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
Department of Industry and Science
10 Binara Street
Canberra City
ACT 2601
P: +61 2 6276 1781
F: + 61 2 6213 6821
E: ADRP@industry.gov.au

INFORMATION FOR APPLICANTS

WHAT DECISIONS ARE REVIEWABLE BY THE ANTI-DUMPING REVIEW PANEL?

The role of the Anti-Dumping Review Panel (the ADRP) is to review certain decisions made by the Minister responsible for the Department of Industry and Science, or by the Anti-Dumping Commissioner (the Commissioner).

The ADRP may review decisions made by the Commissioner:

- to reject an application for dumping or countervailing measures
- to terminate an investigation into an application for dumping or countervailing measures
- to reject or terminate examination of an application for duty assessment, and
- to recommend to the Minister the refund of an amount of interim duty less than the amount contended in an application for duty assessment, or waiver of an amount over the amount of interim duty paid.

The ADRP may review decisions made by the Minister, as follows:

Investigations:

- to publish a dumping duty notice
- to publish a countervailing duty notice
- not to publish a dumping duty notice
- not to publish a countervailing duty notice

Review inquiries, including decisions

- to alter or revoke a dumping duty notice following a review inquiry
- to alter or revoke a countervailing duty notice following a review inquiry
- not to alter a dumping duty notice following a review inquiry
- not to alter a countervailing duty notice following a review inquiry
- that the terms of an undertaking are to remain unaltered
- that the terms of an undertaking are to be varied
- that an investigation is to be resumed
- that a person is to be released from the terms of an undertaking

Continuation inquiries:

- to secure the continuation of dumping measures following a continuation inquiry
- to secure the continuation of countervailing measures following a continuation inquiry
- not to secure the continuation of dumping measures following a continuation inquiry
- not to secure the continuation of countervailing measures following a

continuation inquiry.

Anti-circumvention inquiries:

- to alter a dumping duty notice following an anti-circumvention inquiry;
- to alter a countervailing duty notice following an anti-circumvention inquiry;
- not to alter a dumping duty notice following an anti-circumvention inquiry; and
- not to alter a countervailing duty notice following an anti-circumvention inquiry.

Before making a recommendation to the Minister, the ADRP may require the Commissioner to:

- reinvestigate a specific finding or findings that formed the basis of the reviewable decision; and
- report the result of the reinvestigation to the ADRP within a specified time period.

The ADRP only has the power to make **recommendations to** the Minister to affirm the reviewable decision or to revoke the reviewable decision and substitute with a new decision. The ADRP has no power to revoke the Minister's decision or substitute another decision for the Minister's decision.

WHICH APPLICATION FORM SHOULD BE USED?

It is essential that applications for review be lodged in accordance with the requirements of the *Customs Act 1901* (the Act). The ADRP does not have any discretion to accept an invalidly made application or an application that was lodged late.

Division 9 of Part XVB of the Act deals with reviews by the ADRP. Intending applicants should familiarise themselves with the relevant sections of the Act, and should also examine the explanatory brochure (available at www.adreviewpanel.gov.au).

There are separate application forms for each category of reviewable decision made by the Commissioner, and for decisions made by the Minister. It is important for intending applicants to ensure that they use the correct form.

This is the form to be used when applying for ADRP review of a decision of the Minister whether to publish a dumping duty notice or countervailing duty notice (or both). It is approved by the Commissioner pursuant to s 269ZY of the Act.

WHO MAY APPLY FOR REVIEW OF A MINISTERIAL DECISION?

Any interested party may lodge an application for review to the ADRP of a review of a ministerial decision. An "interested party" may be:

- if an application was made which led to the reviewable decision, the applicant
- a person representing the industry, or a portion of the industry, which produces the goods which are the subject of the reviewable decision
- a person directly concerned with the importation or exportation to Australia of the goods
- a person directly concerned with the production or manufacture of the goods
- a trade association, the majority of whose members are directly concerned with the production or manufacture, or the import or export of the goods to Australia, or
- the government of the country of origin or of export of the subject goods.

Intending applicants should refer to the definition of "interested party" in s 269ZX of the Act to establish whether they are eligible to apply.

WHEN MUST AN APPLICATION BE LODGED?

An application for a review must be received within 30 days after a public notice of the reviewable decision was first published in a national Australian newspaper (s 269ZZD).

The application is taken as being made on the date upon which it is received by the ADRP after it has been properly made in accordance with the instructions under 'Where and how should the application be made?' (below).

WHAT INFORMATION MUST AN APPLICATION CONTAIN?

An application should clearly and comprehensively set out the grounds on which the review is sought, and provide sufficient particulars to satisfy the ADRP that the Minister's decision should be reviewed. It is not sufficient simply to request that a decision be reviewed.

The application should include a statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application. There may be more than one such correct or preferable decision that should be identified, depending on the grounds that have been raised.

The application must contain a full description of the goods to which the application relates and a statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision (s 269ZZE).

If an application contains information which is confidential, or if publication of information contained in the application would adversely affect a person's business or commercial interest, the application will be rejected by the ADRP unless an appropriate summary statement has been prepared and accompanies the application.

If the applicant seeks to bring confidential information to the ADRP's attention (either in their application or subsequently), the applicant must prepare a summary statement which contains sufficient detail to allow the ADRP to reasonably understand the substance of the information, but the summary must not breach the confidentiality or adversely affect a person's business or commercial interest (s 269ZZY).

While both the confidential information and the summary statement must be provided to the ADRP, only the summary statement will be lodged on the public record maintained by the ADRP (s 269ZZX). The ADRP is obliged to maintain a public record for review of decisions made by the Minister, and for termination decisions of the Commissioner. The public record contains a copy of any application for review of a termination decision made to the ADRP, as well as any information given to the ADRP after an application has been made. Information contained in the public record is accessible to interested parties upon request.

Documents containing confidential information should be clearly marked "Confidential" and documents containing the summary statement of that confidential information should be clearly marked "Non-confidential public record version", or similar.

The ADRP does not have any investigative function, and **must** take account only of information which was before the Minister when the Minister made the reviewable decision (s269ZZ). The ADRP will disregard any information in applications and submissions that was not available to the Minister.

HOW LONG WILL THE REVIEW TAKE?

The timeframes for a review by the ADRP will be dependent on whether the ADRP requests the Commissioner to reinvestigate specific findings or findings that formed the basis of the reviewable decision.

If reinvestigation is not required

Unless the ADRP requests the Commissioner to reinvestigate a specific finding or findings, the ADRP must make a report to the Minister:

- at least 30 days after the public notification of the review;
- but no later than 60 days after that notification.

In special circumstances the Minister may allow the Review Panel a longer period for completion of the review (s 269ZZK(3)).

If reinvestigation is required

If the ADRP requests the Commissioner to reinvestigate a specific findings or findings, the Commissioner must report the results of the reinvestigation to the ADRP within a specified period.

Upon receipt of the Commissioner's reinvestigation report, the ADRP must make a report to the Minister within 30 days.

WHAT WILL BE THE OUTCOME OF THE REVIEW?

At the conclusion of a review, the ADRP must make a report to the Minister, recommending that the:

- - Minister affirm the reviewable decision (s 269ZZK(1)(a)), or
- - Minister revoke the reviewable decision and substitute a specified new decision (s 269ZZK(1)(b)).

After receiving the report from the ADRP the Minister must:

- - affirm his/her original decision; or
- - revoke his/her original decision and substitute a new decision.

The Minister has 30 days to make a decision after receiving the ADRP's report, unless there are special circumstances which prevent the decision being made within that period. The Minister must publish a notice if a longer period for making a decision is required (s 269ZZM).

WHERE AND HOW SHOULD THE APPLICATION BE MADE?

Applications must be EITHER:

- - lodged with, or mailed by prepaid post to:

Anti-Dumping Review Panel
c/o Legal Services Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601
AUSTRALIA

- - OR emailed to:

ADRP@industry.gov.au

- - OR sent by facsimile to:

Anti-Dumping Review Panel
c/o Legal Services Branch
+61 2 6213 6821

WHERE CAN FURTHER INFORMATION BE OBTAINED?

Further information about **reviews by the ADRP** can be obtained at the ADRP website (www.adreviewpanel.gov.au) or from:

Anti-Dumping Review Panel
c/o Legal Services Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601
AUSTRALIA

Telephone: +61 2 6276 1781
Facsimile: +61 2 6213 6821

Inquiries and requests for **general information about dumping matters** should be directed to:

Anti-Dumping Commission
Department of Industry and Science
Ground Floor Customs House
1010 Latrobe Street
MELBOURNE 3008

Telephone: 1300 884 159
Facsimile: 1300 882 506
Email: clientsupport@adcommission.gov.au

FALSE OR MISLEADING INFORMATION

It is an offence for a person to give the ADRP written information that the person knows to be false or misleading in a material particular.

(Penalty: 20 penalty units – this equates to $3400).

PRIVACY STATEMENT

The collection of this information is authorised under section 269ZZE of the *Customs Act 1901*. The information is collected to enable the ADRP to assess your application for the review of a decision to publish a dumping duty notice or countervailing duty notice.

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, and
® a countervailing duty notice

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.

A statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application. There may be more than one such correct or preferable decision that should be identified, depending on the grounds that have been raised.

Signature:.....

Name: RICHARD PREST

Position: CFO

Applicant Company/Entity: Pacific Aluminium on behalf of Rio Tinto Aluminium (Bell Bay) Limited

.....

Date: 3 / 7 / 15.

APPLICATION FOR REVIEW

Dumping and countervailing investigation ADC 237
Silicon metal exported from China

Application by Pacific Aluminium

1 Applicant

Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

Name	Pacific Aluminium on behalf of Rio Tinto Aluminium (Bell Bay) Limited ('Pacific Aluminium')
Address	Level 3, 500 Queen Street Brisbane QLD 4000 Australia
Form of business	A business unit of Rio Tinto Limited, consisting of a number of operating companies

2 Applicant's contact details

Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

Contact person	Mr Joseph Carey	
Position	Senior Corporate Lawyer	
Contact details	Telephone:	+61 (7) 3028 2215
	Mobile:	+61 (0) 412 736 833
	Fax:	+61 (7) 3028 2013
	Email:	joseph.carey@pacificaluminium.com.au

3 Applicant's representative

Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

Pacific Aluminium is represented by Corrs Chambers Westgarth (**Corrs**) in this matter. A copy of a letter of authorisation is attached as **Attachment A**.

4 Description of imported goods

Full description of the imported goods to which the application relates.

This Application is made in respect of silicon metal imported from China. In Anti-Dumping Notice 2015/71, the Anti-Dumping Commission (**Commission**) described these goods as follows:

> *silicon metal containing:*
>
> - *at least 96.00 per cent but less than 99.99 per cent silicon by weight; and*
> - *between 89.00 per cent and 96.00 per cent silicon by weight that contains aluminium greater than 0.20 per cent by weight;*
>
> *of all forms (i.e. lumps, granules, or powder) and sizes.*

5 Tariff classification of imported goods

The tariff classification/statistical code of the imported goods.

The imported goods are classified to tariff subheading 2804.69.00 (statistical code 14) in Schedule 3 of the *Customs Tariff Act 1995* (Cth).

6 Reviewable decision

A copy of the reviewable decision. Date of notification of the reviewable decision and the method of the notification.

A copy of the reviewable decision is attached as **Attachment B**. That decision was notified and published in the Commonwealth of Australia Gazette and *The Australian* newspaper on 3 June 2015.

On 3 June 2015, the Commission also published:

- Anti-Dumping Notice No. 2015/71—silicon metal exported from The People's Republic of China (**ADN 2015/71**); and
- Report No. 237—alleged dumping of silicon metal exported from The People's Republic of China and alleged subsidisation of silicon metal exported from The People's Republic of China (**REP 237**).

Applicant's reasons

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

A statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application. There may be more than one such correct or preferable decision that should be identified, depending on the grounds that have been raised.

1 Introduction

1.1 On 10 January 2014, Simcoa Operations Limited applied for a dumping duty notice and a countervailing duty notice in relation to silicon metal exported to Australia from China. On 6 February 2014, the Anti-Dumping Commission (**Commission**) initiated an investigation (ADC 237).

1.2 On 7 May 2015, the Anti-Dumping Commissioner (**Commissioner**) sent his final report to the Parliamentary Secretary to the Minister for Industry and Science (**Parliamentary Secretary**) (**REP 237**),[1] and recommended that the Parliamentary Secretary publish:

(a) a dumping duty notice in respect of all exports of silicon metal from China; and

(b) a countervailing duty notice in respect of all exports of silicon metal from China.

1.3 On 3 June 2015, the Parliamentary Secretary decided to impose:

(a) pursuant to subsections 269TG(1) and (2) of the *Customs Act 1901* (**Act**), dumping duties on silicon metal exported to Australia from China; and

(b) pursuant to subsections 269TJ(1) and (2) of the Act, countervailing duties on silicon metal exported to Australia from China.

[1] http://www.adcommission.gov.au/cases/Documents/EPR%20237/044-Final%20Report%20-%20Other%20-Final%20Report%20237.pdf (REP 237).

1.4 Pacific Aluminium requests that the Anti-Dumping Review Panel (**ADRP**) review the Parliamentary Secretary's decision to impose countervailing duties on silicon metal exported to Australian from China under s269TJ(1) and (2) of the Act (**Reviewable Decision**).

1.5 Pacific Aluminium is a business unit of Rio Tinto Limited. It consists of a number of companies which operate a range of sites across Australia and New Zealand, including three aluminium smelter operations in Australia. The particular operators of those sites are Rio Tinto Aluminium (Bell Bay) Limited, Boyne Smelters Limited and Tomago Aluminium Company Pty Ltd. Each of those companies is a subsidiary of Rio Tinto Limited or Rio Tinto plc.

1.6 Pacific Aluminium was the largest importer of silicon metal from China to Australia during the investigation period.[2] It participated in the investigation by the Commission, including by making submissions, and was the subject of an importer visit report by the Commission[3]

1.7 On this basis, Pacific Aluminium is an "interested party" within the meaning of that term in section 269ZX of the Act.

2 Summary of Reviewable Decision

2.1 Pacific Aluminium submits that the Reviewable Decision was not the correct or preferable decision.

2.2 Specifically, Pacific Aluminium submits that the Commissioner ought not to have made, and the Parliamentary Secretary ought to not to have accepted and relied upon, certain findings and recommendations in REP 237, which resulted in the Parliamentary Secretary's decision to impose countervailing measures on silicon metal exported by uncooperative and all other exporters, and to do so with an effective rate of 37.6%.

2.3 Pacific Aluminium submits that the findings that ought not to have made or recommended by the Commissioner, and which the Parliamentary Secretary ought not to have accepted, are:

(a) that the uncooperative exporters met the eligibility criteria for 38 countervailable subsidy programs, accessed all of those programs and received financial contributions (at the maximum level available, or at a speculative maximum level) that conferred a benefit under all of those programs; and

(b) that the uncooperative and all other exporters had a subsidy margin of 37.6%, and therefore countervailing measures ought to be imposed on their exports from China at that effective rate of duty.[4]

2.4 Pacific Aluminium submits that these findings, and the Parliamentary Secretary's decision to accept them, are inconsistent with the Act and the *Agreement on Subsidies and Countervailing Measures* (**SCM Agreement**), and as a result were either not permitted to be made, or did not constitute the preferable decision on the facts available to the Commissioner and the Parliamentary Secretary.

2.5 If the Commissioner had not found that the uncooperative exporters met the eligibility criteria for, accessed and received financial contributions that conferred a benefit under the 38 countervailable subsidy programs, the Commissioner, and

[2] REP 237, 23.

[3] Document 017 on the Electronic Public Record.

[4] REP 237, 43–47.

in turn the Parliamentary Secretary, would not have determined that a 37.6% subsidy margin applied to all silicon metal exported by the uncooperative and all other exporters from China.

2.6 In Pacific Aluminium's respectful submission, the approach taken by the Commissioner, and accepted by the Parliamentary Secretary, has resulted in the imposition of countervailing measures that are significantly higher than those that ought to have been imposed.

2.7 The reasons in support of Pacific Aluminium's request for review are set out in more detail below.

3 The legal framework relating to uncooperative exporters

3.1 Pacific Aluminium acknowledges that only two of the exporters of silicon metal from China that were asked by the Commission to complete an exporter questionnaire did so, being the two manufacturing entities in the Linan Group, Hua'an Linan Silicon Industry Co., Ltd and Guizhou Liping Linan Silicon Industry Co., Ltd.

3.2 Pacific Aluminium also acknowledges that the Government of China (**GOC**) provided only limited information in response to the Commission's requests for information as part of this investigation.

3.3 Accordingly, Pacific Aluminium accepts that the Commissioner was entitled to find that the uncooperative exporters did not provide all of the information he required to determine:

(a) whether they received countervailing subsidies; and

(b) if so, the amount of those countervailing subsidies.

3.4 In the circumstances, the Commissioner's powers under subsections 269TAACA(1)(c) and (d) of the Act were enlivened. In full, that section provides:

"(1) If:

(a) one of the following applies:

(i) there is an investigation under this Part in relation to whether a countervailing duty notice should be published;

(ii) there is a review under Division 5 in relation to the publication of a countervailing duty notice;

(iii) there is an inquiry under Division 6A in relation to the continuation of a countervailing duty notice; and

(b) the Commissioner is satisfied that an entity covered by subsection (2):

(i) has not given the Commissioner information the Commissioner considers to be relevant to the investigation, review or inquiry within a period the Commissioner considers to be reasonable; or

(ii) has significantly impeded the investigation, review or inquiry;

then, in relation to the investigation, review or inquiry, in determining whether a countervailable subsidy has been received in respect of particular goods, or in determining the amount of a countervailable subsidy in respect of particular goods, the Commissioner or the Minister:

(c) may act on the basis of all the facts available to the Commissioner or the Minister (as the case may be); and

(d) may make such assumptions as the Commissioner or the Minister (as the case may be) considers reasonable.

(2) For the purposes of paragraph (1)(b), the entities are as follows:

(a) any person who is or is likely to be directly concerned with the importation or exportation into Australia of goods to which the investigation, review or inquiry relates or who has been or is likely to be directly concerned with the importation or exportation into Australia of like goods;

(b) the government of the country of export or country of origin:

(i) of goods to which the investigation, review or inquiry relates that have been, or are likely to be, exported to Australia; or

(ii) of like goods that have been, or are likely to be, exported to Australia."

(*emphasis added*)

3.5 Section 269TAACA was introduced to the Act by the *Customs Amendment (Anti-Dumping Improvements) Act (No. 2) 2012* (Cth) (**Anti-Dumping Amendment Act**).

3.6 The Explanatory Memorandum for the Bill which became the Anti-Dumping Amendment Act explains:

"16. The Bill will clarify that the Chief Executive Officer of the Customs and Border Protection Service (the CEO) or the Minister has the express power to act on the basis of all the facts available when determining whether a countervailable subsidy has been received in respect of particular goods, or in determining the amount of a countervailing subsidy in respect of those goods where a relevant entity has not provided relevant information to the CEO within a reasonable period of time. The relevant entities are exporters and importers of the relevant goods, and the Government of the country of export or origin of the relevant goods.

17. This 'all facts available' provision will apply to determinations in regard to countervailing duty notices where there is an investigation into whether measures should be imposed under Part XVB of the Customs Act, a review of existing measures under Division 5 of Part XVB, and/or an inquiry into whether measures should be continued beyond their expiry under Division 6A of Part XVB.

18. It is important to note that the power to act on all facts available will have separate application in relation to the CEO and the Minister. For example, the CEO is able to act on all facts available to the CEO and the Minister is also able to act on all facts available to the Minister. In the case of the Minister this, in practice, will include at least the same facts available to the CEO, since the Minister receives the report from the CEO. In an investigation the CEO may act on the basis of all the facts available by making a preliminary affirmative determination, and by reporting to the Minister. The Minister may then act on the facts available in deciding whether to impose measures.

19. This will partially implement the proposal to amend the subsidies provisions in the Customs Act to better reflect definitions and operative provisions of the [SCM Agreement].

20. This amendment is based on Article 12.7 of the [SCM Agreement] which provides:

'In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.'"

3.7 The Second Reading speech in respect of that Bill further explains:

> "**Substantive measures**
>
> This third tranche of legislation includes four substantive reforms to the antidumping regime.
>
> 1. All facts available provision
>
> First, this bill clarifies the CEO of customs and border protection and the minister's power to take 'all facts available' into account when:
>
> - determining whether a countervailable subsidy has been received; or
> - in determining the amount of a countervailing subsidy;
> - when the parties being investigated by Customs fail to provide relevant information within a reasonable period or significantly impede the investigation, review or inquiry.
>
> This reform ensures that our antidumping system better reflects the World Trade Organisation Agreement on Subsidies and Countervailing Measures."[5]

3.8 To date, the Federal Court of Australia has not considered the requirements of section 269TAACA of the Act. However, it is clear from the Explanatory Memorandum and the Second Reading speech that the purpose of section 269TAACA of the Act was to implement article 12.7 of the SCM Agreement into Australian legislation.

3.9 Article 12.7 of the SCM Agreement provides:

> "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." (emphasis added)

3.10 It follows that any exercise by the Commissioner, and by extension, Parliamentary Secretary, of the powers contained in subsections (1)(c) and (d) of the Act should be consistent with the views of the World Trade Organisation (**WTO**) Appellate Body (**Appellate Body**) and WTO Panel on how those powers can be exercised.[6]

4 WTO Panel and Appellate Body consideration

4.1 A number of WTO Panel and Appellate Body decisions have considered the meaning of the phrase "made on the basis of the facts available". From a review of those decisions, the following principles become clear:

(a) the purpose of the provision is limited to filling in any gaps in the information provided;

(b) an investigating authority must apply a logical process of reasoning and evaluation of the facts before it makes its determination; and

(c) determinations cannot be made on the basis of non-factual assumptions or speculation. Rather, they must be based on a reasonable assessment of the facts actually available to the investigating authority.

[5] Second Reading speech (Wednesday, 21 March 2012, Page: 3688), Customs Amendment (Anti-Dumping Improvements) Bill (No. 2) 2012.

[6] *Siam Polyethylene Company Ltd v Minister of State for Home Affairs* (2009) 258 ALR 481, [66] (Rares J).

The purpose of the provision is to fill in any gaps

4.2 In December 2014, the Appellate Body in *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*[7] (***United States – Hot-Rolled Carbon Steel***) provided this analysis of the purpose of article 12.7:

> " ... Article 12.7 of the SCM Agreement limits use of the "facts available" to instances where an interested Member or interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". This sets the parameters within which an investigating authority makes a determination on the basis of the "facts available", namely, in a context of missing "necessary information". It is the absence of this particular information that the use of the "facts available" is designed to mitigate. This suggests that the process of identifying the "facts available" should be limited to identifying replacements for the "necessary information" that is missing from the record. In this regard, the use of the term "necessary" to qualify the term "information" carries significance. It is meant to ensure that Article 12.7 is not directed at mitigating the absence of "any" or "unnecessary" information, but is rather concerned with overcoming the absence of information required to complete a determination."[8] (emphasis added)

4.3 The Appellate Body went on to refer to its often-cited decision in *Mexico — Definitive Anti-Dumping Measures on Beef and Rice*,[9] (***Mexico – Beef and Rice***), where it explained:

> "[293] Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. Thus, the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination.
>
> [294] ... Secondly, the "facts available" to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide. In certain circumstances, this may include information from secondary sources." [10] (emphasis added)

4.4 Accordingly, any recourse to "facts available" by an investigating authority is simply to fill in any gaps in the information provided by interested parties. It follows that article 12.7 cannot be used punitively. While the Appellate Body has accepted that a failure to cooperate may lead to an interested party achieving a less favourable result,[11] as explained by the WTO Panel in *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*:

> "... In our view, the use of facts available should be distinguished from the application of adverse inferences ... While noncooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences."[12] (emphasis added)

---

[7] *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Report of the Appellate Body, 8 December 2014.

[8] Ibid [4.416].

[9] *Mexico — Definitive Anti-Dumping Measures on Beef and Rice*, Report of the Appellate Body, 29 November 2005.

[10] Ibid [293]–[294].

[11] *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* Report of the Appellate Body, 8 December 2014, [4.425]–[4.426].

[12] *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, Report of the Panel, 15 June 2012, [7.302].

An investigating authority must apply a logical process of reasoning and evaluation of the facts before it makes its determination

4.5 It is well-established that an investigating authority does not have unlimited discretion to apply the facts available to it.[13] The WTO Panel has held that even if an investigating authority is to apply the facts available to fill in any gaps, the "recourse to facts available is not a licence to rely on only part of the evidence provided. Rather, to the extent possible, an investigating authority making use of facts available must take into account all of the substantiated facts on the record."[14]

4.6 In *United States —Hot-Rolled Carbon Steel*, the Appellate Body made the following observations in relation to the immediate context of article 12.7 of the SCM Agreement:

> "First, we consider that the title of Article 12, namely, "Evidence", situates recourse to the "facts available" under Article 12.7 within a broader process of identifying and gathering evidence for the countervailing duty investigation. In Article 11.2 of the SCM Agreement, the term "sufficient evidence" is juxtaposed against the phrase "[s]imple assertion, unsubstantiated by relevant evidence". This indicates that the function of "evidence" is to substantiate assertions by interested parties. Article 12.5 of the SCM Agreement, which provides that "the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based", gives a similar indication on the process of identifying and gathering evidence. In the light of this context, we consider that the task of ascertaining which "facts available" reasonably replace the missing "necessary information" under Article 12.7 calls for a process of reasoning and evaluation. In our view, it would not be possible to identify whether replacements for the missing "necessary information" are "reasonable", and thus constitute the "evidence" on which to ground a determination, without engaging in such a process."[15] (emphasis added)

4.7 This approach has been taken by the WTO Panel and Appellate Body on other occasions.[16]

4.8 Accordingly, the WTO Panel and Appellate Body have also found that when describing a determination made in accordance with article 12.7 of the SCM Agreement, an investigating authority must provide a proper explanation of the basis upon which it used the "facts available" to come to a conclusion. In doing so, the investigating authority must establish that:

(a) there is a logical relationship between the determination of a subsidy and the facts used; and

(b) an evaluative, comparative assessment of the various facts available was conducted before a determination was made as to which facts would replace the missing information.

4.9 Further, article 6.8 of WTO's *Anti-Dumping Agreement* (**AD Agreement**) is in similar terms to article 12.7, and also allows for an investigating authority to make a determination on the basis of "facts available" where necessary information has

[13] *Mexico — Definitive Anti-Dumping Measures on Beef and Rice*, Report of the Appellate Body, 29 November 2005, [289].

[14] *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, Report of the Panel, 15 June 2012, [7.450].

[15] *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Report of the Appellate Body, 8 December 2014, [4.418].

[16] See, eg, *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, Report of the Panel, 2 August 2013, [7.312]; *United States — Countervailing Duty Measures on Certain Products from China*, Appellate Body Report, 18 December 2014.

not been received. Article 6.8 of the AD Agreement is supplemented by Annex II, which is titled, "Best Information Available in Terms of Paragraph 8 of Article 6."

4.10 In *Mexico – Rice and Beef*, the Appellate Body determined that the provisions of Annex II to the AD Agreement also applied when considering "facts available" in accordance with article 12.7 of the SCM Agreement, on the basis it would be "anomalous if Article 12.7 of the SCM Agreement were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[17]

4.11 This approach was also followed by the WTO Panel[18] and Appellate Body[19] in decisions in 2014.

4.12 Accordingly, based on the provisions of Annex II, the WTO Panel has determined that an investigating authority must apply the "best information available."[20] This means the information:

> "has to be not simply correct or useful *per se*, but the most fitting or "most appropriate" information available in the case at hand."[21] (emphasis added)

4.13 Finally, and significantly, in two decisions in December 2014 in relation to Article 12.7, the Appellate Body has made clear that:

> "As determinations made under Article 12.7 are to be made on the basis of the "facts available", they cannot be made on the basis of non-factual assumptions or speculation."[22] (*emphasis added*)

5 The Commissioner's application of section 269TAACA

5.1 The Commissioner determined there were three types of countervailing subsidy programs relevant to the investigation.[23] These were:

(a) electricity provided by the GOC at a reduced rate;

(b) income tax programs; and

(c) various grant and tariff & VAT programs.

5.2 The approach the Commissioner took to calculating subsidy margins under section 269TAACA in respect of each of these programs is set out below.

Electricity (Program 1)

5.3 The Commissioner determined that the co-operating exporter, the Linan Group, obtained a subsidy under the electricity program.[24]

---

[17] *Mexico — Definitive Anti-Dumping Measures on Beef and Rice*, Report of the Appellate Body, 29 November 2005, [295].

[18] *China — Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, Report of the Panel, 23 May 2014, [7.172].

[19] *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, 8 December 2014, [4.426].

[20] *Mexico — Definitive Anti-Dumping Measures on Beef and Rice*, Report of the Appellate Body, 29 November 2005, [289]; *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, Report of the Panel, 15 June 2012, [7.296].

[21] *Mexico – Anti-Dumping Measures on Rice, Report of the Panel, 6 June 2005*, [7.237]–[7.238].

[22] *United States — Countervailing Duty Measures on Certain Products from China*, Appellate Body Report, 18 December 2014, [4.178]; *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Appellate Body Report, 8 December 2014, [4.417].

[23] REP 237, 43–45.

[24] Ibid 46.

5.4 The amount of the subsidy was determined as the difference between adequate remuneration (as established) and the actual purchase price paid for electricity from state-invested enterprises (**SIEs**).[25]

5.5 The amount of subsidy received in respect of silicon metal was apportioned to each unit of the goods using the total sales volume of the relevant entities.[26]

5.6 This calculation resulted in a 6.3% subsidy margin.[27]

5.7 In respect of the uncooperative and all other exporters, the Commissioner considered the following "facts available":[28]

(a) all silicon metal exported from China would require electricity in its manufacture;

(b) all the Linan Group's purchases of electricity were from SIEs; and

(c) at least one of the uncooperative exporters is located in the Yunnan province and the Canadian Border Security Agency inquiry into silicon metal in 2013 found subsidised electricity in that province.

5.8 Based on the above, the Commissioner determined all uncooperative and other exporters purchased electricity from SIEs at subsidised rates. In the absence of any evidence as to the quantum of those subsidies, the Commissioner determined that the 6.3% subsidy rate that applied to the Linan Group should be applied to all uncooperative and other exporters.[29]

Income tax (Programs 6 and 8)

5.9 Following a review of Programs 6 and 8, the Commissioner determined that both programs entitle a recipient to a reduced tax rate of 15%.[30]

5.10 Based on the information provided by the Linan Group, the Commissioner determined that none of the entities in the Linan Group received benefits from either of these programs.[31]

5.11 In respect of the uncooperative and all other exporters, the Commissioner determined that it was likely each exporter met the eligibility criteria for each of the programs, had accessed those programs and therefore received financial contributions under the programs.[32] The Commissioner calculated the amount of subsidy attributable to these benefits under Program 8 by using the taxable income of the entity in the Linan Group with the highest taxable income in 2013, on the assumption that it had benefitted from this program.[33]

---

[25] Ibid 102.

[26] Ibid.

[27] Ibid 47.

[28] Ibid 102

[29] Ibid 102–103.

[30] Ibid 105.

[31] Ibid 104.

[32] Ibid 105.

[33] Ibid.

5.12 In attributing the amount of subsidy to each unit of silicon metal, the benefit was attributed by using the turnover of the same entity of the Linan Group.[34]

5.13 Having assumed that the maximum subsidy benefit was obtained by uncooperative and other exporters for Program 8, the Commissioner concluded that there must be a zero subsidy amount for Program 6.[35]

Grant and tariff & VAT (Programs 7, 9–13; 15–31; 33–44)

5.14 Based on the information provided by the Linan Group, the Commissioner determined that none of the entities in the Linan Group received benefits from any of these programs.[36]

5.15 In respect of the uncooperative and all other exporters, the Commissioner determined that it was likely each exporter met the eligibility criteria for each of the 35 programs, had accessed those programs and therefore received financial contributions under the programs.[37]

5.16 The Commissioner calculated the subsidy as follows:[38]

(a) where the legislative instrument that establishes the program specifies the maximum financial contribution that can be made under that program, that maximum amount will be the amount determined to be the benefit for each program; and

(b) where the maximum financial contribution grantable under a program is not stipulated in its legal instrument (or where no known legislative instrument exists), the amount of the financial contribution shall be considered to be the maximum amount found to have been available under among the Programs for which the maximum possible benefit was known.

5.17 In attributing the amount of subsidy to each unit of silicon metal, the benefit was attributed by using the aggregate turnover of the two manufacturing entities in the Linan Group, in the absence of actual sales date for the non-cooperating exporters.[39]

6 Analysis of the Commissioner's application of section 269TAACA

6.1 Pacific Aluminium respectfully submits that the Commissioner did not apply section 269TAACA in accordance with the principles established above, being:

(a) the purpose of the provision is limited to filling in any missing gaps in the information provided;

(b) an investigating authority must apply a logical process of reasoning and evaluation of the facts before it makes its determination; and

(c) determinations cannot be made on the basis of non-factual assumptions or speculation. Rather, they must be based on a reasonable assessment of the facts actually available to the investigating authority.

6.2 We have addressed each of these matters in turn below.

---

[34] Ibid.

[35] Ibid.

[36] Ibid 46.

[37] Ibid.

[38] Ibid 105–106.

[39] Ibid 106.

The purpose of the provision is to fill in any missing gaps

6.3 In Pacific Aluminium's submission, the Commissioner has not taken an approach of using the facts available to him in order to fill in any gaps. Instead, he appears to have drawn conclusions from facts—or in many cases from speculation as to facts—in a manner directed toward punishing uncooperative exporters for the fact that information requested was not provided.

6.4 This is demonstrated by the following aspects of the Commissioner's approach:

(a) the Commissioner recommended that the countervailing duty imposed on the uncooperative exporters be **almost six times** that imposed on the cooperative exporters;

(b) despite his determination that both Linan Group entities received benefits from only 1 of the 38 programs, the Commissioner determined that all uncooperative and other exporters were eligible for, accessed and received benefits under **all 38** programs;

(c) in determining the amount of subsidy attributable to benefits obtained under Program 8, the Commissioner used the taxable income of the entity in the Linan Group with the **highest** taxable income in 2013 for **all** exporters; and

(d) in determining the amount of subsidy attributable to benefits obtained under Programs 7, 9–13, 15–31 and 33–44, the Commissioner:

(i) used the **maximum** financial contribution stipulated in the legislative instruments establishing those programs as the relevant amount for **all** exporters; and

(ii) where such a maximum financial contribution was not stipulated in the legislative instruments establishing those programs, used the **maximum** amount found among all of the legislative instruments setting up the other programs.

6.5 The Commissioner's focus on maximum amounts, rather than minimum or even average amounts, appears to represent an approach of drawing an adverse inference against each of the uncooperative exporters. This is underscored by his decision that all uncooperative and other exporters received subsidies under 38 programs when the facts available to him demonstrated that the 2 cooperative exporters only received subsidies under 1 program.

An investigating authority must apply a logical process of reasoning and evaluation of the facts before it makes its determination

<u>Absence of any reasoning or evaluation</u>

6.6 In *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*,[40] the United States contended that China acted inconsistently with both articles 6.8 of the AD Agreement and 12.7 of the SCM Agreement by imposing an "all others" rate for uncooperative parties.

6.7 The WTO Panel determined that the investigating authority had provided a limited explanation of how it calculated the "all others" rate, which did not allow an understanding of the facts it had used to calculate it.[41] In those circumstances,

[40] *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, Report of the Panel, 2 August 2013.

[41] Ibid [7.313].

the WTO Panel found that the United States had made "a *prima facie* case of violation."[42]

6.8 In recommending the Parliamentary Secretary impose a countervailing duty of 37.6% to all uncooperative and other exporters in circumstances where the duty imposed on the two entities in the Linan Group is 6.3%, the Commissioner appears to have acted inconsistently with article 12.7 of the SCM Agreement, and in turn, section 269TAACA of the Act.

6.9 This is demonstrated by the following aspects of the Commissioner's approach:

(a) in circumstances where it was determined that both Linan Group entities received benefits from only 1 of the 38 programs, the Commissioner provides no explanation as to why he has determined that all uncooperative and other exporters were eligible for, accessed and received benefits under all 38 programs;

(b) in determining the subsidy attributable to benefits obtained under Program 8, the Commissioner provides no explanation for why he used:

(i) the taxable income of the entity of the Linan Group with the highest taxable income to determine the amount of the subsidy for all uncooperative and other exporters; and/or

(ii) the turnover of that entity to determine the amount of subsidy attributable to each unit of silicon metal exported by the uncooperative and other exporters;

(c) in determining the amount of subsidy attributable to benefits obtained under Programs 7, 9–13, 15–31 and 33–44, the Commissioner provides no explanation as to why he used:

(i) the maximum financial contribution stipulated in the legislative instruments establishing those programs as the relevant amount for exporters all uncooperative and other exporters; and/or

(ii) where such a maximum financial contribution was not stipulated in the legislative instruments establishing those programs, the maximum amount found under the legislative instruments setting up the programs described above as the relevant amount for all uncooperative and other exporters; and/or

(iii) the aggregate turnover of the two manufacturing entities in the Linan Group to determine the amount of subsidy attributable to each unit of silicon metal exported by the uncooperative and other exporters.

6.10 Indeed, there is similarly no explanation as to why the Commissioner applied:

(a) the total volume of sales for Program 1; and

(b) turnover for the remaining 37 programs,

to apportion the amount of subsidy per unit of silicon metal.

<u>No reference to best available information</u>

6.11 Further, while Pacific Aluminium accepts that on the facts available to the Commissioner, he may not have been able to determine which grants would apply to which exporters without their cooperation, even a cursory look at the names of the programs indicates the fact that the "best information" available to him was that certain programs simply could not apply to all uncooperative and other

[42] Ibid [7.359].

exporters. In Pacific Aluminium's submission, the Commissioner would have had considerable other public material available to him in respect of each of the programs to come to this conclusion.

6.12 By way of example:

(a) The following programs are limited by the location of the exporter:

(i) Program 6 – Preferential Tax Policies in the Western Regions;

(ii) Program 19 – Grant for key enterprises in equipment manufacturing industry of Zhongshan;

(iii) Program 21 – Wuxing District Freight Assistance;

(iv) Program 22 – Huzhou City Public Listing Grant;

(v) Program 23 – Huzhou City Quality Award;

(vi) Program 24 – Huzhou Industry Enterprise Transformation & Upgrade Development Fund;

(vii) Program 25 – Wuxing District Public List Grant; and

(viii) Program 34 – Jinzhou District Research and Development Assistance Program.

(b) The following programs are limited by the reputation of the exporter:

(i) Program 10 – One-time Awards to Enterprises Whose Products Qualify for 'Well-Known Trademarks of China' and 'Famous Brands of China'; and

(ii) Program 12 – Superstar Enterprise Grant;

(c) The following program is limited by the size of the exporter:

(i) Program 11 – Matching Funds for International Market Development for Small and Medium Enterprises.

(d) The following programs are limited by the age of the exporter:

(i) Grant for Industrial enterprise energy management centre construction demonstration project Year 2009; and

(ii) Key industry revitalization infrastructure spending in budget Year 2010.

6.13 Accordingly, Pacific Aluminium considers that the Commissioner has not demonstrated any logical reasoning or evaluation of the facts available to justify his determination that all uncooperative and other exporters were eligible for, let alone accessed or received benefits under, all 38 programs.

<u>Non-factual assumptions</u>

6.14 Section 269TAACA(1)(d) is expressed to permit the Commissioner and the Parliamentary Secretary to make such assumptions as they consider reasonable.

6.15 In Pacific Aluminium's submission, the power to make such assumptions needs to be understood in the context of Art 12.7 of the SCM Agreement, and the case law that surrounds it.

6.16 As described above in paragraph 4.13, the Appellate Body has made clear on 2 occasions in the last 12 months that when assessing the facts available, an investigating authority must not make decisions based on "non-factual assumptions or speculation". Instead, decisions must be made on the basis of "facts available" on the record before the investigating authority.

6.17 Consistently with that, the Commissioner was not permitted to make the assumptions that he did about:

(a) the subsidies for which the uncooperative and other exporters were eligible;

(b) the amounts available under those programs; or

(c) the amounts received by the exporters,

when those assumptions appear to have had no foundation on the facts available, and to have constituted speculation.

6.18 In Pacific Aluminium's submission, the power contained in section 269TAACA(1)(d) must be read subject to the Appellate Body's interpretation in this regard. Accordingly, for the reasons set out above, we consider that the Commissioner's findings were made on the basis of non-factual assumptions or speculation, particularly given the lack of explanation. In our view, these assumptions are also unreasonable.

6.19 The notification setting out the Reviewable Decision states that the Parliamentary Secretary "accepted the Commissioner's recommendations, including all material findings of fact on which the Commissioner's recommendations were based, and particulars of the evidence relied on to support the findings". Accordingly, for the same reasons that the Commissioner's findings and recommendation were not correct, the decision of the Parliamentary Secretary was also not correct.

6.20 Even if, contrary to what Pacific Aluminium has submitted, the Commissioner and the Parliamentary Secretary were legally permitted by the Act to make the findings and decision that they made, Pacific Aluminium relies upon each of the matters raised above to submit that the decision, and the findings upon which it was based, were not the findings and decision that ought to have been made. The findings did not constitute the making of reasonable assumptions on the basis of facts available, and did not involve any reasonable or probative analysis of those facts. Accordingly, the decision reached by the Parliamentary Secretary to impose countervailing measures at a rate of 37.6% on uncooperative and other exporters was, in all of the circumstances, not the preferable decision.

7 Conclusion

7.1 Pacific Aluminium respectfully submits that the Commissioner erred in making the findings described in this application, and accordingly, in his recommendations to the Parliamentary Secretary that countervailing measures of 37.6% be imposed on silicon metal exported to Australia from China by uncooperative and all other exporters.

7.2 Pacific Aluminium requests that the ADRP:

(a) review the Reviewable Decision under section 269ZZK of the Act;

(b) recommend that the Parliamentary Secretary revoke the Reviewable Decision and substitute a new decision to be specified by the ADRP on the basis of a corrected assessment of the subsidy margin for uncooperative and all other exporters; and

(c) recommend that the new decision by the Parliamentary Secretary be that the uncooperative and all other exporters had a subsidy margin of 6.3%, and therefore countervailing measures ought to be imposed on their exports from China by the Parliamentary Secretary at that effective rate of duty.

7.3 If the ADRP accepts that the Reviewable Decision was not the correct or preferable decision, but does not agree that the correct or preferable decision is

as outlined in paragraph 7.2(c) above, the ADRP may wish to consider alternate decisions that could be made on the facts available.

7.4 For instance, an alternate decision might involve some or all of the following elements:

(a) on the basis of the supplier addresses on ACBPS's import database, the ADRP could use the addresses to recommend which programs be found to apply to each exporter;

(b) in determining the amount of subsidy attributable to benefits obtained under Program 8, the ADRP could recommend that the Parliamentary Secretary:

(i) use the **average** taxable income of the entities in the Linan Group for all uncooperative and other exporters; and

(ii) use the **average** turnover of the entities in the Linan Group when attributing the amount of subsidy to each unit of silicon metal exported by the uncooperative and other exporters;

(c) in determining the amount of subsidy attributable to benefits obtained under Programs 7, 9–13, 15–31 and 33–44, the ADRP should recommend that:

(i) where the legislative instrument that establishes a program specifies the maximum financial contribution that can be made under that program, find that **half** of that amount will be the amount determined to be the benefit for each of those programs; and

(ii) where the potential financial contribution grantable under a program is not stipulated in its legal instrument (or where no known legislative instrument exists), **no** subsidy should be calculated in respect of those programs.

3 July 2015

PACIFIC **ALUMINIUM**

Anti-Dumping Review Panel
10 Binara Street
Canberra City ACT 2601

Level
500 Queen Stree
Brisbane Qld 400
Australi

GPO Box 243
Brisbane Qld 400
Australi

T +61 (0) 7 3028 200
F +61 (0) 7 3028 201

www.pacificaluminium.com.a

3 July 2015

Dear Panel Members

APPLICATION FOR REVIEW OF DECISIONS BY PARLIAMENTARY SECRETARY TO IMPOSE ANTI-DUMPING MEASURES ON SILICON METAL EXPORTED TO AUSTRALIA FROM THE PEOPLE'S REPUBLIC OF CHINA

We are writing to advise that Pacific Aluminium, on behalf of Rio Tinto Aluminium (Bell Bay) Limited, an importer of silicon metal into Australia from The People's Republic of China, has engaged Corrs Chambers Westgarth to represent it in respect of an application for review of the decision of the Parliamentary Secretary to the Minister for Industry and Science to impose dumping duties and countervailing duties on exports of silicon metal from The People's Republic of China to Australia. Notification of that decision was published on 3 June 2015.

Corrs Chambers Westgarth is authorised to communicate on our behalf in respect of the application for review of the Parliamentary Secretary's decision, including by signing the application for review.

All communications concerning this matter should be directed to:

Mr Andrew Korbel
Partner

Phone: (02) 9210 6537
Fax: (02) 9210 6611
Email: Andrew.Korbel@corrs.com.au

Ms Aditi Kogekar
Senior Associate

Phone: (02) 9210 6168
Fax: (02) 9210 6611
Email: Aditi.Kogekar@corrs.com.au

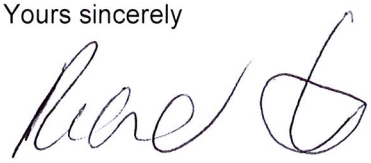
Mr Andrew Percival
Special Counsel

Phone: (02) 9210 6537
Fax: (02) 9210 6611
Email: Andrew.Korbel@corrs.com.au

Corrs Chambers Westgarth
GPO Box 9925
SYDNEY NSW 2001

If you have any queries, please do not hesitate to contact Joseph Carey on (07) 3028 2215.

Yours sincerely



Richard Prest

Chief Financial Officer

Australian Government
Anti-Dumping Commission

Customs Act 1901 – Part XVB

SILICON METAL EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

FINDINGS IN RELATION TO A SUBSIDISATION INVESTIGATION

Public notice under subsections 269TJ(1) and (2) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged subsidisation of silicon metal (the goods), exported to Australia from the People's Republic of China (China).

The goods are classified to tariff subheading 2804.69.00 (statistical code 14) in Schedule 3 of the *Customs Tariff Act 1995*. The general rate of duty is currently "free" for goods imported from China.

A full description of the goods is available in Anti-Dumping Notice (ADN) No. 2014/08. This ADN is available on the internet at **www.adcommission.gov.au**.

The Commissioner reported his findings and recommendations to me in *Anti-Dumping Commission Report No. 237* (REP 237). REP 237 outlines the investigations carried out by the Anti-Dumping Commission (the Commission) and recommends the publication of a countervailing duty notice in respect of the goods.

I have considered REP 237 and have accepted the Commissioner's recommendations and reasons for the recommendations, including all material findings of fact or law on which the Commissioner's recommendations were based, and particulars of the evidence relied on to support the findings.

Particulars of the subsidy programs and level of subsidisation established are set out in the following table:

Exporter	Countervailable subsidy program*	Subsidy Margin
Manufactured by Hua'an Linan Silicon Industry Co., Ltd and supplied through Xiamen K Metal Co., Ltd	1	6.3%
Manufactured by Guizhou Liping Linan Silicon Industry Co., Ltd and supplied through Xiamen K Metal Co., Ltd	1	6.3%
Uncooperative and all other exporters	1, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44	37.6%

* The names and details of each of the above countervailable subsidy programs are contained within REP 237.

I, KAREN ANDREWS, Parliamentary Secretary to the Minister for Industry and Science, have considered, and accepted, the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 237.

I am satisfied, as to the goods that have been exported to Australia from China, that countervailable subsidies have been received in respect of the goods and because of that, material injury to the Australian industry producing like goods might have been caused if the security had not been taken. Therefore under subsection 269TJ(1) of the Customs Act 1901 (the Act), I DECLARE that section 10 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

(i) the goods; and

(ii) like goods that were exported to Australia after 23 February 2015 (when the Commissioner made a Preliminary Affirmative Determination under paragraph 269TD(4)(a) of the Act in respect of the goods) but before the publication of this notice.

I am also satisfied that a countervailable subsidy has been received in respect of the goods that have already been exported to Australia, and that a countervailable subsidy may be received in respect of like goods that may be exported to Australia in the future; and because of that, material injury to the Australian industry producing like goods has been or is being caused. Therefore under subsection 269TJ(2) of the Act, I DECLARE that section 10 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from China.

The considerations relevant to my determination of material injury to the Australian industry caused by subsidisation are the size of the subsidy margins, the effect of subsidised imports on prices in the Australian market in the form of price undercutting and the consequent impact on the Australian industry including loss of sales volume, reduced market share, reduced revenue, price depression, price suppression and reduced profits and profitability.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of subsidised goods, and have not attributed injury caused by other factors to the exportation of those subsidised goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Clarification about how measures are applied to 'goods on the water' is available in Australian Customs Dumping Notice 2012/34, available at **www.adcommission.gov.au**.

REP 237 and other documents included in the public record may be examined at the Commission office by contacting the case manager on the details provided below. Alternatively, the public record is available at **www.adcommission.gov.au**

Enquiries about this notice may be directed to the case manager on telephone number +61 2 6276 1345, fax number 1300 882 506 or +61 3 9244 8902 (outside Australia) or email at **operations2@adcommission.gov.au**.

Dated this 3rd day of June 2015

KAREN ANDREWS
Parliamentary Secretary to the Minister for Industry and Science

GT15604