APPLICATION FOR REVIEW OF A DECISION BY THE MINISTER TO ALTER OR NOT TO ALTER A DUMPING DUTY NOTICE AND/OR A COUNTERVAILING DUTY NOTICE FOLLOWING AN ANTI-CIRCUMVENTION INQUIRY

Anti-Dumping Review Panel
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APPLICATION FOR REVIEW OF A DECISION TO ALTER OR NOT TO ALTER A DUMPING DUTY NOTICE AND / OR A COUNTERVAILING DUTY NOTICE FOLLOWING AN ANTI-CIRCUMVENTION INQUIRY

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 alter a:

☑ dumping duty notice(s) following an anti-circumvention inquiry and/or
☑ countervailing duty notice(s) following an anti-circumvention inquiry.

OR

Not to alter a:

☐ dumping duty notice(s) following an anti-circumvention inquiry and/or
☐ countervailing duty notice(s) following an anti-circumvention inquiry.

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds for a review to be undertaken
- 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 original dumping and/or countervailing notice and 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.

☐ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Signature: .....

Name: JOHN COSGRAVE

Position: LAWYER

Applicant Company/Entity:

OPAL (MACAO COMMERCIAL OFFSHORE) LIMITED

Date: 23 / 3 / 2015

Australian Government

Australian Customs and Border Protection Service

Annexure 2

Customs Act 1901 - Part XVB

Certain aluminium extrusions

exported to Australia from

The People's Republic of China

Findings in relation to a dumping investigation

Notice under section 269TG (1) and (2) of the Cusfoms *Act 1901*

The Australian Customs and Border Protection Service (Customs and Border Protection) has completed its investigations into the alleged dumping of certain aluminium extrusions (the goods), classified to tariff subheading 7604.00.00, 7608.00.00 and 7610.00.00, in Schedule 3 of the Customs *Tariff Act 1995* exported to Australia from the People's Republic of China (China).

In Trade Measures Report No. 148 (REP 148) Customs and Border Protection recommended the publication of a dumping duty notice in respect of the goods. REP 148 outlines the investigations carried out by Customs and Border Protection, a statement of the reasons for the recommendations contained in REP 148, material findings of fact or law on which Customs and Border Protection's recommendations were based and particulars of the evidence relied on to support the findings.

Particulars of the dumping margins established for exporters and an explanation of the methods used to compare export prices and normal values to establish each dumping margin are set out in the following table:

Exporter	Dumping Margin	Method to establish dumping margin
Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd	3.1%	Comparison of the weighted average export price with the weighted average normal value during the investiaation period
PanAsia Aluminium (China) Ltd	10.1%	Comparison of the weighted average export price with the weighted average normal value during the investiqation period
Zhaoqing New Zhongya Aluminium Co Ltd	2.7%	Comparison of the weighted average export price with the weighted average normal value during the investiqation period
Residual exprn ers	6.1%	Comparison of the weighted average export price with the weighted average normal value during the investiqation period
All other exporters	25.7%	Comparison of the weighted average export price with the weighted average normal value during the investigation period

I, ROBERT McCLELLAND, Attorney-General, have considered, and accepted, the recommendations of Customs and Border Protection, 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 148. I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those 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 s.269TG(1) of the *Customs Act 1901* (the Act), I DECLARE that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

- the goods; and
- like goods that were exported to Australia after 3 November 2009 (when the Chief Executive Officer made a Preliminary Affirmative Determination under s.269TD(4)(a) of the Act that there appeared to be sufficient grounds for the publication of a dumping duty notice) but before publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been caused. Therefore under s.269TG(2) of the Act, I DECLARE that section 8 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 to Australia (other than Tai Ao Aluminium Tai Shan Co Ltd).

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports on prices in the Australian market in the form of price undercutting, price suppression and the consequent impact on the Australian industry including loss of sales volume, loss of profits and reduced 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 dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

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

Particulars of the export prices, non-injurious prices, and normal values of the goods as ascertained will not be published in this notice as they may reveal confidential information.

Enquiries concerning this notice may be directed to the case manager on telephone number (02) 6275 6173, fax number (02) 6275 6990 or email tmops3@customs.gov.au.

Dated this 21st day of October 2010.

ROBERT McCLELLAND
Attorney-General

Australian Government
Australian Customs and Border Protection Service

Customs Act 1901 - Part VB

Certain aluminium extrusions exported to Australia from The People's Republic of China

Findings in relation to a subsidization investigation

Notice under section 269TJ(1) and (2) of the Customs *Act 1901*

The Australian Customs and Border Protection Service (Customs and Border Protection) has completed its investigation into the subsidisation of certain aluminiLtm extrusions (the goods), classified to tariff subheading 7604.00.00, 7608.00.00 and 76'10.00.00, in Schedule 3 of the Customs *Tariff Act 1995* exported to Australia from the People's Republic of China (China).

In Trade Measures Report No. 148 (REP 148) Customs and Border Protection recommended the publication of a countervailing duty notice in respect *of* the goods. REP 148 outlines the investigations carried out by Customs and Border Protection, a statement of the reasons for the recommendations contained in REP 148, material findings of fact or law on which is based and particulars of the evidence relied on to support the findings.

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

Exporter	Countrvailailing·subsldy. program	Subsidy Margin
Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd	Programs 13, 15	3.8%
PanAsiaAluminium (China)Ltd	Programs 15	6.1%
Zhaoqing New Zhongya Aluminium Co Ltd	Programs 10, 13,15	7.6%
Residual e>cporters	Programs 10, 13,15	6.4%
All other exporters	Programs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15, 16, 17, 18, 26, 29, 32 and 35	18.4%

* The names and details of each of the above countervailable subsidy programs are contained within REP 148.

I, ROBERT McCLELLAND, Attorney-General, have considered, and accepted, the recommendations of Customs and Border Protection, the reasons for the recommendations and the material findings of fact on which the recommendations are based. I am satisfied, as to the

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

- the goods; and
- like goods that were exported to Australia after 3 November 2009 (when the Chief Executive Officer made a Preliminary Affirmative Determination under s.269TD4(a) of the Act in respect of the goods) but before the publication of this notice.

Iam 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 caused. Therefore under s.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 to Australia (other than Tai Ao Aluminium Tai Shan Co Ltd).

The considerations relevant to my determination of material injury to the Australian indL1stry 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, price suppression and the consequent impact on the Australian industry including loss of sales volume, loss of profits and reduced 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 Trade Measures Review Officer, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the non-injurious prices of the goods as ascertained will not be published in this notice as they may reveal confidential information.

Enquiries concerning this notice may be directed to the case manager on telephone number (02) 6275 6173, fax number (02) 6275 6990 or email tmops3@customs.gov.au.

Dated this 21st day of October 2010

ROBERT McCLELLAND
Attorney-General

3.3 The circumvention goods

3.3.1 Description of the circumvention goods

The goods, the subject of the original notice, are:

> *certain aluminium extrusions (the goods), classified to tariff subheading 7604.00.00, 7608.00.00 and 7610.00.00 Schedule 3 of the Customs Tariff Act 1995 exported to Australia from the People's Republic of China.*

The goods identified above are the 'circumvention goods' the subject of this inquiry. ADN 2014/31, announcing the initiation of the inquiry, described the circumvention goods as follows:

> *Aluminium extrusions produced via an extrusion process, of alloys having metallic elements falling within the alloy designations by The Aluminium Association commencing with 1,2,3,5,6 or 7 (or proprietary or the other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness or diameter greater than 0.5 mm, with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421 mm.*

The goods are classified to the tariff subheadings of Schedule 3 to the *Customs Tariff Act 1995*. The rates of duty for the goods from China are 4% for goods classified to headings 7604 and 7608 and 5% for goods classified to heading 7610.

The application provided the following details of the subject goods:

Tariff Classification	Stat Code	Goods
7604.10.00	06	Non –alloyed aluminium bars, rods and profiles
7604.21.00	07	Alloyed aluminium hollow profiles - Angles, other shapes and sections
7604.21.00	08	Alloyed aluminium hollow profiles – Other
7604.29.00	09	Alloyed aluminium non – hollow profiles – Angles, other shapes and sections
7604.29.00	10	Alloyed aluminium non – hollow profiles – Other
7608.10.00	12	Non – alloyed aluminium tubes and pipes
7608.20.00	10	Alloyed aluminium tubes and pipes
7610.10.00	12	Aluminium doors, windows and their frames and thresholds for doors
7610.90.00	13	Aluminium plates, rods, profiles, tubes and the like prepared for use in structures; and other aluminium structures and parts of structures

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GOVERNMENT NOTICES

Australian Government
Anti-Dumping Commission

Annexure 5

Customs Act 1901 – Part XVB

CERTAIN ALUMINIUM EXTRUSIONS

Exported by PanAsia Aluminium (China) Limited from the People's Republic of China

Findings in relation to an Anti-Circumvention Inquiry into the avoidance of the intended effect of duty

Public Notice under subsection 269ZDBH(1) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the anti-circumvention inquiry into the avoidance of the intended effect of duty, which commenced on 14 April 2014, concerning the export of certain aluminium extrusions (the goods) to Australia by PanAsia Aluminium (China) Limited (PanAsia) from the People's Republic of China.

Recommendations resulting from that inquiry, reasons for the recommendations and material findings of fact and law in relation to the inquiry are contained in *Anti-Dumping Commission Report No. 241* (REP 241).

I, IAN MACFARLANE, the Minister for Industry and Science, have considered REP 241 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts or law set out in REP 241.

Under subsection 269ZDBH(1) of the *Customs Act 1901* (the Act), I declare, for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975*, a different variable factor (a new ascertained export price) for the original notice published under subsection 269TG(2) and subsection 269TJ(2) of the Act in relation to certain aluminium extrusions exported from China from PanAsia which takes effect as follows:

- the alteration to the original notice relating to all exports of certain aluminium extrusions by PanAsia to the following importers is taken to have been made, with effect on and after 14 April 2014:
  - P&O Aluminium (Brisbane) Pty Ltd;
  - P&O Aluminium (Melbourne) Pty Ltd;
  - P&O Aluminium (Perth) Pty Ltd;

- P&O Aluminium (Sydney) Pty Ltd; and
- Oceanic Aluminium Pty Ltd, and

- the alteration to the original notice relating to all exports of certain aluminium extrusions by PanAsia is taken to have been made with effect on and after the day this declaration is published.

The duty that has been determined is an amount worked out in accordance with the fixed (*ad valorem*) and variable duty method in relation to dumping and the fixed (*ad valorem*) method in relation to countervailing.

To preserve confidentiality, the revised variable factor (as ascertained in the confidential tables attached to this notice) will not be published. Bona fide importers of the goods can obtain details of the new rates from the Regional Dumping Officer in their respective capital city.

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

REP 241 has been placed on the public record, which is available at the Anti-Dumping Commission's (the Commission) website at www.adcommission.gov.au. Alternatively the public record may be examined at the Commission's office during business hours by contacting the case manager using the contact details provided below.

Enquiries about this notice may be directed to the case manager on telephone number 03 9244 8065 fax number 1300 882 506 or +61 3 9244 8902 (outside Australia) or acu@adcommission.gov.au

Dated this 21st day of January 2015

IAN MACFARLANE
Minister for Industry and Science

MinterEllison LAWYERS

Appendix A

Non-Confidential – For Public Record

Statement by Opal (Macao Commercial Offshore) Limited relating to a decision of the Minister under s.269ZDBH(1) to declare that an alteration to the ascertained export price is taken to have been made to dumping and countervailing duty notices published on 28 October 2010 and applying to Certain Aluminium Extrusions exported from the People's Republic of China allegedly by PanAsia Aluminium (China) Limited.

A. INTRODUCTION

1. Opal (Macao Commercial Offshore) Limited (OPAL) is an interested party that has been directly concerned with the exportation to Australia of Certain Aluminium Extrusions (**GUC**) from the People's Republic of China (**PRC**).

2. On 19 February 2015, the Minister, pursuant to s.269XDBH(1) of the *Customs Act 1901 (Cth)* (**Act**), published a notice in the Commonwealth Gazette No. C2015G00246 (a**nti-circumvention notice**) declaring that an alteration to the ascertained export price is taken to have been made to dumping and countervailing duty notices (**original notices**) published on 28 October 2010 and applying to the GUC exported from the PRC allegedly by PanAsia.

3. The Minister's declaration is based on Final Report No. 241 (**Report**) and acceptance of the recommendations and reasons for recommendations, including all the material findings of facts or law, set out in that report by the Commissioner of the Anti-Dumping Commission (**Commission**).

4. We request that, pursuant to paragraph 269ZZA(1)(ca) of the Act, the Review Panel reviews the decision and recommends to the Minister under paragraph 269ZZK(1)(b) that he revoke the decision and substitute a new specified decision.

5. Grounds in support of our submission that the Minister's decision is not the correct or preferable decision and our requests for revocation and substitution are set out in Section D of this submission.

B. PRELIMINARY REQUEST

6. We specifically request that the Panel makes a recommendation on each of the elements of the Minister's decision identified in this submission as incorrect or non-preferred. This is necessary to avoid the risk of the right of review of OPAL being thwarted if the Review Panel, purporting to exercise the administrative equivalent of 'judicial economy', concludes that because of a proposed recommendation in relation to one or more findings it is unnecessary to address other findings challenged in the application. In the event that the Minister rejects a recommendation of the Panel, there is in effect no review of those other findings. This was the unfortunate outcome resulting from a recent rejection by the Parliamentary Secretary of a recommendation of the Review Panel.[1] In our submission this event compromised the rights of review intended by the legislation which, we submit, justifies an inference under s.269ZZK(2) that the report of the Review Panel will address, and make recommendations in relation to, each of the 'reasons' required by s269ZZE(2) to be contained in the applicant's statement.

C. BACKGROUND

7. Division 5A of Part XVB of the *Customs Act 1901* (Cth) sets out the circumstances governing the conduct of anti-circumvention inquiries by the Commissioner and provides that, after inquiry and report by the Commissioner, the Minister may, if satisfied of the existence of one of five defined circumvention activities, declare that alterations specified in the declaration are taken to have been made to the original notices. Four of the five current circumvention activities involve situations in which dumping or countervailing duty notices do not apply to the goods being exported to Australia and consequently no duties are being paid. By contrast the fifth circumvention activity, which is the one alleged to have occurred in this case, involves the payment of duties but in amounts that are less than would have occurred if an importer had not allegedly failed to increase his selling prices in Australia by an amount commensurate with the duties payable.

8. The key criterion of the fifth circumvention activity, specified in s.269DBBB(5A) of the Act, only concerns the pricing practices in Australia of importers of goods subject to the original notices. Nevertheless the outcome of an inquiry into such alleged circumvention activity is of vital importance to manufacturers, exporters and sellers of the goods supplied

[1] *Food Service Industrial Pineapple Exported from the Kingdom of Thailand* (18 February 2014)– Dole Thailand Limited

to Australia because the powers that can be exercised by the Minister under s.269ZDBH, after receipt of a Report given to the Minister by the Commissioner, apply to exporters that are the subject of a notice. That section relevantly provides:

> (1) After considering the report of the Commissioner and any other information that the Minister considers relevant, the Minister must declare, by notice published in accordance with subsection (9), that for the purposes of this Act and the Dumping Duty Act:
>
> (a) the original notice is to remain unaltered; or
>
> (b) the alterations specified in the declaration are taken to have been made to the original notice, with effect on and after a day specified in the declaration.
>
> (2) Without limiting subsection (1), the alterations may be of the following kind:
>
> (a) – (c) …
>
> (d) in relation to exporters that are the subject of the original notice--the specification of different variable factors in respect of one or more of those exporters.
>
> (e) …

Paragraph (2)(e) is the provision in this case that the Minister has purported to apply on the ground of activities allegedly undertaken by importers, but the exercise of that power in the manner implemented by the Minister will totally exclude PanAsia and OPAL from the Australian market for the GUC.

D. GROUNDS

I. *There is no positive evidence that any importer of the GUC from OPAL has sold the imported goods in Australia without increasing the price commensurate with the total amount of dumping and countervailing duty payable. The Commissioner applied the wrong test and failed to gather relevant evidence.*

9. Section 269ZDBB(5A)(d) defines the central element of the alleged circumvention activity in the present matter as follows:

> the importer of the circumvention goods, whether directly or through an associate or associates, sells those goods in Australia without increasing the price commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act. [Emphasis added]

10. In the Report the material finding of fact relating to this central element and the particulars of the evidence relied on to support those findings are expressed almost exclusively in terms of such purported indicators as 'sales at a loss' and 'avoidance of

intended effect of duty'[2]. On the two occasions when the actual terms of the paragraph are referred to there is no analysis of the proper interpretation of the wording of the provision, only a reliance on the notion of sales at a loss. The following example from section 4.1 of the report illustrates the point:

> "the Identified Importers sold the circumvention goods in Australia without increasing the price commensurate with the total amount of duty payable by selling them at a loss." [Emphasis added]

11. While the issue of sales at a loss may be relevant to the identification of 'arms length transactions' under s.269TAA, it is not a determinative factor in the application of s.269ZDBB(5A)(d). Indeed the Report, echoing observations made in the Revised Explanatory Memorandum by the Minister, acknowledges that …*selling at a loss by an importer, in and of itself, does not indicate that circumvention activity is occurring*[3]. Furthermore profitable sales by an importer do not exclude the possibility that the importer had failed to increase prices commensurate with the total duty payable.

12. Whatever observations may be made about sales at a loss and avoidance of the intended effect of duty, the central task of the Commissioner and the Minister is to ascertain whether or not prices in sales of the GUC by importers have been increased by an amount commensurate with the dumping and countervailing duty paid. That task necessarily involves a comparison because the existence of an 'increase' cannot be established without reference to a benchmark. The only available benchmarks are the prices at which importers were selling the GUC prior to the publication of the original notices of 28 October 2010.

13. We submit, therefore, that the task before the Commissioner was in the first instance to compare the GUC selling prices of the five identified importers over a reasonable period commencing after 28 October 2010 with the selling prices prevailing over a comparable period prior to that date. It was then necessary for adjustments to be made to that broad comparison to take account of extraneous factors influencing prices in the two periods such as exchange rates, product mix, selling costs or exporter pricing. Only then could a robust assessment be made of whether prices had increased and whether any increase was commensurate with the additional duty payments in the latter period. Such an assessment is essential as the basis for a lawful decision on whether a circumvention activity has

[2] Report #241: p.22 – "For the purposes of this inquiry, the Commission has focused on whether the Identified Importers are selling at a loss that may indicate avoidance of the intended effect of the duty"
[3] ibid – p.22

occurred and whether an alteration should be made to the original dumping and countervailing duty notices.

14. It is clear from section 4 of the Report that the Commissioner did not undertake any of these essential steps or assemble any of the evidence necessary to support a finding that a circumvention activity had occurred or a recommendation that the original notice should be altered. On this ground we submit that the Minister's decision to make an alteration to the original notices is incorrect and we request that the Review Panel recommend that the decision be revoked and substituted with a new decision by the Minister that the original notices remain unaltered.

II. ***The Act does not authorise the Commissioner to extend the inquiry to importers not specified in the application and it does not authorise the Minister to make a declaration under s.269ZDBH(1) purporting to apply to importers not specified in the application and furthermore such action by the Minister is inconsistent with the purpose or object of the Act.;***

15. An application for the conduct of an anti-circumvention inquiry must be made in an approved form. Form B1236 has been approved by the Commissioner under s.269ZDBD(1)(c) of the Act for the purpose of applying for the conduct of an inquiry concerning the circumvention activity described in s.269ZDBB(5A). That form requires the applicant to specify, *inter alia*, the names of the importers engaging in the alleged circumvention activity. The applicant in this matter specified five importers and these importers were also identified by the Commissioner in the inquiry notice published by the Commissioner on 14 April 2014:

> "The anti-circumvention inquiry will examine whether any of the following importers:
>
> • P&O Aluminium (Brisbane) Pty Ltd;
> • P&O Aluminium (Melbourne) Pty Ltd;
> • P&O Aluminium (Perth) Pty Ltd;
> • P&O Aluminium (Sydney) Pty Ltd; or
> • Oceanic Aluminium Pty Ltd;
>
> have engaged in circumvention activity that avoids the intended effect of duty, as outlined in subsection 269ZDBB(5A) of the Act."

16. On 18 September 2014 the Commission published an Issues Paper concerning the anti-circumvention inquiry. One of the stated purposes of the publication was …*to communicate the Commission's proposed approach to conducting the inquiry*… . The publication went on to describe the alternative measures that might result from the inquiry and provided the following unequivocal undertaking to importers of the GUC that were not the subject of the inquiry:

> "The Commission notes the original notice issued under section 8 of the Dumping Duty Act refers to dumping and countervailing duties applied to exporters and does not make reference to specific importers (which is the Commission's usual practice). The Commission proposes that for the purposes of this anti-circumvention inquiry the Minister may consider amending the dumping and/or countervailing notice to increase the dumping duty payable for imports exported by certain specified exporters by certain specified importers. A new export price (NC price), which will be calculated for each importer that is found to be engaging in circumvention activity, will determine the increase in the dumping duty rate. This targeted approach is intended to ensure that the circumvention activity is appropriately addressed and at the same time those importers who have not been found to be engaging in circumvention activity are not adversely impacted."

17. Unaccountably, the Commissioner's recommendations and the Minister's declaration ignored this undertaking by applying the prospective alteration to the original notices to all importers of the GUC manufactured by PanAsia. According to section 6.4 of the Report this extended the application of the Minister's decision beyond the five specified importers to three other importers, one of which was characterised as a "New importer" and two others described as "minor importers". It is clear from the Report that in relation to the three non-specified importers the Commissioner did not undertake the statutory task described in paragraph 13 above and in particular did not assemble any evidence concerning the resale prices of those importers either before or after the date of the original notices.

18. The Report claims that late in the inquiry on 5 November 2014 it wrote to two of three non-specified importers but the letters do not form part of the public record. That record does include a copy of a letter dated 26 November 2014 from Protector Aluminium Pty Ltd that acknowledges importing the GUC manufactured by PanAsia, makes it clear that apart from that trading relationship it is not associated in any way with PanAsia, emphasises its understanding that the inquiry is limited to specified importers and points out that to extend the application of any alteration notice to non-specified importers … *would unfairly penalise and punish companies such as ours that have not engaged in any anti-circumvention activity or been the subject of any such allegations.* The Report also claims that a further letter to Protector Aluminium was sent on 1 December 2014 as well as follow up emails but again none of this material can be found on the public record.

19. In these circumstances why did the Commissioner recommend that the prospective alteration declaration should apply to all importers? Obviously he was not concerned with any legal issues concerning the Minister's power to specify importers in a declaration made under s 269ZDBH because he recommended exactly such specification

in relation to the retrospective application of the declaration, an action that is consistent with the terms of paragraph (2)(d) of the section that allows the specification of more than one exporter.

20. The answer appears to lie in the assertion that:

> "Current importation circumstances suggest that an alteration to the original notice is necessary to prevent any ongoing or future circumvention activity that had been identified in this inquiry."

The main circumstance identified in the report is that … *it would appear that this new exporter (sic) [the 'New importer'] has supplanted the Identified Importers in the Australian market in trading in the circumvention goods with PanAsia.* The only reason advanced in support of this speculation is that the New importer has been importing 'not dissimilar' volumes to those previously imported by the specified importers. The Report contains no evidence of the prices at which the New importer is selling the goods in Australia. No 'circumstances' justifying the inclusion of the remaining two 'minor importers' are identified, merely observations of their very minor import volumes which cannot justify the collateral damage to their businesses resulting from their inclusion in a prospective declaration applying to all importers.

21. In the absence of any evidence, analysis, reasoning or findings relevant to a proper consideration of whether circumvention activity had occurred, mere speculation relating to alleged potential new circumvention activity provides no support for the Minister's decision to include in his prospective declaration importers that were not the subject of the application of an anti-circumvention inquiry, were not included in the scope of the inquiry announced by the Commissioner and were the subject of an undertaking by the Commission that any ministerial declaration would not apply to them. Excluding those importers not specified in the application from the prospective declaration is also the preferred course of action because it would best achieve the purpose and object of the Act. In the present matter the Commissioner is dealing with the only circumvention activity in a suite of five activities that is concerned only with the conduct of importers and only those importers whose conduct falls within the terms of s. 269ZDBB(5A)(d). The purpose of the paragraph is not to punish an exporter or any importer in relation to whom there is no evidence that its selling prices in Australia have not increased commensurate with the imposition of dumping and countervailing duties. The purpose of the paragraph, in concert with s.269TAC of the Act, is to raise selling prices of the GUC

in Australia to a level that reflects the recovery by the importer of the cost of duties imposed by the Dumping Duty Act.

22. Consequently, we submit that the Minister's decision to include all importers in the prospective alteration to the original notices is incorrect and we request that the Review Panel recommend that the decision be revoked and substituted with a new decision by the Minister that that any prospective alteration to the original is limited in its application to the five importers listed in the application and the inquiry notice published by the Commissioner.

III. *Proper identification of the exporter impacts on the lawfulness of the current inquiry. We submit that the exporter in this matter is Opal (Macao Commercial Offshore) Limited (OPAL).*

23. Section 269ZDBB(5A)(b) of the Act stipulates that the circumvention activity alleged in the present case only occurs if … *the exporter* [of the circumvention goods] *is an exporter in respect of which the notice* [the original dumping and countervailing notice] *applies*… . The Commissioner has found, correctly, that as a matter of fact PanAsia was identified by the Minister as the exporter to which the original notice applied[4] but fails to consider the question of whether PanAsia is the exporter of the circumvention goods and merely assumes that the conclusion in the original investigation that PanAsia was the exporter was correct. The Commissioner has failed to undertake any analysis of the evidence relevant to the identification of the exporter of the circumvention goods or the application of the relevant provisions of the Act to that evidence.

24. The fact that it is OPAL[5] that sells the goods to Australian importers is not in dispute[6]. The Australian importer places an order on OPAL who forwards the order to PanAsia. PanAsia sells the goods ex works to OPAL who takes responsibility for and title to the goods at the factory gate and makes all the necessary arrangements for export formalities, inland and overseas transport and marine insurance. OPAL sells the goods to Australian importers on a CIF basis.

[4] Report #241, section 3.4.2
[5] The reference in sections 3.3 and 4.1 of the Importer Visit Report for Oceanic Aluminium Pty Ltd [Public Record: Item #029] to Panasia Aluminium (Macao Commercial Offshore) Ltd is incorrect. That company ceased to operate on and from 5 May 2009 and since that time the vendor in all sales of PanAsia production to Australian importers has been OPAL.
[6] Report #148: section 6.8.1

25. The term exporter is not defined in the Act but was considered at some length by Finn J in the Federal Court in *Companhia Votorantum de Celulose e Papel v Anti-Dumping Authority and Ors* [1996] FCA 356 (***Companhia***)and his decision and reasoning was affirmed on appeal in a majority judgement[7]. While in that matter the imported goods also arrived in Australia as a result of tripartite transactions the detail was significantly different from the present case. An Australian importer (**A**) placed orders for the goods on a Japanese trading house (**B**) which then ordered the goods from a Brazilian manufacturer (**C**). C shipped the goods from Brazil direct to Australia but invoiced B for an amount that included the price of the goods plus the overseas freight. B paid C the invoiced amount and in turn invoiced A for a higher amount which was paid to B by A. While Finn J found that C was the exporter of the goods in that factual situation he cautioned that he was not propounding a definition of exporter that would be universally applicable and he allowed that there may be circumstances in which a supplier of imported goods sourced from a manufacturer is the exporter for the purposes of the Act. The latter observation appears to have been ignored by the Commission in practice, as when dealing with tripartite transactions it invariably rejects arguments that a supplier to Australia of goods sourced from a manufacturer is the exporter.

26. We submit that the Commission's approach to this issue both generally and in relation to the facts of this case are inconsistent with a proper construction of the Act and the following finding of Owen J. of the High Court of Australia in *Henty v Bainbridge-Hawker* (1963) 36 ALJR 354 at 356:

> "Another general submission was made that neither the defendant nor the companies which he directed and managed could be found to have been the exporter of prohibited exports because whatever goods were in fact exported were sold f.o.b. Sydney to an overseas buyer. The seller's obligations therefore ceased when the goods were placed on board the ship at the Port of Sydney and it was the overseas buyer who thereupon became the exporter of them. For the purposes of this case it is sufficient to say that if, in the case of an f.o.b. contract with an overseas buyer the seller places the goods sold on board a ship bound for foreign parts and engages with the shipowner to carry them to the overseas buyer and the goods are carried overseas, the seller has, in my opinion, exported the goods within the meaning of the *Customs Act*."

Based on this finding, the majority on appeal in *Companhia* observed that the identification of the seller as the exporter of the goods would be strengthened in the case of a C&F transaction[8]. We submit that in the present matter the evidence clearly supports

[7] *Companhia Votorantum de Celulose e Papel v Anti-Dumping Authority* (1996) 71 FCR 80
[8] *Companhia Votorantum de Celulose e Papel v Anti-Dumping Authority* (1996) 141 ALR 297 at 308

the view that OPAL sold the goods to the Australian importers, that it took possession of the goods at the factory gate, that it placed the goods on board a ship bound for Australia, arranged for the carriage of the goods to Australia and was the entity sending the goods from the PRC to Australia.[9]

27. Consequently the Minister's identification of PanAsia as the exporter of the circumvention goods was an incorrect decision and as exports of the circumvention goods by OPAL were not the subject of the application, inquiry or report, we request that the Review Panel recommend that the decision be revoked and substituted with a new decision by the Minister that the original notices remain unaltered.

IV. *Even if PanAsia is the exporter of the circumvention goods, the Minister's reliance on the Commissioner's erroneous finding[10] that the statutory inference in s.269TAA(2)applies has resulted in an incorrect decision to declare that the original notices are altered.*

28. The Commission's approach in the Report to the task of assessing a new ascertained export price relies totally on invoking s.269TAA(2) of the Act[11] which provides that:

> Without limiting the generality of subsection (1), where:
>
> > (a) goods are exported to Australia otherwise than by the importer and are purchased by the importer from the exporter (whether before or after exportation) for a particular price; and
> >
> > (b) the Minister is satisfied that the importer, whether directly or through an associate or associates, sells those goods in Australia (whether in the condition in which they were imported or otherwise) at a loss;
>
> the Minister may, for the purposes of paragraph(1)(c), treat the sale of those goods at a loss as indicating that the importer or an associate of the importer will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or a part of the price.

29 However that provision obviously cannot apply in relation to the three unspecified importers as, irrespective of who is the exporter, there is absolutely no evidence which could justify any claim by the Minister that he was satisfied that any of those importers had sold the GUC in Australia at a loss as required by paragraph (b) of the subsection. In relation to the specified importers if PanAsia is identified as the exporter, the subsection again has no application because the importers have not purchased the goods from

[9] *Australian Trade Commission v Goodman Fielder Industries Ltd* (1992) 36 FCR 517 at 523
[10] Report #241: section 6.4.1
[11] ibid., sections 5.3 and 6.4.1

PanAsia as required by paragraph (a). In these circumstances the Minister's purported application of the statutory inference in declaring an alteration to the original notices cannot be justified and we request that the Review Panel recommend that the decision be revoked and substituted with a new decision by the Minister that the original notices remain unaltered.

V. There is no evidence to support any claim that sales of the GUC to Australian importers are, in fact, other than arms length transactions

30. Absent the availability of the statutory inference in s. 269TAA(2), the assessment of any new ascertained export price would require a finding as to whether the sales to the importers were in fact arms length transactions. Apart from appearing to suggest, incorrectly, that the application of a statutory inference somehow creates a factual situation[12], the Report contains no evidence to support a claim that the sales to importers were other than arms length transactions and it even fails to identify the relevant sales transaction.[13]

31. Section 269TAA(1) of the Act provides:

> For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:
>
> (a) there is any consideration payable for or in respect of the goods other than their price; or
>
> (b) the price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or
>
> (c) in the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

The effect of the drafting approach in the subsection is that the default position under PartXVB of the Act is that purchases and sales of goods are arms length. Consequently positive evidence that supports the existence one or more of the three alternative grounds set out in the subsection must be identified before a purchase or sale shall not be treated as an arms length transaction.

32 We note that there is no suggestion by the Commissioner or the Minister that paragraphs (a) or (b) apply in this matter. In relation to paragraph (c) we are instructed that OPAL itself and members of the PanAsialum Holdings Company Limited group have not, do not and will not provide to the Australian buyers or any associate of those buyers, directly or indirectly, any reimbursement, compensation or other form of benefit [other than possible reimbursements of the kind described in s.269TAA(1A)] for, or in respect of, the

[12] Report #241: section 6.4.3
[13] ibid., section 6.4.1

whole or any part of the price. We also note again that in the Report the Commission has not identified any evidence to support a claim that any such reimbursements, compensation or benefits have, in fact, been received by any of the Australian buyers.

33. We are concerned, however, that the phrasing of certain observations by the Commissioner may have caused the Minister to form an opinion under paragraph (c) that the buyers or their associates had in fact received reimbursements, compensation or benefits in respect of the price. For example in section 6.4.3 of the Report the Commissioner states that:

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

While the subsection containing the statutory inference is acknowledged, we submit that the remaining phraseology might well have led the Minister to conclude, mistakenly, that reimbursements had in fact been received. In the absence of any evidence of actual reimbursements, compensation or other benefits we submit that the decision to declare an alteration to the original notices was incorrect and consequently we request that the Review Panel recommend that the decision be revoked and substituted with a new decision by the Minister that the original notices remain unaltered.

VI. The failure to include in the Minister's declarations a revised normal value and non-injurious price has resulted in a failure to comply with Australia's international obligations and a dumping and countervailing duty regime that will impose on importers amounts of duty greater than is necessary to prevent injury to the Australia industry[14].

34. Paragraph (d) of s.269ZDBG(1) of the Act requires the Commissioner, when recommending a declaration that the original notice should be altered, to detail the 'alterations' to be made. Paragraph (d) of s.269ZDBH(2) requires the Minister to specify different 'variable factors' when making a declaration to alter an original notice. Clearly the Minister has a discretion to specify more than one variable factor but in this matter he did not exercise that discretion. In our submission the preferable decision would be for the Minister to specify not only the export price but also the normal value of the goods. The exercise of ministerial discretions under Part XVB of the Act in a manner that complies with Australia's international obligations is always to be preferred[15].

[14] see s.269TACA of the Act and s.8(5B) of the *Dumping Duty Act*
[15] *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406 at 417

35. The concept of a 'fair comparison' is central to the *Anti-Dumping Agreement*[16] and the ascertainment of the amount of an interim dumping duty by reference to a contemporaneous ascertained export price and a 2010 normal value obviously does not comply with that requirement. In relation to practical issues the Commissioner acknowledges the existence of a parallel review of variable factors being conducted by the Commission following an application by PanAsia on 1 May 2014 and the existence of a full questionnaire response made to the Commission by PanAsia[17]. Based on that response at the beginning of September 2014 the Commission has been in possession of all relevant information necessary to assess a contemporaneous ascertained normal value. It has failed to do so. The only observation made by the Commissioner in relation to this serious failure is in section 5.5 of the Report where he asserts that:

> "The calculation of a normal value is not considered to be one of the variable factors within the scope of the inquiry."

No authority is cited for this assertion and we submit that it is clearly inconsistent with the flexibility set out in the provisions of the Act referred to in paragraph 33 above.

36. We also draw the Review Panel's attention to a further serious omission from the Commissioner's recommendations. No alteration to the non-injurious price is proposed in the report and none has been declared by the Commission. The imposition of a combined duty of 57.6% is very likely to result in the sum of the ascertained export price and the interim dumping duty exceeding both a contemporaneous non-injurious price and the non-injurious price contained in the original notices.[18] Such an outcome would be contrary to the requirements of both Australian law and the fair comparison principle of the *Anti-Dumping Agreement.*

37. We submit that in exercising his discretion to specify alterations to variable factors in a declaration under s.269ZDBH the preferred decision would be for the Minister to specify different variable factors for normal value and non-injurious price, as well as export price, and we request the Review Panel to recommend accordingly.

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[16] see Article 2.4
[17] Report #241: section 4.5.2
[18] *Dumping Duty Act:* section 8(5B).

MinterEllison
LAWYERS

Appendix B

Non-Confidential – For Public Record

Statement by Opal (Macao Commercial Offshore) Limited identifying the correct or preferable decisions based on the grounds set out in Attachment A.

The correct decision based on Ground I, III, IV or V in Attachment A is that the original dumping and countervailing duty notices published on 28 October 2010 are to remain unaltered.

The correct decision based on Ground II in Attachment A is that any specification of a different ascertained export price applies only to the five importers referred to in Report No 241 as the Identified Importers.

The correct decision based on Ground VI in Attachment A is that the specification of different variable factors should include a different ascertained normal value and non-injurious price as well as a different ascertained export price.

MINTER ELLISON

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Attn: Mr. John Cosgrave

Dear John,

Re: Application for Review of a Decision following an Anti-Circumvention Inquiry to alter Dumping and Countervailing Duty Notices concerning Certain Aluminium Extrusions

OPAL (Macao Commercial Offshore) Limited appoints Mr John Cosgrave of Minter Ellison Lawyers to act on its behalf in relation to an application for review of a decision by the Minister to declare that alterations are taken to have been made to Dumping and Countervailing Duty Notices applying to exports to Australia of Certain Aluminium Extrusions.

Name: Ms. Ng Bonnie Po Ling
Title: Director
Date: 20 March 2015

Attachment to Application by Opal (Macao Commercial Offshore) Limited – 23 March 2015

Name, Street, Postal Address and Form of Business

Opal (Macao Commercial Offshore) Limited

Base M, 13/F., The Macau Square, Avenida do Infante D. Henrique No.43-53A, Macau

Company

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

Bonnie Ng,
Director
tel. 852 2972 2028
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bonnie.ng@palum.com

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

Mr John Cosgrave
Minter Ellison
25 National Circuit
Forrest ACT 2609

Telephone: 02 6225 3781
Facsimile: 02 6225 1781
email: john.cosgrave@minterellison.com

The authorisation is at Annexure 1.

Full description of the original dumping and/or countervailing notice and the imported goods to which the application relates.

The original dumping duty notice is at Annexure 2

The original countervailing notice is at Annexure 3

The description of the goods is at Annexure 4

The tariff classification/statistical code of the imported goods

This information is contained in Annexure 4

A copy of the reviewable decision

This information is contained in Annexure 5

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

Date of notification was 19 February 2015 by way of a public notice in the *Australian* newspaper. The applicant has not received any notification of the declaration from the Minister as required by s.269ZDBH(6)

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

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

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 considered correct or preferable decisions are set out in Appendix B to this application