of ADC Final Report 241

6. The Minister accepted the recommendations of the ADC and on 21 January 2015 the Minster declared a different variable factor (a new AEP) for the original dumping duty notice and countervailing duty notice in relation to certain aluminium extrusions exported from China by PanAsia would take effect as follows:
    - the alteration to the original notice relating to all exports of certain aluminium extrusions by PanAsia to the following importers is taken to have been made, with effect on and after 14 April 2014:
        i. P&O Aluminium (Brisbane) Pty Ltd;
        ii. P&O Aluminium (Melbourne) Pty Ltd;
        iii. P&O Aluminium (Perth) Pty Ltd;
        iv. P&O Aluminium (Sydney) Pty Ltd
        v. Oceanic Aluminium Pty Ltd
    - The alteration to the original notice relating to all exports of certain aluminium extrusions by PanAsia is taken to have been made with effect on and after the day the declaration was published[5].
7. As noted above, the decision of the Minister was published on 19 February 2015.

Conduct of the Review

8. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the review, s.269ZZ requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it was the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.
9. In carrying out its function the Review Panel is not to have regard to any information other than to "relevant information" as that expression is defined in s.269ZZK(6). For the purpose of the review, the relevant information is that to which the ADC had, or was required to have, regard when making the findings set out in the report to the Minister[6]. In addition to relevant information, the Review Panel is only to have regard to conclusions based on relevant information that are contained in the application for review and any submissions received under s.269ZZJ[7].
10. Unless otherwise indicated, in conducting this review, I have had regard to the applications (including documents submitted with the applications or referenced in the applications) and the submissions received pursuant to s.269ZZJ, insofar as they contained conclusions based on relevant information. I have also had

[5] Public Notice under s.269ZDBH (1) of the Act published on 19 February 2015 and ADN 2015/17
[6] S.269ZZK(6)(ca)
[7] S.269ZZK(4)

regard to the ADC Report, and information relevant to the review which was referenced in the ADC Report. This latter information included the original report which led to the anti-dumping and countervailing measures being imposed[8], verification reports and correspondence between the ADC and interested parties.

11. The ADC was asked to provide comments on the grounds raised in the applications for review[9]. While no formal response was received from the ADC, the ADC provided copies of confidential documents and correspondence which were referenced in the ADC Report. The ADC also provided information confirming certain information provided in the applications for review was relevant information. The request to the ADC was made publicly available. The other correspondence with the ADC was not made publicly available.
12. Submissions were received within the 30 days required by s.269ZZJ of the Act from the following parties:
    - Capral
    - OPAL
    - PanAsia
    - Success Aluminium Pty Ltd (Success Aluminium)
    - Protector Aluminium Pty Ltd (Protector Aluminium).

Grounds for Review

Capral

13. Capral submits in its application for review that the decision of the Minister was not the correct or preferable decision because the Minister should have applied the alterations to the dumping duty notice and the countervailing duty notice to two particular importers (Success Aluminium and another) from the date of commencement of the inquiry, namely 14 April 2014.

OPAL/PanAsia

14. OPAL and PanAsia were both represented in the review by MinterEllison, lawyers, and the grounds put forward by OPAL and PanAsia are set out in a submission by MinterEllison, which was Appendix A to the applications for review. As the grounds are the same for both applications, I will deal with them together.
15. There are six reasons given by OPAL and PanAsia as to why the decision of the Minister was not the correct or preferable decision. These are:
    - There is no positive evidence that any importer of the goods under consideration from OPAL has sold the imported goods in Australia

[8] Australian Customs and Border Protection Services Report No. 148, April 2010
[9] Letter from the Anti-Dumping Review Panel to the ADC dated 4 May 2015

without increasing the price commensurate with the total amount of dumping and countervailing duty payable. The ADC applied the wrong test and failed to gather relevant evidence;

- The Act does not authorise the ADC to extend the inquiry to importers not specified in the application and it does not authorise the Minister to make a declaration under s.269ZDBH(1) purporting to apply to importers not specified in the application and furthermore such action by the Minister is inconsistent with the purpose or object of the Act;
- Proper identification of the exporter impacts on the lawfulness of the current inquiry and the exporter in this matter is OPAL;
- Even if PanAsia is the exporter of the circumvention goods, the Minister's reliance on the ADC's erroneous finding that the statutory inference in s.269TAA(2) applies has resulted in an incorrect decision to declare that the original notices are altered;
- There is no evidence to support any claim that sales of the goods under consideration to Australian importers are, in fact, other than arms length transactions; and
- The failure to include in the Minister's declarations a revised normal value and non-injurious price has resulted in a failure to comply with Australia's international obligations and a dumping and countervailing duty regime that will impose on importers amounts of duty greater than is necessary to prevent injury to the Australian industry.

Consideration of Grounds

Capral

16. As Capral was the applicant for the anti-circumvention inquiry, it supports the decision of the Minister to alter the dumping duty and countervailing duty notices. It takes issue only with the decision to alter the notices to cover all exports from PanAsia from February 2015 and not from April 2014, at least with respect to two importers. These importers are LIG Australia Pty Ltd (LIG) and Success Aluminium.
17. The reasons why the notices should have been altered with respect to these importers from April 2014 are summarised by Capral as:
    - the nominated importers were found to have engaged in circumvention activity but ceased operation shortly after the anti-circumvention inquiry began;
    - phoenix companies (LIG and Success Aluminium) were established in their place;
    - the phoenix companies failed to cooperate with the ADC's inquiry;
    - imports by the phoenix companies were not arms length transactions;

- there was sufficient evidence of on-going circumvention by the phoenix companies to justify prospectively altering the notices;
- the Minister had the power to alter the notices in relation to the phoenix companies with effect from the time that those companies commenced operations; and
- to not exercise this power sends a signal to importers that phoenix companies can be used to continue the circumvention of measures while the ADC conducts a lengthy inquiry.

18. The first five points made above raises issues of what evidence there was before the ADC at the time the report to the Minister was made. I will deal with these points together before considering the last two points. These latter points relate to whether or not there is power to apply the alterations to the notices retrospectively in relation to importers who were not named in the anti-circumvention inquiry application and to whether or not, if there is power, it should be exercised in this case.

The evidence

19. With regard to the first point made by Capral, there is no doubt that the ADC found that the importers nominated in the anti-circumvention inquiry application (the nominated importers) were involved in circumvention activity.[10] The ADC also found that the nominated importers (which it referred to as the Identified Importers) no longer imported the circumvention goods.[11]
20. The second point made by Capral is that LIG and Success Aluminium took over the operations from the nominated importers. With respect to LIG, the basis for this assertion by Capral is certain findings by the ADC which led to the following conclusion by the ADC:

    "a new importer entered the market in May 2014 and has been importing significant volumes of the goods from PanAsia. These volumes are not dissimilar to the importation volumes made by the Identified Importers before they ceased importation sometime after April 2014, and it would appear that this new exporter has supplanted the Identified Importers in the Australian market in trading in the circumvention goods with PanAsia."[12]

21. The ADC Report does not identify the new importer. While the ADC Report confirms that the new importer was incorporated in April 2014, it does not provide any further information regarding the structure of the company or its relationship with the nominated importers or PanAsia.

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[10] Section 1.2, page 5, section 4.7, page 37 and section 7, page 49 of ADC Final Report 241
[11] Section 6.4.3, page 48 of ADC Final Report 241
[12] As above

22. On the other hand, the ADC accepted that Success Aluminium did take over the businesses of the nominated importers. It found however, that Success Aluminium had not at the time of the ADC Report imported any of the aluminium extrusions which were the subject of the anti-circumvention inquiry from PanAsia or any other exporter.[13]
23. From the relevant information given in the ADC Report, I do not consider that the statement made by Capral that "LIG/Success" were established in place of the nominated importers can be made without some qualification. There is simply not enough information as to the new importer, assuming that it is LIG, and its relationship with PanAsia or the nominated importers. While the ADC accepted that Success Aluminium acquired the businesses of the nominated importers, it does not appear to be involved in the importation of the aluminium extrusions which were the subject of the inquiry.
24. The third point made by Capral regarding the lack of cooperation of LIG and Success Aluminium also needs some qualification. The ADC Report does note that there was limited cooperation by the nominated importers. Only three out of the five responded to the questionnaires and the three that did respond, only gave limited cooperation.[14]
25. In support of its contention, Capral refers to comments made during a verification visit that the "new owners" would not permit the ADC to view the audited accounts and other source documents for the nominated importers. This is presumably a reference to the comment in the Verification Report that the ADC requested a copy of a report on the 2013 financials "but has been advised that the company will require its release to be authorised by the company's new owners"[15] . The ADC was not provided with the copy as requested, although representatives of the ADC did have access to the report during the verification visit.
26. I also note that the audited accounts for the 2013 financial year were not provided to the ADC and that it was stated during the verification visits that following their acquisition in 2014, the 2013 financial data was removed from the nominated importers' accounting systems and transferred off-site.[16]
27. It is difficult to know to what extent the failure by the nominated importers to provide records or otherwise to cooperate with the inquiry is to be attributed to Success Aluminium, which is presumably the new owners to which reference is made. It is even more difficult to know what responsibility LIG or the "new importer" had. With respect to the co-operation of the latter, I note that the ADC Report records that a letter was sent to the "new importer" dated

[13] Section 6.4.2, page 46 of ADC Final Report 241
[14] Section 2.3.3, pages 15 and 16 of ADC Final Report 241
[15] Verification Report dated 6 October 2014, page 14 (EPR No.28)
[16] As above; Verification Report dated 6 October 2014, page 13 (EPR No29)

5 November 2014 but no response was received.[17]Of course, neither Success Aluminium nor LIG were the focus of the inquiry and did not import the aluminium extrusions which were the subject of the inquiry during the investigation period.

28. With respect to the fourth point, namely that the imports by LIG and Success Aluminium were not arms length transactions, Capral refers to the comment in the ADC Report that" Success Aluminium does have a trading relationship with PanAsia (who has been found to have engaged in non-arms length transactions with Success Aluminium's predecessors)".[18] The comment though was made in the context of the ADC recommending that the notices be prospectively altered in relation to Success Aluminium to address the potential for circumvention activities to take place.[19] The ADC did not find that there had actually been non-arms length transactions between Success Aluminium and PanAsia.
29. With regard to LIG, assuming it is the new importer to which the ADC Report refers, the ADC Report does state that "it would appear that this new exporter has supplanted the Identified Importers in the Australian market in trading in the circumvention goods with PanAsia"[20] I also note that the ADC considered that the circumstances of the importations by the new importer appeared not to be coincidental and were possibly a response to the circumvention inquiry.[21]
30. Again, as with those made with respect to Success Aluminium, these comments were made in the context of recommending that the alterations to the notice should apply prospectively to all importers dealing with PanAsia. It was not a specific finding that the transactions between the new importer and PanAsia were not arms length.
31. Capral also relies on an inference it claims can be drawn from the comment noted above that the "new owners" would not permit the ADC to view the audited accounts and other source documents for the nominated importers. Capral contends that if LIG and Success Aluminium were truly independent of the nominated importers, they would have fully cooperated with the inquiry to ensure they avoided any adverse outcome as a result of their predecessors' behaviour. I do not consider that such an inference can be drawn. The evidence is not sufficiently clear as to the reason for any lack of co-operation by the nominated importers or the involvement of the new importer or Success Aluminium with such non-cooperation.
32. Finally in relation to the evidence, Capral notes that there was sufficient evidence of ongoing circumvention by LIG/Success Aluminium to justify prospectively altering the notices. I do not consider that this statement is correct.

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[17] Section 6.4.2, page 47 of ADC Final Report 241. The letter was actually dated 14 November 2014.
[18] Section 6.4.2, page 46 of ADC Final Report 241
[19] As above
[20] Section 6.4.3, page 48 of ADC Final Report 241
[21] As above

The ADC did not find that there had been ongoing circumvention activity by the new importer or by Success Aluminium.

Retrospective alteration of the notices

33. Capral contends that the Minister has power to alter the notices in relation to LIG and Success Aluminium with effect from the time those companies commenced operations. I agree that there is no express requirement in the legislation that a dumping duty notice or countervailing duty notice can only be altered retrospectively in relation to importers nominated in the application for the inquiry.
34. The Minister's power to alter the notices is found in s.269ZDBH of the Act. S.269ZDBH was inserted into the Act as part of the amendments made to that Act under the *Customs Amendment (Anti-Dumping Improvements) Act (No. 3) 2012*.
35. S.269ZDBH(1)(b) provides that the alterations to the notices are taken to have been made with effect on and from a date specified in the declaration by the Minister. Relevantly, s.269ZDBH(8) limits the retrospective application of any alterations. It provides:

    *"*A day specified in a declaration as mentioned in paragraph (1)(b) must not be earlier than the day of publication of the notice under subsection 269ZDBE(4) or (5) about the conduct of an anti-circumvention inquiry in relation to the original notice.*"*
36. I have been unable to discern from any of the extrinsic material for the legislation introducing s.269ZDBH or for the legislation which provided for the specific circumvention activity the subject of this inquiry[22], any legislative intent to limit the ability of the Minster to make the alterations to the notices retrospective, apart from that set out in s.269ZDBH(8).
37. The limit imposed by s.269ZDBH(8) does however indicate a legislative intention to link any retrospectivity to the public notice of the inquiry. This accords fairness to importers in that their imports will not be affected by retrospective changes to the duties imposed on them before they are put on notice that their imports would be the subject of the inquiry. It could also be argued that such fairness should limit any retrospectivity to those importers named in the public notice of the inquiry.
38. Even if there is no legislative prohibition on applying the alterations to the notices to importers not named in the public notice, this does not mean that such alterations should be applied retrospectively to those importers in this case. It would have to be a very clear case to warrant applying the alterations retrospectively to such importers to outweigh the unfairness involved.

[22] *Customs Amendment (Anti-Dumping Measures) Act 2013*.

39. The notice of the inquiry published by the ADC described the inquiry as follows:

    "The anti-circumvention inquiry will examine whether any of the following importers:
    • P&O Aluminium (Brisbane) Pty Ltd;
    • P&O Aluminium (Melbourne) Pty Ltd;
    • P&O Aluminium (Perth) Pty Ltd;
    • P&O Aluminium (Sydney) Pty Ltd; or
    • Oceanic Aluminium Pty Ltd;
    have engaged in circumvention activity that avoids the intended effect of duty, as outlined in subsection 269ZDBB(5A) of the Act.
    Capral alleges that the circumvention goods have been imported from PanAsia Aluminium (China) Limited from China. The goods exported to Australia during the period 1 January 2013 to 31 December 2013 will be examined to determine whether the circumvention activity has occurred."[23]

40. In the usual course, I consider that the terms of the inquiry as publicly notified should limit the retrospective effect of any alterations to the dumping duty and countervailing duty notices recommended by the ADC as a result of an anti-circumvention inquiry. Neither LIG nor Success Aluminium were identified in the public notice and therefore could consider that they were not the subject of the anti-circumvention inquiry. In this type of anti-circumvention inquiry there is no Statement of Essential Facts published which limits the information available to interested parties as to the likely findings and recommendations the ADC will make.
41. The argument made by Capral for retrospectivity in relation to LIG and Success Aluminium is the length of time taken for the anti-circumvention inquiry to be completed. If the measures are not applied to companies in the circumstances found by the ADC to have occurred after the inquiry commenced, then not applying the alteration of the notices retrospectively allows the circumvention activities to continue while the inquiry is being conducted with resulting injury to the Australian industry.
42. There is some merit in the point made by Capral and in certain circumstances it may be that it is appropriate that the alteration of the notices apply retrospectively to importers other than those nominated in the application for the inquiry and in the public notice of the inquiry. However, in my view, there would need to be a clearer factual basis for such action than was found in this case. Not all of the facts asserted by Capral were supported by findings made by the ADC or by other relevant information.
43. In particular, the absence of evidence establishing that the new importer was actually engaged in circumvention activity with its imports and the lack of

[23] ADN 2014/31

imports by Success Aluminium of the aluminium extrusions the subject of the inquiry mitigates against any retrospective application of the alterations to the notices.

PanAsia and OPAL

44. I deal below with each of the six reasons put forward by PanAsia and OPAL in support of their argument that the reviewable decision was not the correct or preferable decision.

No positive evidence

45. The Applicants, PanAsia and OPAL, take issue with the reliance by the ADC on the finding that the nominated importers were selling the circumvention goods at a loss. They point out that sales at a loss are not a determinative factor in the application of s.269ZDBB(5A)(d). They point out that the ADC Report acknowledges that selling at a loss by an importer does not in and of itself indicate that circumvention activity is occurring. They also point out that profitable sales do not exclude the possibility that the importer has failed to increase prices commensurate with the total duty payable.
46. The points made by the Applicants in this regard are correct. The test for whether or not there has been circumvention activity within the meaning of s.269ZDBB(5A)(d) is whether or not the importer sold the goods in Australia without increasing the price commensurate with the total amount of dumping and/or countervailing duty payable on those goods.
47. The Applicants maintain that to ascertain whether or not prices have increased commensurate with the dumping and countervailing duty paid, there has to be a comparison of prices. This involves a comparison of the prices at which the nominated importers sold the goods for a reasonable time after the publication of the original dumping duty and countervailing duty notices with the prices at which the importers were selling the goods before those notices were published. They note that there would have to be adjustments made to the prices to account for other factors which could influence the prices differently in the two periods. As this exercise was not done by the ADC, the Applicants contend that there was not the necessary evidence to support a finding that circumvention had occurred or a recommendation that the original notices be altered.
48. I do not agree with the submission by the Applicants that the comparison exercise they describe must be done before a finding of circumvention activity as defined by s.269ZDBB(5A) can be made. It is one way in which to approach the task. It is not however the only way. The evidence needs to establish that the importers are not increasing their prices (above what they would otherwise be) to cover the extra cost of the dumping or countervailing duty being paid. To

simply consider whether prices have increased from one period to the next is too simplistic. As the Applicants concede, prices can vary and in fact decrease over time for different reasons.

49. Sales at a loss by the importer can be an indication that the price has not been increased commensurate with the duty payable. In the absence of another explanation, sales by an importer over a reasonable length of time at prices which do not cover the cost involved in the sale, including the duties payable on the imported goods, is evidence that the importer is not increasing the price commensurate with the duties payable.
50. The Revised Explanatory Memorandum for the Bill introducing s.269ZDBB(5A)(d) into the Act, refers to circumvention activity occurring because of "the lowering of the export price, sales at a loss, profit reduction, reimbursement or compensation from the exporter, or other activity of a similar nature".[24] There needs of course to be an examination of whether or not there is another explanation for the sales by the importers being at a loss.
51. The findings by the ADC were that the three nominated importers who co-operated had traded at a considerable loss during the investigation period and that there was sufficient evidence to conclude that the remaining two nominated importers had also traded at a loss during that period. The ADC also examined whether or not there was any other explanation for such losses.[25] I reviewed the approach taken by the ADC in making these findings and consider that it was consistent with the legislation. Given these findings, I think it reasonable to conclude that the nominated importers had not during the investigation period increased the prices of the imported goods commensurate with the dumping and countervailing duty imposed on those imports.

Extension of Inquiry to other importers

52. The Applicants argue that the Minister did not have the power to make a declaration under s.269ZDBH(1) applying the prospective alteration of the notices to importers of the relevant goods not identified in the application for the anti-circumvention inquiry. The basis for this argument appears to be that:
    - the other importers were not the subject of the application for the anti-circumvention inquiry;
    - they were not included in the scope of the inquiry announced by the ADC;
    - they were the subject of an undertaking by the ADC that any ministerial declaration would not apply to them; and
    - not including them would better serve the purpose and object of the Act.

[24] Replacement Explanatory Memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2013, paragraph 55, page 15
[25] Section 4.5, pages 33 to 37 of ADC Final Report 241

53. It is correct that the other importers were not included in the application for the anti-circumvention inquiry. Nor were they named in the public notice published by the ADC announcing the inquiry. It is far from clear though that this would limit the power of the Minister under s.269ZDBH to apply alterations to the original notices prospectively to other importers. There is no such limit on the Minster's power expressed in s.269ZDBH.
54. The Minister is given a broad discretion under s.269ZDBH(1) as to the alterations which can be made to the original notices. Some of the alterations are listed in s.269ZDBH(2) but this is stated to be without limiting s.269ZDBH(1). The alterations do include different goods, foreign countries and exporters to those included in the notice. It does not limit the different goods, countries or exporters to those the subject of the inquiry.
55. S.269ZDBE(6) requires that the notice which the ADC has to give of the inquiry has to:
    - describe the kind of goods to which the inquiry relates; and
    - describe the original notice the subject of the inquiry; and
    - state that the inquiry will examine whether circumvention activities in relation to the original notice have occurred; and
    - indicate that a report will be made to the Minister.
56. A comparison of the information which must be given in the notice by the ADC of the inquiry with the alterations which are listed in s.269ZDBH(2) indicates that the alterations are not limited by the description of the inquiry in the public notice.
57. I note that the Revised Explanatory Memorandum to the bill which introduced the circumvention activity in s.269ZDBB(5A), states that its aim was " to address sales at a loss and other practices that undermine the effect of anti-dumping and countervailing duties already imposed".[26]
58. There is a legislative intent that those affected by the decision of the Minister should be put on notice that they may be affected and have an opportunity to make submissions. This is evidenced by the requirement for the public notice of the inquiry, the right of interested parties to make submissions to which the ADC must have regard in preparing the report to the Minster[27] and the requirement to maintain a public record of the inquiry.[28]
59. An inquiry into the circumvention activity described in s.269ZDBB(5A) does have a more limited consultation process than other anti-circumvention inquiries in that there is no requirement that the ADC publish a Statement of Essential

[26] Paragraph 4, page 2 of Replacement Explanatory Memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2013
[27] S.269ZDBG (2)(aa)
[28] S.269ZJ

Facts and it is intended to be a quicker inquiry than the others.[29] I note however that the Revised Explanatory Memorandum, presumably referring to the right to make submissions states that:

> "Once the inquiry is initiated, and it is established that the prices for the goods concerned have not risen commensurate with the level of the duties payable, the exporters and importers involved have an opportunity to explain why the price has not increased commensurate with the level of the duties imposed."[30]

60. In summary, then, I do not consider that there is a legislative limit on the power of the Minister in making a declaration under s.269ZDBH, to limit any alterations to those affecting the importers named in the application for the anti-circumvention inquiry. I also consider that the legislation intends that usually any alterations should not affect parties who have not been put on notice that they may be affected and have had an opportunity to make submissions.
61. In this inquiry, those dealing with PanAsia and the nominated importers were put on notice that the inquiry would inquire into exports of the relevant goods by PanAsia during the investigation period. PanAsia and OPAL, and Protector Aluminium in their submissions, point to a statement in the Issues Paper published by the ADC. The statement referred to a targeted approach which would ensure that those importers who had not been found to have engaged in circumvention activity would not be adversely affected.[31] I agree with the submission that this could have led importers not subject to the inquiry to believe they would not be adversely affected by alterations to the original notices.
62. Apart from the nominated importers, the ADC found that the only importer of the relevant goods from PanAsia was the new importer it identified and two importers who imported a small quantity of the goods. Of these two importers, only one continued to import the goods in 2014. This importer was Protector Aluminium.[32]
63. In the ADC Report, it is noted that the ADC wrote to the new importer on 5 November 2014 inviting it to make submissions. No response was received.[33]The ADC Report also refers to a letter it sent to Protector Aluminium dated 5 November 2014 inviting it to make submissions. This was a mistake. The letter to Protector Aluminium was dated 14 November 2014. Protector Aluminium responded to the letter on 26 November 2014. The ADC Report states that:

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[29] S. 269ZDBG(1)(b) requires the ADC to report to the Minister within 100 days after the public notice of the inquiry whereas it is 155 days for other inquiries.
[30] Page 6 of Replacement Explanatory Memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2013
[31] Page 6, paragraph 16 of the Submission by MinterEllison; Page 7 of Issues Paper 2014/02 dated 18 September 2014
[32] Section 6.4.2, page 47 of ADC Final Report 241
[33] As above. The date of the letter was in fact 14 December 2014.

> "The Commission wrote a second letter to Protector Aluminium on 1 December 2014 with the intention of clarifying the impact of potential outcomes from the inquiry. Protector Aluminium did not respond to the Commission's letter of 1 December 2014. Protection Aluminium also did not respond to the Commission's follow up emails and telephone calls seeking further clarification about its submission to the Commission."[34]

64. In its submission, Protector Aluminium admits receiving the letter of 1 December 2014 but states that it did not receive any follow up emails or telephone calls. It did not respond to the further letter from the ADC because it did not interpret the letter as indicating that the ADC intended to resile from its earlier assurance that any variation of the dumping and countervailing duty notices would only affect importers found to have been engaging in circumvention activity.
65. I have reviewed the correspondence between the ADC and Protector Aluminium. In the letter of 1 December 2014, the ADC stated:

> "In the circumstances where Protector Aluminium Pty Ltd (Protector Aluminium) has imported from PanAsia Aluminium on or after 14 April 2014, if the Parliamentary Secretary decides to make alterations to the notice, Protector Aluminium will be affected by the inquiry's outcome."

66. While this should have put Protector Aluminium on notice that it could be affected by the Minister's decision, despite the statement in the Issues Paper, the letter from the ADC went on to warn that "the Commission's preliminary views as set out in Issues Paper 2014/02, are subject to change as a result of the inquiry findings". In these circumstances, I consider that Protector Aluminium was put on notice that alterations to the notice as a result of the Minister's declaration could adversely affect it and it was given an opportunity to make submissions. I have also been provided with a copy of a follow up email and there is a reference to telephone calls.
67. The final point made by the Applicants, PanAsia and OPAL, is that including the other importers does not serve the purpose and object of the legislation. Given the findings which had been made with respect to the imports from PanAsia by the nominated importers, the circumstances of the acquisition of the nominated importers by Success Aluminium, the entry of the new importer and the similarity of its activities with that of the nominated importers, I consider that declaring the alterations to apply prospectively to all imports of the relevant goods from PanAsia does serve the purpose and object of the legislation. This would not be achieved if the alterations to the original notices only apply to the nominated importers. As they are no longer importing the goods, the alterations would not have any impact.

[34] Section 6.4.2, page 48 of ADC Final Report 241

Proper Identification of the Exporter

68. The Applicants correctly identify in their submission that s.269ZDBB(5A)(b) of the Act requires that the exporter of the circumvention goods has to be an exporter to which the original dumping and countervailing duty notices apply. While it is accepted that the original notices did apply to PanAsia, the Applicants contend that the ADC did not consider whether PanAsia was the exporter of the circumvention goods and merely assumed that it was. They contend that the exporter of the goods to the Australian importers was OPAL and not PanAsia.
69. In the original investigation, PanAsia was found to be the exporter and the dumping duty and countervailing duty notices applied to exports by it. The original report stated:

    > "Customs and Border Protection found that the producer, PanAsia, was the exporter of the goods. The beneficial owner and importer of the goods at the time of their arrival into Australia was found to be PanAsia's Australian customers. A related trading intermediary based in Macao, OPAL (Macao Commercial Offshore) Limited (OPAL), was found to purchase the goods from PanAsia and on-sell to the Australian customers. Customs and Border Protection found that the role of OPAL was to act only as a trading intermediary."[35]

70. PanAsia and others affected by the decision of the Minister to publish the dumping duty and countervailing duty notices sought a review of the decision of the Minister by the then Trade Measures Review Officer. However, it does not appear that any issue was taken by PanAsia with the finding that it was the exporter. Nor does it appear that this issue was raised by PanAsia in its appeal to the Federal Court.[36]
71. The Applicants' submission does not identify any facts different to those which existed at the time of the original investigation, other than that OPAL had replaced OPAL (Macao Commercial Offshore) Limited's role in the transactions. It does not appear that PanAsia or any of the nominated importers advised the ADC during the inquiry that there had been a change with the export arrangements which would affect the original finding that PanAsia was the exporter.
72. It is true that the ADC in the anti-circumvention inquiry did not analyse the issue of whether or not PanAsia was the exporter of the relevant goods to the nominated importer. This was not surprising given that the finding in the original investigation had not been queried at the time and was not the subject of any submissions in the inquiry.
73. The Applicants point out that it is not in dispute that OPAL sells the goods to the Australian importers. This is not however the test for determining which entity

[35] Section 6.8.1, page 48 of Australian Customs and Border Protection Services Report No. 148, April 2010
[36] PanAsia Aluminium (China) Limited v Attorney-General of the Commonwealth (2014) FCA 708

is the exporter. This test was considered in the decision of the Full Court of the Federal Court in *Companhia Votorantum de Celulose e Papel v Anti-Dumping Authority and Ors*[37]. The majority in that case specifically ruled out the test being determined by the vendor under the contract with the importer:

> "It is not the passing of property which identifies the exporter (although it may be critical to identification of the importer) but rather the identification of which party satisfies the requirements of truly being the exporter. This view is reinforced by the presence of paragraph 269TAB(1)(c) which contains no description referrable to purchase."[38]

74. The Applicants also seek to rely on the fact that the contracts under which OPAL sells the goods to the Australian importers were on a CIF basis. They rely on comments by the majority in the Companhia Votorantum case that the identification of the seller as the exporter of the goods is strengthened in the case of a C&F transaction. The comments in that case though do not assist. What the majority said was:

    > "In the present case the relevant contracts were C&F contracts. If anything, that circumstance strengthens the argument that Celpav was the exporter."

    The company which is described as Celpav was not however the seller of the goods to the Australian importer.
75. The Applicants also argue that OPAL makes all necessary arrangements for export formalities, inland and overseas transport and marine insurance. This may or may not be the case. No reference is given to material, to which the Review Panel can have regard, to support the claim. A trading intermediary could also be expected to undertake such activities. It does not necessarily mean that OPAL is to be regarded as the exporter.
76. The Review Panel does not itself investigate issues raised by an application. It reviews the decision of the ADC and is limited in the material to which it can have regard. Given this and the comments above, I do not consider that the Applicants have established that the identification of PanAsia as the exporter was incorrect.

S.269TAA(2)

77. With this point, the Applicants argue that s.269TAA(2) had no application to the circumstances of the imports by the nominated importers. I agree with the submission that S.269TAA(2) requires that the goods are purchased by the importer from the exporter. If the nominated importers were purchasing from

[37] [1996] FCA 1048
[38] As above, page 15 per Wilcox and R. D. Nicholson JJ.

OPAL and not PanAsia then, given the finding that PanAsia was the exporter, s.269TAA(2) does not apply.

78. However, the relevancy of s.269TAA(2) to this case is not clear. If the nominated importers are purchasing the goods from OPAL, then neither s.269TAB(1)(a) or (b) apply and the export price is to be determined under s.269TAB(3), which is what occurred in this case.[39] It is not necessary for a finding that anti-circumvention activity as defined by s.269ZDBB(5A) has occurred, that there be non-arms length transactions.

No evidence sales other than arms length

79. The Applicants contend that there is no evidence that the sales to the importers were other than arms length transactions. They point to comments in the ADC Report which they submit may have misled the Minister that reimbursements had in fact been received. The example they give is that from section 6.4.3 of the ADC Report:

    > "As set out above, under subsection 269TAA(2) of the Act, there is an indication that the importers identified in Capral's application were directly or indirectly receiving reimbursements or compensation or otherwise receiving a benefit for, or in respect of, the whole or part of the price."[40]

80. I am not sure what was meant by the above quote. S.269TAA(2) does not appear to be relevant to the exercise the ADC was required to do in making the recommendation to the Minister under s.269ZDBG. While there may be a strong suspicion that the nominated importers were receiving some form of reimbursement given the period over which they were found to be trading at a loss, it is not necessary that such a finding be made.

81. The inquiry found sufficient evidence that the nominated importers were trading at a loss (and in respect of at least three of them, a considerable loss) to support a finding that, in the absence of any other credible explanation, the prices for the relevant goods were not being increased commensurate with the duty payable. This is the relevant finding which was made and which supported the recommendation to the Minister to alter the notices.

Revision of normal value and non-injurious price

82. This argument by the Applicants is 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. Not to do so was a breach of the requirement for a "fair comparison" which they

[39] Section 5.3, page 39 of ADC Final Report 241
[40] Page 48

contend is central to the requirements of both Australian law and the Anti-Dumping Agreement.[41]

83. The Applicants submit that the Minister has a discretion under s.269ZDBH(2)(d) to specify different variable factors when making a declaration to alter the original notice. I agree that the Minister does have such a discretion, but the scheme of the anti-circumvention legislation indicates that this is to address the circumvention activity disclosed by the report under s.269ZDBG. The purpose of introducing the circumvention activity described in s.269ZDBB(5A), was:

    > "…to address sales at a loss and other practices that undermine the effect of anti-dumping and countervailing duties already imposed."[42]

84. The Australian anti-dumping legislation allows interested parties to seek a review of the variable factors[43]. This is the remedy that parties such as the Applicants can seek if they contend such variable factors as the normal value of the exports or the non-injurious price should be altered. In such a review, all interested parties have an opportunity to make submissions on the claim that the variable factors should be altered and the Minister has a report from the ADC on that issue on which to make a decision. This is not the case when the Minister makes a decision under s.269ZDBH(1).
85. For these reasons, I do not agree that the Minister's discretion under s.269ZDBH(1) should be used to alter the variable factors of the original notice except for the purpose of addressing the circumvention activity identified in the report from the ADC.

Recommendations/Conclusion

86. While certain points made by the Applicants in the applications for review have some merit, I do not consider that they establish that the decision of the Minister was not the correct or the preferable decision.
87. Pursuant to s.269ZZK of the Act, I recommend that the Minister affirm the reviewable decision.

Joan Fitzhenry

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[41] WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

[42] Paragraph 4 of the of Replacement Explanatory Memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2013

[43] Division 5 of Part XVB of the Customs Act 1901

Anti-Dumping Review Panel Member
9 June 2015