Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

[1] By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. **Applicant's details**

Applicant's name:

Address:

Type of entity (trade union, corporation, government etc.):

Applicant's name:	Steelforce Trading Pty Ltd Steelforce Australia Pty Limited and Dalian Steelforce Hi-Tech Co Ltd Collectively "Steelforce".
Address:	W-7 5 - 7 Osprey Drive Port of Brisbane Queensland 4178
Type of entity:	Corporations

2. **Contact person for applicant**

Full name:	Rod Corkill
Position:	CEO Steelforce Australia Pty Limited Company Secretary Steelforce Trading Pty Ltd
Email address:	(07) 3900 6903
Telephone number:	rodc@steelforce.com.au

3. **Set out the basis on which the applicant considers it is an interested party**

Dalian Steelforce Hi-Tech Co Ltd is a producer and exporter of the goods subject to the reviewable decision, which was named in the relevant Section 269ZDB(1) notice regarding that decision.

Steelforce Trading Pty Ltd is the importer of the goods exported by Dalian Steelforce Hi-Tech Co Ltd.

Dalian Steelforce Hi-Tech Co Ltd and Steelforce Trading Pty Ltd are both owned by Steelforce Australia Pty Limited.

Accordingly, each member of Steelforce is directly concerned with the importation and exportation of the goods subject to the reviewable decision as per the definition of "interested party" in Section 269ZX of the *Customs Act 1901* and may seek review of that reviewable decision in accordance with Section 269ZZC of that same Act.

4. Is the applicant represented?

Yes.

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☐Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☒Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision

The Goods subject to the reviewable decision were:

Certain electric resistance welded pipe and tube made of alloy steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes.

7. Provide the tariff classifications/statistical codes of the imported goods

The goods are classified under the following tariff subheadings:

- 7306.50.00 (statistical code 45) – OTHER TUBES, PIPES AND HOLLOW PROFILES (FOR EXAMPLE, OPEN SEAM OR WELDED, RIVETED OR SIMILARLY CLOSED), OF IRON OR STEEL - Other, welded, of circular cross-section, of other alloy steel; and
- 7306.61.00 (statistical code 90) – OTHER TUBES, PIPES AND HOLLOW PROFILES (FOR EXAMPLE, OPEN SEAM OR WELDED, RIVETED OR SIMILARLY CLOSED), OF IRON OR STEEL - of square or rectangular cross-section - of iron or non-alloy steel – other.

8. Provide the Anti-Dumping Notice (ADN) number of the reviewable decision
If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

The reviewable decision was made via Anti-Dumping Notice No. 2016/24.

A copy of the notice is attached as “Attachment A”.

9. Provide the date the notice of the reviewable decision was published

Anti-Dumping Notice No. 2016/24 was published on the Anti-Dumping Commission's website on 18 March 2016. Please note that although the notice is dated 17 March 2016, it was not published until 18 March 2016.

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

10. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.**

Please refer to Attachment B.

11. **Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.**

Please refer to Attachment B.

12. **Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.**

Please refer to Attachment B.

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

PART D: DECLARATION

The applicant's authorised representative declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:  .....

Name: Alistair Bridges

Position: Associate

Organisation: Moulis Legal

Date: 18 April 2016

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative	Alistair Bridges
Organisation	Moulis Legal
Address	6/2 Brindabella Circuit Brindabella Business Park Canberra International Airport Australian Capital Territory 2609
Email address	alistair.bridges@moulislegal.com
Telephone number	(02) 6163 1000

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

Please refer to Attachment C.

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

ATTACHMENT B

18 April 2016

In the Anti-Dumping Review Panel

Application for review
Hollow Structural Sections exported from China

Steelforce

1 Grounds upon which the reviewable decision is not the correct or preferable decision

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.[1]

A Introduction

On 7 April 2015, Australian Tube Mills Pty Limited ("ATM") lodged an application for the initiation of an "anti-circumvention" inquiry. The application alleged that certain HSS exported from China, Korea and Taiwan were being exported to Australia in "circumvention" of the pre-existing measures imposed under notices published under Section 269TG(2) and 269TJ(2) of *Customs Act 1901* ("the Act"). ATM alleged that the form of "circumvention activity" was the "slight modification of goods exported to Australia" as described by Regulation 183A of the *Customs Regulations 1926* (now Regulation 48(3) of the *Customs (International Obligations) Regulations 2015).* This "circumvention activity" was created via the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015*, which commenced operation on 1 April 2015.

As a result of this application, the Anti-Dumping Commission ("the Commission") initiated an "anti-circumvention inquiry" on 11 May 2015 under Section 269ZDBE(4) of the Act. On 29 February 2016 the Commission provided a report ("Report 291") to the Parliamentary Secretary to the Minister for Industry, Innovation and Science ("the Parliamentary Secretary") under Section 269ZDBG(1)(a) of the Act, recommending that the anti-circumvention inquiry had occurred and that the Parliamentary Secretary should amend the Section 269TG(2) and Section 269TJ(2) notice to cover the "circumvention goods".

On 18 March 2016, the Parliamentary Secretary published a notice under Section 269ZDBH(1) of the Act in which she expressly "*accepted the recommendations, and reasons for the recommendations including all material findings of fact and law"* as set out in Report 291.[2] Accordingly, the Parliamentary

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[1] As per the requirement of Section 269ZZE(2)(b) of the Act, and question 10 of the form approved under Section 269ZY of the Act.

[2] The notice incorrectly refers to itself as being a notice under Section 269ZDB(1).

Secretary amended the Section 269TG(2) and Section 269TJ(2) notice as recommended by the Commission.[3]

That decision is not the correct or preferable decision, because it is premised on the following incorrect findings:

Finding 1 **that boron-added HSS was a "circumvention good";**

Finding 2 **that a circumvention activity had occurred; and**

Finding 3 **that it was appropriate in the circumstances to backdate the operation of the amended notices.**

These findings are discussed in greater detail below.

B Finding 1 – that boron-added HSS was a "circumvention" good

The relevant "circumvention activity" that was found to have occurred was a "slight modification of goods exported to Australia". This finding is erroneous.

The elements of a "slight modification" circumvention activity are stipulated in Regulation 48(2) of the *Customs (International Obligations) Regulations 2015* ("the Regulations"). In order to be satisfied that such an activity has occurred, that Regulation provides as follows:

> *(2) The circumstance is that all of the following apply:*
>
> *(a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice applies;*
>
> *(b) before that export, the circumvention goods are slightly modified;*
>
> *(c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;*
>
> *(d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;*

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[3] The notice incorrectly identifies that the Section 269TJ(2) notice should be amended in relation to Dalian Steelforce Hi-Tech Co Ltd ("Dalian Steelforce"), however, as per Anti-Dumping Notice 2016/09, published on 4 February 2016, the Section 269TJ(2) notice is taken to have been revoked, insofar as it relates to Dalian Steelforce.

(e) section 8 or 10 of the Customs Tariff (Anti-Dumping) Act 1975, as the case requires, does not apply to the export of the circumvention goods to Australia.

In short, that Regulation requires:

1 goods subject to an anti-dumping or countervailing notice exist;

2 those goods are "slightly modified";

3 as a result of that slight modification, those goods fall outside the description of the goods subject to the notices; and

4 those goods are then exported to Australia.

The key requirement is that goods that are subject to a dumping duty notice be slightly modified and, as a result of that slight modification, the goods no longer fall within the scope of the dumping duty notice. In this regard we note that a common definition of the term "modify" is:

make partial changes in; make different…

Accordingly, Regulation 48(2) expressly requires that the goods covered by the dumping and/or countervailing notice be slightly changed in some manner, and as a result of that change, be removed from the scope of those notices. Whether this has occurred is a question of fact. It is not sufficient to have a set of goods that are similar to the goods the subject of the notice, but which are not themselves modified versions of the goods the subject of the notice. This is clear on the express terms of Regulation 48(2).

We note that Regulation 48(3) sets out a non-exhaustive list of factors that may be considered by the Commissioner when determining whether the circumvention goods have been slightly modified. These factors appear to be targeted at identifying the purpose of the "circumvention goods" and their relationship to the goods subject to the relevant notices. However, these factors are not determinative of the question of whether the circumvention goods have been slightly modified, nor should they obfuscate the task under Regulation 48(2), which, again, is determining whether the goods subject to the measures have actually been slightly modified. If, irrespective of the consideration of the Regulation 48(3) factors, it cannot be asserted that those goods have actually been slightly modified, then no such circumvention activity can be found to have occurred.

Report 291 explains its finding of "slight modification" in the following terms:

> *The Commission considers that the balance of evidence supports a finding that alloyed HSS exported by Dalian Steelforce during the inquiry period has been slightly modified through a minor change to the manufacturing process. This modification occurred through the use of alloyed HRC instead of non-alloyed HRC prior to production of the circumvention goods in China, and hence occurred before the exportation of those goods.*[4]

HRC, referencing "hot rolled coil", is one of the primary inputs for HSS. The metallurgical structure of the HRC will determine the chemical structure of the HSS. The goods subject to the original Section 269TG(2) notice are:

> *Certain electric resistance welded pipe and tube made of carbon steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes.*[5]

In order to produce "carbon steel" HSS, a producer needs to use carbon steel HRC. The use of alloy HRC does not, and cannot, produce carbon steel HSS. The use of different HRC – in this case, alloyed HRC instead of carbon HRC – in the production of a different product to the goods subject to the measures (alloy HSS) is not and cannot be considered to be a modification of the goods subject to the measures in any degree (carbon HSS). At no point was carbon HSS *partially changed* to transform it into alloy HSS. Likewise, at no point in its existence is alloy HSS capable of falling within the scope of the Section 269TG(2) notice. Dalian Steelforce raised this point in its submission following the publication of the SEF. In this regard, Report 291 states:

> *Although HRC is the prime raw material used in the manufacture of HSS, this raw material is slightly modified, whether it be by Dalian Steelforce or by the manufacturer of the HRC, to manufacture alloyed HSS as opposed to non-alloyed HSS. The only difference between the HRC used for non-alloyed HSS and alloyed HSS is the addition of boron, and/or any other alloy which result in the tariff classification changing and not being subject to the original anti-dumping measures. This is considered to be a slight modification of the non-alloyed HSS. No circumvention activity has occurred prior to 1 April 2015.*[6]

Respectfully, this reasoning is flawed. Firstly, the Commission is aware that Dalian Steelforce does not produce HRC. It purchases HRC.[7] So the suggestion that Dalian Steelforce modifies carbon HRC to produce alloy HRC is misleading. Secondly, Report 291 appears to take the position that it is the HRC

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4 Page 34.

5 Page 18.

6 Page 24.

7 This is noted in the paragraph directly above the extract included in this application, which states:

HRC materials are purchased from HRC manufacturers unrelated to Dalian Steelforce.

that is slightly modified, and this slight modification somehow transfers to the HSS produced out of the HRC. The "slightness" of the modification of the alloy HRC is not apparent – Report 291 does not delve into the differences in the production processes of carbon HRC and alloy HRC in any great detail. If the Commission's conclusion is that alloy HRC is just "slightly modified" carbon HRC, then the evidence supporting that conclusion is not apparent on the facts of Report 291. As to the "transference" of the modification of the HRC to the HSS, this does not appear to be something that is open on the terms of Regulation 48(2).

The elucidation of the Commission's position in Report 291 highlights the difficulty with trying to fit the usage of a different input into the "slight modification" framework. It is essentially a square peg, round hole situation. Again, Regulation 48(2) provides that:

> *(a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice applies;*
>
> *(b) before that export, the circumvention goods are slightly modified;*

It is the circumvention goods that need to be "slightly modified". The circumvention goods are defined to be:

> *Certain electric resistance welded pipe and tube made of alloy steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes.*[8]

It is apparent from the Report 291 that the "modification" is the use of alloyed HRC in the production process. As noted above, it is questionable whether this in itself is a modification of the HRC, and whether that modification is slight. In any regard, the alloy HSS, being the circumvention good is not modified, which is the requirement under Regulation 48(2)(b).

Regulation 48(2) further requires:

> *(c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;*
>
> *(d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;*

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[8] Report 291, page 8.

(e) section 8 or 10 of the Customs Tariff (Anti Dumping) Act 1975, as the case requires, does not apply to the export of the circumvention goods to Australia.

Regulation 48(2)(d) requires that, had the circumvention good not been slightly modified, it would not have been subject to the notice. With regard to the "modification" of HRC, if indeed this is a cogent description of the use of alloy HRC instead of carbon HRC, we note that there are currently no anti-dumping or countervailing measures in place in relation to HRC – irrespective of metallurgical description – exported from China. With regard to HSS, the simple fact is that if alloyed HRC was not used in the production of alloyed HSS, then the result would not be carbon HSS. If alloyed HSS was not slightly modified in the manner described in Report 291, it simply would not exist. At no point in the existence of alloyed HSS (or alloyed HRC for that matter) is it capable of falling within the definition of "carbon HSS", and therefore, at no point could it be said that, but for the use of alloyed HRC, alloyed HSS would have been subject to the dumping notice as is required by Regulation 48(2).

Dalian Steelforce has not slightly modified its carbon HSS. During the inquiry period, Dalian Steelforce produced and exported both carbon HSS and the alloy HSS the subject of this inquiry. That carbon HSS remains subject to the relevant dumping measures. Alloy HSS, which is not, and cannot be found to be, a slightly modified form of carbon HSS, is also produced and exported, and in accordance with the scope of the notice that imposed the anti-dumping measures, does not accrue any anti-dumping liability.

HSS made from alloy HRC was never within the description of the goods under consideration. Carbon HSS, being the goods that are subject to the notice, cannot be transformed into alloy HSS. Simply put, the law does not allow for a finding that a circumvention activity has occurred in these circumstances. Accordingly, it was incorrect to find that the circumvention activity described in Regulation 48(2) of the Regulations occurred.

C Finding 2 – that a circumvention activity had occurred

Report 291 makes the following finding:

> *No circumvention activity has occurred prior to 1 April 2015* [9]

The 1 April 2015 date is important because it is the day immediately after the date upon which the "inquiry period" – being 1 July 2010 to 31 March 2015 – ended. Essentially, the Commission is making a finding that no circumvention activity occurred during the "inquiry period".

The relevance of the inquiry period was stated in the Anti-Dumping Notice announcing the initiation of the inquiry ("ADN2015/58") as follows:

> *The alleged circumvention goods exported to Australia during the period 1 July 2010 to 31 March 2015 will be examined to determine whether the circumvention activity has occurred.*[10]

This is mirrored in the notice that was published in *the Australian* on 11 May 2016 in accordance with subsection 269ZDBE(4) of the Act ("the Public Notice"):

> *The alleged circumvention goods exported to Australia during the period 1 July 2010 to 31 March 2015 will be examined to determine whether the circumvention activity in relation to the original notice has occurred.*

Similarly, Consideration Report 291, which explained the Commission's reasoning for initiating the inquiry, stated that:

> *For the purposes of this inquiry, the inquiry period to determine whether circumvention has occurred will be from 1 July 2010 to 31 March 2015.*[11]

Steelforce understands that the purpose of the inquiry is to provide the Commission the opportunity to consider whether circumvention activities in relation to the original notices have occurred. This is clear from Section 269ZDBG(1)(d)(i) which ties any recommendation that the Commissioner makes to Minister to alter the original notices to the Commissioner being *satisfied that circumvention activities in relation to*

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9 Page 24.

10 Page 2.

11 *Consideration Report No. 291 – Application for an Anti-Circumvention Inquiry into the Slight Modification of Goods Exported to Australia – Hollow Structural Sections Exported from the People's Republic of China, the Republic of Korea and Taiwan,* page 4.

the original notice have occurred. If the Commissioner is not so satisfied, he cannot recommend that the original notice be altered. In specifying an "inquiry period" the Commissioner indicated what period of time he would be "inquiring" into to allow himself to gain satisfaction as to whether circumvention activities had occurred, and put interested parties on notice as to what period they would need to provide the Commissioner information in relation to properly defend their interests. Indeed, the Exporter Questionnaires created by the Commissioner and provided to exporters for the purpose of eliciting the information necessary for the Commissioner to make his recommendation under Section 269ZDBG(1) of the Act reiterated that *the anti-circumvention goods exported to Australia during the period 1 July 2010 to 31 March 2015 will be examined to determine whether the circumvention activity has occurred.*[12] Indeed, the majority of the information the Commission requested of the exporters related to the inquiry period.

Therefore, Steelforce considers that the finding that there was no circumvention activity during the inquiry period to be completely incongruous with the Commission's finding that:

> *For the purpose of subsection 269ZDBB(6) of the Act, a circumvention activity, in relation to the notice under subsection 269TG(2) and subsection 269TJ(2), in the circumstances prescribed by Section 48 of the Regulation, has occurred.*[13]

Similarly, the specific finding in relation to Dalian Steelforce is in direct contradiction with the finding that there was no circumvention activity during the inquiry period:

> *The Commission considers that the balance of evidence supports a finding that alloyed HSS exported by Dalian Steelforce during the inquiry period has been slightly modified through a minor change to the manufacturing process. This modification occurred through the use of alloyed HRC instead of non-alloyed HRC prior to production of the circumvention goods in China, and hence occurred before the exportation of those goods.*[14]

Neither of these findings are open on the basis of their earlier finding that no circumvention activity occurred prior to 1 April 2015. No anti-circumvention activity was found during the inquiry period. If no circumvention activity occurred, there cannot be any "circumvention goods" for the purposes of Regulation 48(2). Therefore, the conclusion that "a circumvention activity, in relation to the notice under

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12 See page 3, http://www.adcommission.gov.au/cases/EPR%20251%20%20300/EPR%20291/013-Questionnaire-Exporter-Dalian%20Steelforce-Case291.pdf.

13 Page 60.

14 Page 34.

subsection 269TG(2) and subsection 269TJ(2), in the circumstances prescribed by Section 48 of the Regulation, has occurred" is apparently without basis.

According to Section 269ZDBG(4) of the Act, the Commissioner's report to the Minister must set out the material findings of fact on which the recommendation is based and provide particulars of evidence relied on to support those findings. On the face of Report 291, the pertinent finding of fact is that *no circumvention activity has occurred prior to 1 April 2015.* The inquiry was established to consider whether circumvention activity occurred between July 2010 and 31 March 2015. Report 291 find that no circumvention activity occurred during this period. Report 291 does not address any additional findings of fact, or identify any evidence, to support a finding that a "circumvention activity" has occurred outside of the inquiry period. Nor should it, as interested parties were not given the opportunity to provide information or comment regarding activities outside of the inquiry period. Therefore, the finding that circumvention activity has occurred is not the correct or preferable finding.

The Commission's finding that there was no anti-circumvention activity prior to 1 April 2015 is the correct finding, as this was the date upon which *Customs Amendment (Anti-Dumping Improvements) Regulation 2015* ("the Amendment Regulation") commenced. The Amendment Regulation stated:

(a) that it sets out certain circumstances (those in Sub-regulation 48(2) as set out above) which are prescribed for Subsection 269ZDBB(6), the latter of which allows for further circumstances – in addition to those that were included in the Act - to be prescribed as a "circumvention activity"; and

(b) that it commences on the 30th day after it was registered. The Amendment Regulation was registered on 2 March 2015, and therefore commenced on 1 April 2015.

The Explanatory Memorandum for Amendment Regulation confirms that it is "legislative instrument" for the purpose of the *Legislative Instruments Act 2003,* now the *Legislation Act 2003* ("the LA"). With regard to the commencement of legislative instruments, Section 12(1) of the LA provides:

> *(1) A legislative instrument or a notifiable instrument commences:*
>
> *(a) at the start of the day after the day the instrument is registered; or*
>
> *(b) so far as the instrument provides otherwise—in accordance with such provision.*

As noted above, the Amendment Regulation expressly stated that it commenced 30 days after registration (i.e. on 1 April 2015). There is absolutely no indication in the instrument that it was intended

to commence before the date of registration, or before 1 April 2015. Therefore in accordance with Section 12(1)(b) of the LA the Amendment Regulation began operation on 1 April 2015.

The purpose of the Amendment Regulation was to prescribe certain circumstances for the purpose of subsection 269ZDBB(6) of the Act as being circumvention activities. Prior to the commencement of the Amendment Regulation, those circumstances were not prescribed, and therefore were not a "circumvention activity" for the purpose of Section 269ZDBB(6) of the Act. Accordingly, activity that occurred prior to the commencement of the Amendment Regulation cannot be found to be, nor can it be considered to be, circumvention activity.

In light of Report 291's finding that no circumvention activity occurred during the inquiry period, Report 291's finding that a circumvention activity occurred in the circumstances prescribed by Regulation 48 of the Regulation cannot be the correct or preferable decision. There are no relevant findings of fact or supporting evidence cited in Report 291 to support such a conclusion. Indeed, that conclusion is apparently counter to the findings in Report 291 and therefore cannot be the correct or preferable decision.

D Finding 3 - that it was appropriate in the circumstances to backdate the operation of the amended notices

Steelforce notes that the ADRP is empowered to review decisions made by the Minister under Section 269ZDBH(1) of the Act. Section 269ZDBH(1)(a) allows the Minister to specify a date upon which any alterations to the original notices arising from the Inquiry are considered to take effect. As such, Steelforce considers that the decision as to when any altered notice takes effect is one that falls within the ADRP's review remit.

In her notice under Section 269ZDBH(1) of the Act, the Parliamentary Secretary declared that the original Section 269TG(2) notice be altered, and that those alterations were deemed to have effect as of 11 May 2015. 11 May 2015 is the earliest date the alterations could have effect, in accordance with Section 269ZDBH(8) of the Act. Without prejudice to its primary position, which is that no circumvention activity can be legally found to have occurred, for either and both of the reasons already explained, Steelforce also considers that the decision to give the amended notices retrospective application is not the correct or preferable decision.

Steelforce notes that the power to back-date the amended notice is a discretionary power that resides with the Parliamentary Secretary. However, there were very good reasons as to why that power should

not have been be exercised on this occasion, and no valid reason provided as to why it should have been exercised.

The only reasoning for the exercise of the power to backdate the application of the amended notice was that it would provide "*the most effective remedy to the Australian industry under the terms of the legislation*".[15] Respectfully, why this was a consideration is unclear. Report 291 does not make any finding regarding the impact of the importation of alloyed HSS on the Australian industry. Indeed, the term "Australian industry" is used only twice in the Report and the term "remedy" is used exactly once, to justify the backdating of the measures. The remedial effect of the amended notice is hypothetical at best and misleading at worst. Therefore this cannot be an appropriate basis for the exercise of the Parliamentary Secretary's discretion to backdate the operation of the amended notice.

In considering this matter, it is important to note that the power to retrospectively amend the notice relates to all types of anti-circumvention activity. Other forms of circumvention activity include assembly of parts in Australia, assembly of parts in a third country, exports of goods through one or more third countries and arrangements between exporters. Of these, the latter relates to an activity which is described as "transhipment". This involves the re-routing of the goods subject to measures through another country, without changing them at all. This practice relates to goods that have already been found to have been dumped (or subsidised) and arguably would also involve a misstatement in an entry form on importation into Australia as to either the origin of the goods or their place of export. We submit that this activity would more naturally and perhaps inexorably involve some degree of underhandedness, wherein the exporter would contrive the circumstances through which the goods were transported and entered into Australia. It seems to us that this is a kind of practice to which retrospective action would be well-suited.

That is not the case for Steelforce. The goods which have been called circumvention goods have been imported into Australia in a completely open and transparent manner. The goods were not the subject of any anti-dumping or countervailing measures, and it was completely legal and proper that they be imported without incurring dumping and countervailing duties. Notwithstanding the "witch hunt" that the Australian industry has mounted to complain about such a practice, the conduct was normal commercial

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15 Page 59.

behaviour. Indeed, Report 291 clearly states that the alloy goods were not subject to the dumping measures.

Moreover, it was not apparent that the importation of the subject goods was, or could be, considered to be a circumvention activity until the relevant inquiry was initiated a little over a month after the Amendment Regulation commenced operation. Even now there are serious questions as to whether the circumvention activity as described by Regulation 48(2) could be found to have occurred. In this application, Steelforce has highlighted two legal impediments to finding that the "slight modification" activity has occurred. Because of this overriding uncertainty, it was highly unreasonable to expect that importers would adjust their business practices at the time the inquiry was initiated, and now to punish them for not doing so.

In light of the above, Steelforce submits that the decision to backdate the operation of the amended notice was not the correct or preferable decision because the balance of convenience did not favour that backdating. Indeed, the only reasoning given for the backdating was the supposed "remedial" effect of the amended notice, an effect which is neither evidenced nor discussed in Report 291. This is counterbalanced by the cost to the importers who (a) have been open and transparent about their business practices, and (b) should not be expected to alter their business practices on the basis of the initiation of an anti-circumvention inquiry in circumstances where there is significant doubt as to whether the relevant anti-circumvention activity could be found to exist.

2 The proposed correct and preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10[16]

As discussed in Parts B and C of this Application, Steelforce considers that the Commissioner could not have been satisfied as a result of the inquiry that the "slight modification" anti-circumvention activity had occurred, and therefore should not have recommended to the Parliamentary Secretary that the Section 269TG(2) notice should have been altered under Section 269ZDBG(1)(d) of the Act. It is clear that the Commissioner could not have reached this level of satisfaction because (a) the relevant circumvention activity could not be found to have occurred because alloyed HSS was not "slightly modified" and (b) the circumvention activity could not be found to have occurred, because the Commissioner's finding that the circumvention activity occurred related entirely to a period prior to the commencement of the Amendment Regulation, being a period before that activity was "prescribed". If the Commissioner is not satisfied that an anti-circumvention activity has occurred, he cannot recommend the alteration of the original notices to the Parliamentary Secretary.

In making her decision under Section 269ZDBH(1), the Parliamentary Secretary accepted the recommendations and the reasons for the recommendations, including all the material findings of fact and law as set out in Report 291. In doing so, her decision in Section 269ZDBH(1) is effected by the same errors as the Commissioner's findings. Accordingly, the correct and preferable decision was a decision under Section 269ZDBH(1)(a) of the Act, being that the original notices remain unaltered ("proposed decision 1").

In the alternative, and without derogating from Steelforce's primary position, the correct and preferable decision was the amended notices should only have effect as of 18 March 2016, as discussed in Part D of this Application. This is the correct and preferable decision because the decision to backdate the operation of the amended notices was based solely on the premise that doing so would have some remedial effect on the Australian industry, however that remedial effect is not substantiated or explained in any form in Report 291. However, what is clear is that the backdating of the measures will punish importers for an activity that they undertook in a clear and transparent manner, and which they had no

[16] As per the requirement of Section 269ZZE(2)(c) and (d) of the Act, and question 11 of the form approved under Section 269ZY of the Act.

certainty would be found to be a circumvention activity. This effect will be curtailed if the amended notices only have effect from 18 March 2016, the date upon which the Parliamentary Secretary published her decision, confirming her opinion that the circumvention activity had occurred ("proposed decision 2").

3 Difference between the reviewable decision and the proposed decision

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision[17]

Proposed decision 1 is different from the reviewable decision because it would result in the original notice not being amended.

Proposed decision 2 is different from the reviewable decision because it would result in the amended notice being operational only from the date that the Parliamentary Secretary made the reviewable decision.

Lodged for and on behalf of Steelforce by:

Alistair Bridges
Associate

Moulis Legal

[17] As per the requirement of Section 269ZZE(2)(e) of the Act, and question 12 of the form approved under Section 269ZY of the Act.