**PUBLIC FILE**

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30 November 2016

Mr Scott Ellis
Member
Anti-Dumping Review Panel

**BY EMAIL** adrp@industry.gov.au

Dear Member,

***Submission concerning review of a decision by the Assistant Minister for Industry, Innovation and Science in respect of GRINDING BALLS exported from the People's Republic of China***

The Australian industry notes the applications for review lodged on behalf of the exporters of the goods from China, specifically, Changshu Longte Grinding Ball Co., Ltd. (**Longte**), Jiangsu CP Xingcheng Special Steel Co., Ltd (**Xingcheng**) and Anhui Sanfang New Material Technology Co., Ltd (**Sanfang**).

For the assistance of the Panel in conducting this *Review of a decision by the Assistant Minister* under section269ZZI of the *Customs Act 1901*[1], the Australian industry provides the following submission in response to a particular matter raised by the various applicants for review.

**Longte's first ground for review - *"the grinding bar costs substituted in Longte's cost of production was not the cost in the country of origin"***

The first ground for review set out in Longte's application, is also reflected in the fifth ground for review in the application of Xingcheng[2] and the seventh ground for review in the application of Sanfang[3]. It should be noted that the Longte application expresses the view that Australian legislation does not comply with the WTO Anti-Dumping Agreement.

Longte states:

> "*Our client maintains that Regulation 43(2)(b)(ii), despite being a law of Australia, is a non-compliant implementation of the relevant provision in the WTO Anti-*

[1] All references to statutory provisions are references to provisions of the *Customs Act 1901*, unless otherwise specifically stated.
[2] Referred to as "10.5"
[3] Referred to as "10.7"

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> *Dumping Agreement, which instead refers to an obligation on the investigating authorities to use the financial records of an exporter….(Article 2.2.1.1. refers).”*[4]

Similarly, the applications of Xingcheng and Sanfang express the view that subparagraph 269TAC(2)(c)(i) means that when there is a particular market situation finding, the normal value may be constructed with cost of production being “*such cost of production or manufacture … in the country of export*.”

Central to these grounds for review, is the alleged requirement that the Assistant Minister *must* determine the costs of production or manufacture of the goods in the country of export.

The statutory construction of the provision for the determination of constructed normal value under section 269TAC(2)(c)(i) was examined and settled in a matter recently before the Federal Court of Australia, namely, *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2016] FCA 1309, per Robertson J at [109] – [111] (copy attached as Appendix 1)

In response to Dalian Steelforce alleging that the Commissioner, in using a benchmark price to determine its cost of production or manufacture, erred in law by using production information from steel mills outside China(contrary to s 269TAC(2)(c)(i)), the Court there found that:

> *“As to the point of construction, I do not accept the applicants’ submission that using the cost of production or manufacture from countries other than the country of export was, per se, to take into account an irrelevant consideration and to make an error of law.*
>
> *In my opinion, the applicants’ submission does not take into account the context in which the expression “the cost of production or manufacture of the goods in the country of export” appears. The context is that the Minister is satisfied that the normal value of goods exported to Australia cannot be ascertained under s 269TAC(1) or that the Minister is satisfied, in a case where like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under s 269TAC(1). In those circumstances, the normal value of the goods for the purposes of Pt XVB is to be, relevantly, such amount as* ***the Minister determines to be*** *the cost of production or manufacture of the goods in the country of export (emphasis added.) In my opinion, contrary to the applicants’ submission, the provision does not exclude the use of overseas data in an appropriate case. The*

[4] Longte Application, Pg 7 – footnote 10

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> *object of the provision is to determine the cost of production or manufacture of the goods in the country of export but it does not follow that only the cost of production or manufacture of the goods in that country may be used, particularly where it has been found that the costs of HRC provided by Dalian Steelforce relating to the review period do not reasonably reflect competitive market prices: see the report at page 16.8."* [underlining added]

This Federal Court decision confirms that under Australian domestic law, the use of external (i.e. non-Chinese) benchmark cost values is entirely appropriate in situations where a particular market situation is found to exist, as was established in *Investigation No. 316*. Therefore, the Assistant Minister's decision is the correct and preferable one.

To assist the Review Panel further in its interpretation of the relevant statutory provisions cited by the applicants for review, an associate of the Australian industry has previously obtained an external legal opinion on those grounds[5], which is attached to this submission[6]. The advice received maintains that the arguments of exporter applicants for review, (a) misconstrue the legislative provisions, (b) ignore the history of the current regulatory provisions (specifically section 43 of the *Customs (International Obligations) Regulation 2015*) (***the Regulations***), and (c) overlook the binding legal precedent established in two other recent matters before the Federal Court.[7]

> *"The approach adopted by the Assistant Minister in this case, and by her predecessors in PanAsia and Dalian, was to identify the cost of production method as the 'appropriate proxy'[8] for the gold standard and to determine the total cost of production in the country of export using benchmark cost elements as substitutes for actual cost elements in China that had been identified as being 'artificially low' as a result of market distortions driven by the government policies. In constructing a normal value in this manner we see no implied restrictions in the legislation concerning the choice of substitute cost elements other than that the substitute elements should reasonably reflect the competitive market costs that would apply in China in the absence of the identified market distortions. In particular we cannot find any justification in the statutory language to suggest that only Chinese cost elements can be used as surrogates.*
>
> *"In summary we consider that s.269TAC(2)(c) requires the Assistant Minister in the circumstances of this case to determine what the total cost of production of the goods would be in the country of export if the 'situation in the market' of that*

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[5] Which are a restatement of grounds expressed in various parties' grounds for *Review of a Decision of the Parliamentary Secretary in respect of steel reinforcing bar exported from China*

[6] Attached as Appendix 2.

[7] *PanAsia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 and *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885

[8] *US Softwood Lumber V*: para 7.278; *EU – Biodiesel*: para 7.233

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> *country did not exist. In doing precisely that the Assistant Minister, in our view, has made the correct and preferable decision."*[9]

Therefore, the applicants for review are in error to assert that the Assistant Minister is unable to identify costs of production of the goods that are *not* "in the country of export".

Longte has further asserted that the recently published WTO Appellate Body Report in *European Union – Anti-Dumping Measures on biodiesel from Argentina* somehow supports its contention that in substituting costs identified to not reasonably reflect competitive market costs, "*any cost used still had to be such amount as determined by the Minister in the country of export*".[10]

Although only persuasive authority on the issue[11] of the use of sources other than the "cost of production in the country of origin", Moly-Cop nevertheless disagrees with Longte's interpretation of the WTO Appellate Body decision in *European Union – Anti-Dumping Measures on biodiesel from Argentina*. Indeed, the conclusion reached by the Appellate Body instead affirms the view that substitution of costs need not be limited to the "country of origin". More precisely, the Appellate Body concluded:

> *"In light of our examination above of the phrases "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "cost of production … in the country of origin" in Article VI:1(b)(ii) of the GATT 1994, we consider that these provisions do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin.*[12] *For this reason, we do not consider that Argentina has demonstrated that the Panel erred in stating that these provisions "do not limit the sources of information that may be used in establishing the costs of production", and do not "prohibit an authority [from] resorting to sources of information other than producers' costs in the country of origin" but do "require that the costs of production* established by the authority reflect conditions prevailing in the country of origin".[13]

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[9] Appendix 2 at p. 5.
[10] Longte application, pg 14
[11] Australian legal authority requires some ambiguity to be identified in the relevant provisions of the Act and Regulation to justify reference to external jurisprudence. Further, the EU domestic legislation considered by the WTO Disputes Settlement bodies in WT/DS473/AB/R has no parallel in Australian domestic law, and the decision there relates to an interpretation of the word 'costs' in Article 2.2.1.1 and not to the phrase 'competitive market costs' in Australian domestic law.
[12] Original fn 233: *"This interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 is without prejudice to our interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement."*
[13] Original fn 234: *"Argentina's other appellant's submission, para. 195 (quoting Panel Report, para. 7.171)."*

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Separately, it is important to observe that the Appellate Body Report relates to an interpretation of the word 'costs' in Article 2.2.1.1 and not to the phrase 'competitive market costs' as appears in the Australian domestic law[14]. In considering this matter in *Investigation 316*, it must not be forgotten that the Assistant Minister was satisfied that the costs reported in the exporters' records "*are significantly influenced by the GOC distortion, such that they do not reasonably reflect competitive market costs".*[15]

Further to the extent that the various exporter applicant parties allege that *"Australia's Regulation 43 is also incompatible with the Anti-Dumping Agreement"*, we again restate the advice of our legal opinion that observes that:

> *"Whether the Australian regulation is consistent with the Anti-Dumping Agreement is not an issue before the Review Panel and, in any event, we consider that it is not a matter falling within the jurisdiction of the Review Panel."*

For the reasons stated above, the ground for review sought by the exporter applicants on the basis of non-China benchmark substitution having been applied is unsound and should be rejected.

Should you require any clarification on the above matters, or to discuss any aspects of the external legal opinion attached to this submission, please do not hesitate to contact the undersigned.

Yours sincerely

[redacted]

[redacted]

Moly-Cop Australasia, Waratah Steel Mill
Commonwealth Steel Company Pty Ltd

[14] Refer subsection 43(2) of the Regulations
[15] EPR 316/Folio 54 – Final Report (pg 26 at 5.8)

# FEDERAL COURT OF AUSTRALIA

## Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science [2016] FCA 1309

| | |
|---|---|
| File number: | ACD 18 of 2016 |
| Judge: | **ROBERTSON J** |
| Date of judgment: | 9 November 2016 |
| Catchwords: | **ADMINISTRATIVE LAW** – judicial review – Part XVB of the *Customs Act 1901* (Cth) (the **Act**) – anti-dumping measures – hollow steel sections (**HSS**) exported from China to Australia – whether denial of procedural fairness or failure to follow the procedures required by the Act – whether division of domestic sales into subsets – whether determination of profit involved errors of law – whether errors of law in using a benchmark price to determine costs – whether uplift calculation was unreasonable and involved an error of law – discretion to withhold relief |
| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 16<br>*Customs Act 1901* (Cth) ss 269T, 269TAAD, 269TAC, 269TE, 269ZA, 269ZC, 269ZD, 269ZDA, 269ZDB, 269ZJ<br>*Customs Tariff (Anti-Dumping) Act 1975* (Cth) ss 8, 10<br>*Customs (International Obligations) Regulation 2015* (Cth) ss 43, 44, 45 |
| Cases cited: | *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321<br>*Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs (No 2)* [2015] FCA 1332<br>*Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs (Cth)* [2012] FCA 1192; 131 ALD 291<br>*Kamha v Australian Prudential Regulation Authority* [2005] FCAFC 248; 147 FCR 516<br>*Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332<br>*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259<br>*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152<br>*Thai Pineapple Canning Industry Corp Ltd v Minister for* |

*Justice and Customs* [2008] FCA 443; 104 ALD 481

| | |
|---|---|
| Date of hearing: | 24 June 2016 |
| Date of last submissions: | 28 June 2016 |
| Registry: | New South Wales |
| Division: | General Division |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
| Category: | Catchwords |
| Number of paragraphs: | 123 |
| Counsel for the Applicants: | Mr P Walker SC and Mr B Buckland |
| Solicitor for the Applicants: | Moulis Legal |
| Counsel for the Respondents: | Mr G Kennett SC and Ms V McWilliam |
| Solicitor for the Respondents: | Clayton Utz |

# ORDERS

**ACD 18 of 2016**

| | |
|---|---|
| **BETWEEN:** | **STEELFORCE TRADING PTY LTD ACN 110 146 515**<br>First Applicant |
| | **DALIAN STEELFORCE HI-TECH CO., LTD.**<br>Second Applicant |
| **AND:** | **PARLIAMENTARY SECRETARY TO THE MINISTER FOR INDUSTRY, INNOVATION AND SCIENCE**<br>First Respondent |
| | **COMMISSIONER OF THE ANTI-DUMPING COMMISSION**<br>Second Respondent |

**JUDGE:** **ROBERTSON J**

**DATE OF ORDER:** **9 NOVEMBER 2016**

**THE COURT ORDERS THAT:**

1. The application is dismissed.

2. The applicants pay the respondents' costs, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR JUDGMENT

## ROBERTSON J:

### Introduction

1 This application for judicial review, brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), is of a decision to report to the Minister in accordance with s 269ZDA of the *Customs Act 1901* (Cth). By that section, the Commissioner of the Anti-Dumping Commission (the **Commissioner**) must, after conducting a review of anti-dumping measures, give the Minister a report making certain recommendations.

2 Earlier, the first applicant, (**Steelforce Trading**) had lodged with the Commissioner an application, under s 269ZA, to review anti-dumping measures imposed on steel hollow structural sections (**HSS**) on the basis that one or more of the variable factors relevant to the taking of the measures had changed. The variable factors said to have changed were the normal value, export price and the level of countervailable subsidy.

3 That application had resulted in report No. 285 entitled "Review of Anti-Dumping Measures - Hollow Structural Sections Exported from the People's Republic of China by Dalian Steelforce High-Tech Co Ltd" (the **Report**). The Report was dated 29 February 2016. The review period was 1 January 2014 to 31 December 2014.

4 The second applicant, (**Dalian Steelforce**) is the supplier to Steelforce Trading. Thus, Dalian Steelforce produces HSS in the People's Republic of China (the **PRC**) and exports those goods to Australia. Steelforce Trading is an importer into Australia of HSS exported from the PRC by Dalian Steelforce.

5 The Commissioner said at para 1.3 of the Report that he was satisfied that the variable factors relevant to the taking of the anti-dumping measures in relation to Dalian Steelforce had changed. The Report stated at paragraph 1.4 that the Commissioner recommended to the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the first respondent) (the **Parliamentary Secretary**) that the dumping duty notice, relevant to Dalian Steelforce, be modified on the basis that the variable factors relating to normal value, export price and the non-injurious price had changed. In summary, the Commissioner stated at paragraph 1.4 that he recommended that the dumping duty remain a combination of fixed and

variable duties; and the fixed component of the interim dumping duty be revised to an amount equal to 17.3% of the export price.

**The grounds of the amended application for judicial review**

6 The applicants rely on a number of the grounds set out in s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

7 Grounds 1 and 2 of the application allege a breach of the rules of natural justice and of procedures required by law to be observed and those grounds have the same factual foundation. Put differently, the reasons particularised in relation to ground 1 found the allegation that the Commissioner failed to follow the procedures set out in ss 269ZC(7)(e)-(g), 269ZD, 269ZDA(3) and (4) of the *Customs Act*.

8 Ground 3 alleges that there was no evidence upon which the Commissioner could have based his finding in the Report that profit should be calculated on domestic sales of non-prime HSS only.

9 Ground 4 alleges an error of law in the calculation of profit based upon select categories of domestic sales of HSS.

10 Ground 5 alleges that the Commissioner erred in law in relation to the actual amount of Dalian Steelforce's profit. It is claimed that there was an error in the manner in which the Commissioner worked out the actual amount of profit realised.

11 Ground 6 alleges that the Commissioner, in using a benchmark price to determine Dalian Steelforce's costs of production or manufacture, made errors of law: first, in using production information from steel mills outside the PRC and, secondly, misapplying s 43(2) of the *Customs (International Obligations) Regulation 2015* (Cth) (the ***Regulation***).

12 Ground 7 alleges that the Commissioner's uplift calculation was unreasonable and involved an error of law: first, because it resulted in Dalian Steelforce's hot-rolled coil (**HRC**) costs being higher than the competitive market price (HSS is made using HRC) and, secondly, as the uplift resulted in Dalian Steelforce's costs being determined by the Commissioner as higher than the costs of production or manufacture as determined in the benchmark.

**The relief claimed**

13 In the amended originating application the applicants sought orders quashing the Report and the recommendations of the Commissioner in the Report; an order prohibiting the

Parliamentary Secretary from considering the Report; an order prohibiting or restraining the Parliamentary Secretary from making a declaration under s 269ZDB of the *Customs Act* in respect of the HSS produced and exported by Dalian Steelforce and imported by Steelforce Trading; and costs.

**Chronology**

14 The background events go back to September 2011 and June 2012 when the Chief Executive Officer of Customs and Border Protection conducted an investigation into alleged dumping and subsidisation of HSS by a number of companies, including Dalian Steelforce, and produced report No. 177 dated 7 June 2012. In July 2012 the Minister for Home Affairs accepted the recommendations in that report and published a dumping duty notice and a countervailing duty notice. A dumping duty of 13.4% and a countervailing duty of 11.1% were applicable to exports of HSS by Dalian Steelforce.

15 On application by the present applicants for judicial review, filed on 31 July 2012, on 27 November 2015 (after the publication of reasons on 21 August 2015) the Court made orders setting aside the decision to publish the dumping duty and countervailing notices: *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs (No 2)* [2015] FCA 1332 (Nicholas J). The relevant orders were as follows:

> 1. In so far as it applies to the First Applicant, the decision of the First Respondent made on 26 April 2013 pursuant to s 269ZZM(1) of the *Customs Act 1901* (Cth) be set aside.
> 2. The matter be remitted to the First Respondent for consideration under s 269ZZM of the *Customs Act 1901* (Cth) and in accordance with the following directions:
>
> (a) the Minister's consideration of the matter take place in accordance with the Court's reasons for judgment published on 21 August 2015 and 27 November 2015; and
>
> (b) the Minister's consideration of the matter under s 269ZZM take place in accordance with the provisions of the *Customs Act 1901* (Cth) as they stood at 26 April 2013.

16 On 9 April 2015, the Commissioner decided not to reject Steelforce Trading's application under s 269ZA for a review of trade measures applied to HSS exported by Dalian Steelforce. This was Investigation No. 285. As I have said, the review period was 1 January 2014 to 31 December 2014.

17 The Commissioner published a Statement of Essential Facts (**SEF**) No 285 on 28 July 2015. The Commissioner's then proposed recommendations were that the countervailing duty be 0% and that the dumping margin was negligible (less than 2%).

18 On 17 August 2015, Australian Tube Mills (**ATM**) made a submission in response to the SEF, which I consider more fully below at [68].

19 On 20 August 2015, Dalian Steelforce responded to ATM's submission, which I consider more fully below at [69].

20 On 19 February 2016, Steelforce Trading was advised by email by the Commissioner that the dumping margin had been recalculated for the final report to be 17.3%.

21 On 23 February 2016, Steelforce Trading met with officers of the Commissioner to discuss the calculation of the dumping margin and, the next day, sent an email to the Commissioner confirming what was discussed at the meeting.

22 On 29 February 2016, the Commissioner provided the Report to the Parliamentary Secretary which recommended an interim dumping duty of 17.3%.

23 On 16 March 2016, Steelforce Trading and Dalian Steelforce commenced the present proceedings for judicial review.

**The evidence**

24 Apart from a bundle of documents tendered by each side, the applicants read some affidavit evidence.

25 The applicants tendered parts of an affidavit of Mr Rodney Roy Corkhill sworn 16 March 2016. Mr Corkhill was the Company Secretary of Steelforce Trading and the Chief Executive Officer of Steelforce Australia Pty Limited. The paragraphs that were read and admitted were [16]-[21], [23]-[24] and [39]-[44]. I rejected paragraph [22] as inadmissible.

26 In those paragraphs Mr Corkhill deposed as follows. He said that on 18 February 2016 he had a telephone conversation with the Commissioner who said words to the effect that he wanted to be "open and transparent" about the review and "not blind side" the applicants. The Commissioner explained that in preparing the Report, the dumping duty had been recalculated and the Commission had come to a different figure than reported in the corrected SEF. He said words to the effect that that figure was "way away" from "your numbers". Mr

Corkhill said although he was not aware of the numbers to which the Commissioner referred as being the applicants', it was clear from the conversation that the dumping duty rate was now much higher than it had been before.

27 In a telephone conversation on 19 February 2016 with an officer of the Commission about the dumping duty calculations, that officer said words to the effect that the Commissioner had calculated the dumping duty to be around 18%. Mr Corkhill said words to the effect of "can I make submissions on this calculation?" To which the officer responded with words to the effect of "No, the process is effectively over".

28 On the same day, the trade advisor to Steelforce Trading received an email from the Commissioner enclosing the calculations for the report which were to be provided to the Parliamentary Secretary. The dumping margin was calculated at 12.7%. A further email followed on the same day from the Commissioner advising that the calculation of 12.7% should be disregarded as there was an error. Further calculations were provided which showed the dumping margin to be calculated at 17.3%.

29 On 23 February 2016, Mr Corkhill deposed that, he attended a meeting at the offices of Steelforce Trading in Brisbane with officers of Steelforce Australia Pty Ltd and two officers of the Commission, those officers being Mr Justin Wickes and Mr Joe Crowley. At the meeting the parties discussed the method used by the Commissioner to determine profit; the replacement of coil costs used in the calculation; and the choice of benchmark price used in the calculations.

30 On the next day, 24 February 2016, Mr Corkhill sent an email to the Commissioner confirming what was discussed at the meeting on 23 February 2016. That email was in the following terms, omitting formal parts:

> … After reviewing the calculations over the weekend, we identified three key areas for discussion that covered the major disconnect between our dumping duty calculations and the Commission's. I have provided below a summary of the key talking points around these topics, from our meeting, which have been reviewed and confirmed by Justin earlier today as an accurate summary of discussions.
>
> 1. **Calculation of profit** - we explained that all domestic sales are considered and treated as 'downgrade' or 'non-prime' products, as they all relate to like goods which have non-complying characteristics such as aesthetic appearance or non-conforming mechanical or chemical properties. We agree with the Commission that these are all sales not in the ordinary course of trade. We also agree that these sales may be considered to be the same general category of goods. We further agree with the view outlined

by the Commission in the SEF 285, that a meaningful and suitable profit cannot be calculated using these downgrade products. However, we now understand that the Commission has reversed its position on this issue. We believe that the calculation of profit is flawed as it incorrectly compares the selling prices of downgrade products, which have been produced and stockpiled over many months and years, with contemporary costs that do not relate to those particular goods. As the evidence provided to the Commission shows, approximately 75% of all domestic sales would have been produced in the previous year. And for the remaining sales, there is a strong likelihood that the sales were produced in an earlier quarter to the month in which it was sold. This is evidenced from the submitted mill certificates. Hence the calculated profit is not accurate as it does not reasonably compare the selling price with the relevant costs. We also agree with OneSteel that the profit should be calculated having regard to all relevant information. In our view, we consider that the weighted average profit achieved by cooperating exporters in the original investigation and the basis of the original normal value, remains relevant and reasonable.

2. **Replacement of coil costs** - we explained that the method used to substitute Dalian Steelforce's coil costs results in the adjusted costs being substantially greater than the determined benchmark. This does not seem reasonable or the preferred approach being adopted by the Commission in other investigations or reviews. We explained that we agreed with OneSteel that the benchmark price determined by the Commission should be substituted so that the replaced coil costs reflected the benchmark price. The Commission commented that in applying the benchmark price, an adjustment would be required for the yield associated with conversion of coil to HSS. We agreed and identified the relevant yield for the review period in the Commission's calculations.

3. **Use of MEPS for benchmarking purposes –** we explained that there was general confusion by the inconsistency in the Commission's use of MEPS in this review, when it has not been considered relevant for benchmarking purposes in other steel investigations. We also queried the willingness to change the benchmarking source given the lack of proper reasoning by OneSteel, and the clear preference by the Australian market for relying on SBB published data.

After providing explanations to Justin and Joe on the points above, it became apparent very quickly that the gap between our calculation results and the Commission's is due primarily to a gap in the Commission's understanding of the Steelforce business operations. After having the opportunity to provide further explanation, we believe that we are now in agreement on the key issues above.

As such, we believe that we have a legitimate case for adjusting the Commission's calculations to more accurately reflect a lower interim dumping duty rate applicable to Steelforce. I would be grateful if you would consider these discussions prior to finalising your report to the Parliamentary Secretary.

31 Mr Corkhill's evidence was not challenged and I accept it.

32 The applicants also read a further affidavit of Mr Corkhill sworn 20 June 2016. In that affidavit Mr Corkhill deposed, in relation to the meeting on 23 February 2016, that during the

meeting none of the representatives of the Commissioner said that the meeting was an opportunity for the applicants to make submissions on the calculations and the representatives of the Commissioner did not indicate that anything in the meeting would be placed on the public record. Mr Corkhill said that his understanding was that the only record of the meeting was his email to the Commissioner on 24 February 2016 which summarised the issues discussed. He said that a copy of the email did not appear on the public record. There was no note or indication on the public record of the meeting having taken place or of anything that occurred or was said at the meeting. This evidence was not challenged and I accept it.

33 Parts of an affidavit of Mr Alan Matthew Gerard affirmed 20 June 2016 were also sought to be read, those paragraphs being 1, 2, 3, 9, 13, 14, 15, 19(c) and 19(d). I rejected those paragraphs as they referred to matters of underlying fact which were not before the Commissioner or communicated to the Anti-Dumping Commission and because senior counsel for the respondents indicated that on the applicants' procedural fairness ground he was not going to make a submission that there was nothing that could have been said.

**The submissions of the parties and consideration of those submissions**

*Grounds 1 and 2*

34 The applicants submitted that there had been a breach of the rules of procedural fairness and of the procedures required by law to be observed in connection with the making of a decision.

35 First, the applicants submitted that for the purposes of calculating the selling, general and administrative costs of the normal value for s 269TAC(2)(c), the SEF stated that Dalian Steelforce did not have any domestic sales of goods in the same general category as the goods exported to Australia and, as a result, the Commissioner calculated selling, general and administrative costs using "any other reasonable method" as referred to in s 44(3)(c) of the *Regulation* but did not set out what that other method was. In the Report, the Commissioner concluded that Dalian Steelforce's domestic sales of goods were in the same general category of goods as the goods exported to Australia. The Commissioner then proceeded to use Dalian Steelforce's export costs to calculate selling, general and administrative costs.

36 Secondly, the applicants submitted that in the SEF, consistently with the view the Commissioner had expressed in relation to selling, general and administrative costs, the Commissioner did not regard Dalian Steelforce's domestic sales as being in the same general category of goods for the purposes of determining profit. In the SEF the Commissioner did

not propose adding any profit to the constructed cost to manufacture and sell goods domestically. The weighted average dumping margin was assessed as being negligible. In the Report, the Commissioner assessed the profit component on the basis that Dalian Steelforce's domestic sales of non-prime and downgrade goods were in the same general category of goods as the goods exported to Australia. The Commissioner recommended assessing profit using s 45(3)(a) of the *Regulation*.

37 Thirdly, the applicants submitted that the Commissioner made the explicit finding on page 24 of the Report that he regarded "non-prime and downgrade products" as the same general category of goods as the goods exported to Australia. In addition to changing his view from that expressed in the SEF about whether the domestic sales were in the same general category of goods in calculating profit under s 45(3)(a), it was submitted that the Commissioner went further. The Commissioner had never before identified any relevant distinction between categories of domestic HSS sales for the purposes of calculating a normal value: non-prime and downgrade were treated as equivalent terms. Yet, without notice, the Commissioner recommended a profit calculation based not on all domestic sales in the same general category but on a subset of those sales. The Commissioner had selected from all domestic sales only a subset of those products as the basis of his profit assessments. Specifically, the Commissioner had included only sales of HSS identified as non-prime with finishes of "NOPC", "NOPC/Painted", "Painted" and "Pregal" HSS, and excluded sales of HSS identified as downgrade.

38 The applicants submitted they were denied the ability to comment on whether the domestic sales of the product were in the same general category as their exports to Australia. In addition, the applicants submitted they were not made aware that the Commissioner would base his recommendation on a profit calculation based upon domestic sales in the PRC. No profit had been proposed to be added in the SEF. The applicants submitted they were denied the opportunity to make a submission on that method of profit assessment, or on the division of the sales of the same general category of goods into subsets. The inability to make such a submission resulted, the applicants submitted, in the Commissioner making errors in the profit calculations which were the subject of other grounds of appeal.

39 The applicants submitted that the Commissioner had denied them procedural fairness and had also failed to follow the procedures required by ss 269ZC(7)(e)-(g), 269ZD, 269ZDA(3) and (4) but, in particular, s 269ZD(1), which required the Commissioner to place on the public

record a statement of the facts on which the Commissioner proposed to base a recommendation to the Minister in relation to the review of anti-dumping measures (the SEF).

40 The respondents submitted that there had been no denial of procedural fairness in the sense of any practical injustice to the applicants. As ground 2 was dependent on the success of ground 1 it failed for the same reasons.

41 The respondents characterised the applicants' complaints as being that statements in the SEF did not accord with the ultimate findings of the Report and the applicants had no opportunity to be heard on the determination of the dumping margin of 17.3%.

42 The respondents submitted that the publication of an SEF was to be performed at a particular time (within 110 days after the publication of the notice under s 269ZC). There was no basis for inferring that the obligation continued so that a revised SEF must be published whenever the Commissioner's understanding of the facts changed. The SEF provided a formal mechanism whereby interested parties were informed of the information before the Commissioner and the findings proposed to be made. The principles of procedural fairness did not require the Commissioner to give a further update on his proposed findings. Submissions made in response to the SEF by interested parties were required to be placed on the "public record" maintained by the Commissioner under s 269ZJ and this was done. By those means parties were informed of, and were able to respond to, any arguments about matters discussed in the SEF raised by other parties. The respondent referred to *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice and Customs* [2008] FCA 443; 104 ALD 481 and submitted that there was no finding in that case that an amended SEF was required before the decision-maker took a different approach in the final report – only that on the specific facts of that case the opportunity to deal with "the critical issue or factor" on which the decision was to turn had been denied.

43 The respondents submitted that those submissions were sufficient to dispose of grounds 1 and 2 as there was no basis to suggest that an SEF was not published in accordance with s 269ZD, or that the submissions received in response to the SEF were not considered. The respondents further submitted that each of the issues upon which the Commissioner's position changed was clearly brought to the attention of the applicants before the Report was finalised.

44 As to the first complaint, see [35] above, the respondents submitted that a third party, ATM, raised the broader issue of selling, general and administrative costs in its submission of 17 August 2015, criticising the method that had been used in the SEF, and the applicants responded to this issue in a submission dated 20 August 2015. The respondents also referred to the meeting between officers of the Commission and representatives of the applicants on 23 February 2016. The nature of Dalian Steelforce's domestic sales and whether they included sales in "the same general category of goods" was discussed at this meeting, albeit in connection with the profit calculations. In any event, the respondents submitted, the change of position in relation to domestic sales did not affect the approach to calculating selling, general and administrative costs. The Report concluded that even though there were domestic sales in the "same general category", the nature of those sales meant that Dalian Steelforce's export sales remained the most appropriate basis for calculating selling, general and administrative costs and, therefore, there was no change from the method used in the SEF.

45 As to the second complaint, see [36] above, the respondents submitted that in its submission of 17 August 2015 the same third party, ATM, directly took issue with the conclusion in the SEF that there was no sufficient basis to calculate a profit and contended that Dalian Steelforce's domestic sales could be used for this purpose. The applicants responded in their submission of 20 August 2015. On 19 February 2016, an officer of the Commission sent revised calculations to the applicants' advisor. The revised calculations included a profit component based on some of those sales under s 45(3)(a) of the *Regulation*. The respondents referred again to the meeting on 23 February 2016, and submitted that the discussion included which of the applicants' domestic sales comprised goods in the "same general category".

46 As to the third complaint, see [37] above, the respondents submitted that this was really an aspect of the second. The profit calculation which was sent to the applicants' advisor on 19 February 2016 (and discussed at the meeting on 23 February 2016) used domestic sales of "non-prime" products and excluded "downgrade", which was also the position taken in the Report.

47 In their written reply, the applicants submitted that the Commissioner failed to advise of a "critical issue or factor" when he stated in the SEF that he did not regard the second applicant's domestic sales as being in the same general category as its export sales and then reversed that conclusion in the Report by regarding the domestic sales as being in the same

general category and then subdividing them without notice of either to the second applicant. The amount to be the profit was increased from zero in the SEF to 10.8% in the Report. It was submitted that findings that the goods were in the "same general category" were clearly "critical factors". The Commission's departure from the method adopted in the SEF changed the nature of the opportunity previously given to the Dalian Steelforce and, as a result, rendered prior submissions largely irrelevant. The applicants submitted the Commissioner was obliged to advise of any adverse conclusion not open on the known material: a person whose interests were affected could not be left to guess. The applicants submitted that the period provided for submissions on the SEF "in response to" it was not the time for anticipating changes to the essential facts. This point was emphasised by the requirement for the SEF to be taken into account when making recommendations to the Minister. If it were contemplated that facts could change it would not make sense to require that the SEF be taken into account. The failure to accord procedural fairness was not, and was never intended to be, rectified at the meeting which took place on 23 February 2016. The meeting was never on the public record, it did not comply with s 269ZJ(1), and s 269ZJ(4) prevented it being taken into account. A failure to include the factual finding about whether the second applicant's domestic sales were of goods in the same general category denied the applicants procedural fairness and failed to follow the procedures set out by law.

48 I turn to consider grounds 1 and 2. It is necessary to retrace, by reference to the steps required by the *Customs Act*, the events of which the applicants complain. As was said by a unanimous High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at 160-161 [26], it has long been established that the statutory framework within which a decision-maker exercises a statutory power is of critical importance when considering what procedural fairness requires. Otherwise the argument proceeds at too high a level of abstraction and may proceed upon assumptions that are ill founded. Their Honours added that it was also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case.

49 By s 269ZC(4), where the Commissioner decides not to reject an application for review of anti-dumping measures, relevantly for these purposes the Commissioner must publish a notice on the Commission's website. Pursuant to s 269ZC(7), that notice must, amongst other things, invite interested parties to lodge with the Commissioner, within 37 days after the date of publication of the notice, submissions concerning the review. It must state that within 110

days after the publication of the notice (or such longer period as the Minister allows) the Commissioner will place on the public record a statement of the essential facts on which the Commissioner proposes to base a recommendation concerning the measures under review and inviting interested parties to lodge with the Commissioner, within 20 days of that statement being placed on the public record, submissions in response to that statement. The expression "interested party" is defined in s 269T(1) to include an applicant for review.

50 Section 269ZD provided:

> **269ZD Statement of essential facts in relation to review of anti-dumping measures**
>
> (1) If the Commissioner publishes a notice under subsection 269ZC(4), (5) or (6) in relation to the review of anti-dumping measures, he or she must, within 110 days after the publication of the notice or such longer period as the Minister allows under section 269ZHI, place on the public record a statement of the facts (the ***statement of essential facts***) on which the Commissioner proposes to base a recommendation to the Minister in relation to the review of those measures.
>
> (2) Subject to subsection (3), in formulating the statement of essential facts, the Commissioner:
>
> (a) must have regard to:
>
> (i) the application or request; and
>
> (ii) any submissions relating generally to the review that are received by the Commissioner within 37 days after the publication of the notice under subsection 269ZC(4), (5) or (6); and
>
> (iii) any other submission received by the Commissioner relating generally to the review if, in the Commissioner's opinion, having regard to the submission would not prevent the timely placement of the statement of essential facts on the public record; and
>
> (b) may have regard to any other matters that the Commissioner considers relevant.
>
> (3) The Commissioner is not obliged to have regard to any submissions relating generally to the review that are received by the Commissioner after the end of the period referred to in subparagraph (2)(a)(ii) if to do so would, in the Commissioner's opinion, prevent the timely placement of the statement of essential facts on the public record.

51 By s 269ZDA, where the Commissioner has conducted a review of anti-dumping measures within 155 days after the date of publication of the notice, or such longer period as the Minister allows, the Commissioner must give the Minister a report. The report must recommend that the dumping duty notice or countervailing duty notice remain unaltered; or,

that the notice be revoked in its application to a particular exporter or to a particular kind of goods or revoked generally; or, that the notice have effect in relation to a particular exporter or to exporters generally, as if different variable factors had been ascertained. Relevant to the present procedural question are the following provisions of s 269ZDA:

> (3) Subject to subsection (4), in deciding on the recommendations to be made to the Minister in the report, the Commissioner:
>
> (a) must have regard to:
>
> (i) the application or request for review; and
>
> (ia) any application to extend the review that was not rejected; and
>
> (ib) any request to extend the review; and
>
> (ii) any submission relating generally to the review to which the Commissioner has had regard for the purpose of formulating the statement of essential facts in relation to the review; and
>
> (iii) that statement of essential facts; and
>
> (iv) any submission made in response to that statement that is received by the Commissioner within 20 days after the placing of that statement on the public record; and
>
> (b) may have regard to any other matters that the Commissioner considers to be relevant to the review.
>
> (4) The Commissioner is not obliged to have regard to any submission made in response to the statement of essential facts that is received by the Commissioner after the end of the period referred to in subparagraph (3)(a)(iv) if to do so would, in the Commissioner's opinion, prevent the timely preparation of the report to the Minister.
>
> (5) The report to the Minister must include a statement of the Commissioner's reasons for any recommendation contained in the report that:
>
> (a) sets out the material findings of fact on which that recommendation is based; and
>
> (b) provides particulars of the evidence relied on to support those findings.

52 By s 269ZJ(1), subject to information claimed to be confidential, the Commissioner must maintain a public record of the review, containing a copy of all submissions from interested parties, the SEF compiled in respect of that review, and a copy of all relevant correspondence between the Commissioner and other persons; draw the attention of all interested parties to the existence of the public record, and to their entitlement to inspect that record; and, at the request of an interested party, make the record available to that party for inspection. By s 269ZJ(4), if oral information is given to the Commissioner by a person, the Commissioner must not take that information into account unless it is subsequently put in writing and thereby becomes available as a part of the public record.

53 It is also to be noted that by s 269TE the Commissioner is required, in making such a recommendation, to determine any matter ordinarily required to be determined by the Minister under the *Customs Act* or the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) in like manner as if he or she were the Minister and having regard to the considerations to which the Minister would be required to have regard if the Minister were determining the matter.

54 Although, it cannot be maintained that the Commissioner was bound to adhere to what was stated in the SEF, that is not the end of the enquiry. In my opinion, if a critical issue or factor first appeared only in the Report where the opposite view of that critical issue or factor had been stated in the SEF and practical injustice was thereby caused to an interested party, there may be a denial of procedural fairness.

55 I put to one side, for present purposes, the claimed failure to follow statutory procedures as I am not persuaded that there was any failure to follow the procedure required by s 269ZC(7) as to the content of the notice under s 269ZC(4) or any breach of the obligation under s 269ZD, in particular s 269ZD(1), to place on the public record a SEF, being the facts on which the Commissioner proposed to base a recommendation to the Minister in relation to the review of the measures. Neither is there any evidence to suggest that the Commissioner did not have regard to the matters he was either required to have regard to or had a discretion to have regard to as referred to in s 269ZDA(3) and s 269ZDA(4).

56 In the present case, in para 5.5.2.2 of the SEF, the Commission considered selling, general and administrative costs. In that context it was explained that the Commission had used s 44(3)(c) of the *Regulation* and used the export selling, general and administrative costs as reported by Dalian Steelforce in relation to their sales of HSS to Australia for the purpose of constructing a normal value in light of, amongst other things, the statement "Dalian Steelforce does not have any domestic sales of goods in the same general category as the goods exported to Australia."

57 Turning to the Report in relation to this subject matter, in para 4.4.2.2 the Commission said that it had further examined Dalian Steelforce's domestic sales and considered that it had domestic sales of goods in the same general category as the goods exported to Australia. However, the Commission noted that those domestic sales were of non-prime and downgrade products and were isolated sales of sub-standard product, for which it was more cost-effective for Dalian Steelforce to dispose of locally than export to Australia. For that reason, the

Commission said, it continued to consider that Dalian Steelforce's export selling, general and administrative costs were the most suitable for the purpose of constructing a normal value.

58 The Commission noted, but did not accept ATM's submission, that the Commission use selling, general and administrative costs from a recently completed review relating to exports of HSS from a single Chinese exporter as permitted under s 44(3)(b) of the *Regulation*.

59 In the present case, in para 5.5.2.3 of the SEF, the Commission considered profit and stated that the Commission had not added any profit to the constructed cost to manufacture and sell the goods domestically based on, amongst other things, what was said to be the inapplicability of s 45(3)(a) of the *Regulation* because: "Dalian Steelforce does not have any domestic sales of the same general category of goods during the review period that are considered suitable for the purpose of establishing a profit on domestic sales."

60 Section 269TAC of the *Customs Act* provided, so far as relevant:

> **269TAC Normal value of goods**
>
> (1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.
>
> (1A) …
>
> (2) Subject to this section, where the Minister:
>
> (a) is satisfied that:
>
> (i) because of the absence, or low volume, of sales of like goods in the market of the country of export that would be relevant for the purpose of determining a price under subsection (1); or
>
> (ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);
>
> the normal value of goods exported to Australia cannot be ascertained under subsection (1); or
>
> (b) is satisfied, in a case where like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under subsection (1);
>
> the normal value of the goods for the purposes of this Part is:

(c) except where paragraph (d) applies, the sum of:

(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and

(ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export—such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale; or

(d) if the Minister directs that this paragraph applies—the price determined by the Minister to be the price paid or payable for like goods sold in the ordinary course of trade in arms length transactions for exportation from the country of export to a third country determined by the Minister to be an appropriate third country, other than any amount determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of any such transactions.

(3) The price determined under paragraph (2)(d) is a price that the Minister determines, having regard to the quantity of like goods sold as described in paragraph (2)(d) at that price, is representative of the price paid in such sales.

(3A) The Minister is not required to consider working out the normal value of goods under paragraph (2)(d) before working out the normal value of goods under paragraph (2)(c).

(4) …

(5) …

(5A) Amounts determined:

(a) to be the cost of production or manufacture of goods under subparagraph (2)(c)(i) or (4)(e)(i); and

(b) to be the administrative, selling and general costs in relation to goods under subparagraph (2)(c)(ii) or (4)(e)(ii);

must be worked out in such manner, and taking account of such factors, as the regulations provide for the respective purposes of paragraphs 269TAAD(4)(a) and (b).

(5B) The amount determined to be the profit on the sale of goods under subparagraph (2)(c)(ii) or (4)(e)(ii), must be worked out in such manner, and taking account of such factors, as the regulations provide for that purpose.

…

61 Section 45 of the *Regulation* provided:

**Division 2—Normal value of goods**

**45 Determination of profit**

(1) For subsection 269TAC(5B) of the Act, this section sets out:

(a) the manner in which the Minister must, for subparagraph

269TAC(2)(c)(ii) or (4)(e)(ii) of the Act, work out an amount (the ***amount***) to be the profit on the sale of goods; and

(b) factors that the Minister must take account of for that purpose.

(2) The Minister must, if reasonably practicable, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade.

(3) If the Minister is unable to work out the amount by using the data mentioned in subsection (2), the Minister must work out the amount by:

(a) identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export; or

(b) identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or

(c) using any other reasonable method and having regard to all relevant information.

(4) However, if:

(a) the Minister uses a method of calculation under paragraph (3)(c) to work out an amount representing the profit of the exporter or producer of the goods; and

(b) the amount worked out exceeds the amount of profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export;

the Minister must disregard the amount by which the amount worked out exceeds the amount of profit normally realised by the other exporters or producers.

(5) For this section, the Minister may disregard any information that he or she considers to be unreliable.

(6) For paragraph (3)(b), subsection 269T(5A) of the Act sets out how to work out the weighted average.

62 Previously, in para 5.5.2.3 of the SEF, the Commission said that it had again examined the nature of Dalian Steelforce's domestic sales of like goods to determine whether sales in the ordinary course of trade could be identified to determine profit under s 45(2) of the *Regulation*. The domestic sales' listing provided by Dalian Steelforce of like goods in response to the exporter questionnaire included sales of both non-alloy HSS and alloy HSS but the Commission said it was satisfied that those sales were only of products that were considered sub-prime or downgrade. The Commission considered that the nature of those goods meant that domestic sales made during the review period were not in the ordinary course of trade for the purposes of the review. As the Commission found that there were no

sales of like goods in the ordinary course of trade, it said in the SEF that s 45(2) of the *Regulation* could not apply.

63 In the Report, at para 4.4.3.1, the Commission noted the submission by ATM dated 17 August 2015 and Dalian Steelforce's response dated 20 August 2015, including on the issue of profit. Having regard to those submissions, the Commission had considered the findings made in the SEF on this issue.

64 At para 4.4.3.2 of the Report, in relation to the domestic sales of like goods, the Commission said it was satisfied that these sales were only of products that were considered non-prime or downgrade, and again considered that the nature and low-volume of those goods meant that domestic sales made during the review period were not in the ordinary course of trade for the purposes of the review. It followed, the Commission said, that s 45(2) of the *Regulation* could not apply. After some analysis, the Commission relied on s 45(3)(a) of the *Regulation* to add the profit from Dalian Steelforce's sales of the same general category of goods in the PRC's domestic market to the constructed cost to manufacture and sell the goods domestically.

65 The Commission's analysis was to address s 45(3)(a) of the *Regulation* which provided that the Minister must work out the amount which was to be the profit on the sale of goods by identifying the actual amount realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export. The Commission considered that Dalian Steelforce's domestic sales of non-prime alloy HSS and non-prime non-alloy HSS comprised the same general category of goods. It considered non-prime HSS to be the closest category of goods to the 'prime' HSS exported to Australia. Because s 45(3)(a) of the *Regulation* did not require that the domestic sales of the same general category of goods be made in the ordinary course of trade, the non-prime HSS sales were considered suitable for the purpose of establishing an amount for profit.

66 I am not persuaded that there was any denial of procedural fairness, constituting practical injustice, in relation to the selling, general and administrative costs: the Commission continued to consider that Dalian Steelforce's export selling, general and administrative costs were the most suitable for the purpose of constructing a normal value: see the Report at para 4.4.2.2, referred to above at [57]. Put differently, the Commission's change of position did not affect its approach to calculating selling, general and administrative costs.

67 In relation to Dalian Steelforce's domestic sales and the issue of the same general category of goods for the purpose of calculating profit, in my opinion the effect of s 269ZDA(3), set out at [51] above, is that the Commissioner must have regard to not only the SEF but also any submission made in response to that SEF where that submission is received by the Commissioner within 20 days after the placing of the SEF on the public record. In terms of procedural fairness, therefore, an interested party is to be taken to be aware of the issues in any such submission.

68 In the present case, ATM made a submission, dated 17 August 2015, which included the following:

> Level of profit
>
> ATM submits that the Commission has erred by not including a level of profit in the Dalian Steelforce constructed normal value. Subsection 269TAC(5B) requires an amount of profit to be determined in accordance with subsection 45 of the *Regulations*. The Commission has in accordance with the regulations considered the requirements of Subsections 45(2) and (3). ATM disagrees with the Commission's conclusion that it cannot work out an amount of profit for Dalian Steelforce as it is claimed that the only domestic sales of like goods in the ordinary course of trade are for "sub-prime or downgrade" goods. It is not clear from SEF 285 how the Commission was satisfied that the referred domestic sales that were confirmed as sub-prime or downgrade were not either a "like good" or a good of the "same general category" when subprime product whilst not suitable for sale to Australian standards may have been suitable (sic) sale to Chinese standards.
>
> "As highlighted and explained in Dalian Steelforce's exporter questionnaire response, all sales of HSS on the Chinese market are exceptional sales, taken from stockpiles of non-prime products which failed to comply with strict quality control measures based on Australian Standards."
>
> ATM contends that these sales – that are alike and considered as such by the Commission – can be used for determining a level of profit to be applied in Dalian Steelforce's s. 269TAC(2)(c) constructed normal value. The provisions do not permit the Minister to exclude the profit on sales of like goods that are described as "non-prime" goods by Dalian Steelforce. The non-prime goods are alike to the exported goods and the level of profit included in those domestic sales must be used on the basis of subsection 45(3) by "having regard to all relevant information".
>
> …
>
> SEF 285 indicates that the dumping margin determined for Dalian Steelforce (based upon export prices during the review investigation period and the constructed normal values) was "negligible". ATM submits that the inclusion of a relevant SG&A expense for domestic sales and a reasonable level of profit will result in the dumping margin for Dalian Steelforce being above negligible levels.
>
> (Footnote omitted.)

69 Dalian Steelforce's responded to ATM's submission, its submission being dated 20 August 2015. It included the following:

> **3. Level of profit**
>
> ATM states that it disagrees with the Commission's finding that profit on sales of like goods were not able to be determined under subsection 45(2) of the Regulations. In particular, ATM states that it disagrees with the Commission's conclusion *'that it cannot work out an amount of profit for Dalian Steelforce as it is claimed that the only domestic sales of like goods in the ordinary course of trade are for "sub-prime or downgrade" goods.'*
>
> It appears to Dalian Steelforce that ATM has misunderstood the Commission's findings in SEF 285 as they have ultimately concluded that sales of like goods were not sales made in the ordinary course of trade. As explained in SEF 285, this finding is consistent with the Commission's original findings in REP 177 and REP 2013.
>
> Further, ATM appears to again be submitting a position inconsistent with its previous views. In the original investigation, OneSteel ATM commented on domestic sales of downgrade pipe by the Taiwanese exporter, Yieh Phui, and submitted that *'[a]s there are no export sales of downgrade pipe, OneSteel ATM does not consider that a fair comparison can be made if domestic sales of downgrade pipe are included in normal value calculations.'*
>
> Dalian Steelforce submits that the Commission's finding is supported by evidence provided by Dalian Steelforce and consistent with its practice of treating downgrade steel products as sales not in the ordinary course of trade and not relevant for the purposes of determining normal values.
>
> …
>
> (Original emphasis. Footnote omitted.)

70 In my opinion, the issue was raised at the appropriate level of particularity, including by reference to s 45(2) and (3) of the *Regulation*, by ATM and that submission was on the public record maintained under s 269ZJ. As I have said, the Commissioner was required to have regard to it. In order to afford the applicants procedural fairness it was not necessary for the Commissioner to go further. In the present case, however, the applicants recognised, by their submission, that how profit was going to be worked out, whether there were domestic sales that could be used and what goods were suitable for that purpose, remained a live issue. The Commissioner was required to have regard to the applicants' submission as well.

71 For completeness I note, but do not rely on for my conclusion, the communications between officers of the Commission and officers or advisors of the applicants on and after 19 February 2016, those communications beginning when an officer of the Commission sent revised calculations, and the subsequent discussion at the meeting on 23 February 2016 as set out at [20]-[23] and [27]-[30] above. This is because I have accepted the evidence that on 19 February 2016 an officer of the Commission said to Mr Corkhill words to the effect that further submissions on the calculation of dumping duty would not be received as the process was effectively over: see [27] and [31] above.

72 For these reasons, grounds 1 and 2 fail.

*Ground 3*

73 This is a "no evidence" ground, claiming that there was no evidence upon which the Commissioner could have based his finding in the Report that profit should be calculated on domestic sales of non-prime HSS only. The applicants submitted that the facts were simply not available to support the conclusion as stated in the Report, that non-prime HSS and only non-prime HSS was the same general category of goods, and that conclusion contradicted the finding made in the Report that non-prime and downgrade *were* in the same general category of goods.

74 The applicants submitted that nowhere in the Report was there any finding about non-prime/downgrade HSS: distinguishing between non-prime/downgrade HSS and HSS exported to Australia; justifying the change in view in the SEF that non-prime/downgrade HSS was not the same general category of goods and the view in the Report that it was; permitting a distinction to be drawn within the category of non-prime/downgrade steel; or permitting a finding that would justify calculating profit on the basis of sales that excluded HSS labelled "downgrade".

75 The respondents submitted that this ground called for attention to the material that was before the Commission rather than the discussion of that material in its reasons. The respondents further submitted that the question was whether there was nothing before the Commissioner capable of supporting the inference specified, such that the inference was not reasonably open: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 at 356. I accept both these submissions in relation to this ground of judicial review.

76 The respondents submitted that the distinction drawn at page 27 of the Report between downgrade and non-prime was a distinction which had a basis in the material that was before the Commission and could not be described as one unsupported by evidence.

77 In this respect, the respondents referred to a contrast between the original Exporter Questionnaire submitted on 6 March 2015 and the revised Exporter Questionnaire dated 19 June 2015. In the earlier document it was said:

> Dalian Steelforce is generally unable to sell lower quality HSS to its Australian customers. Almost all downgrade material is cleared from the factory by way of being sold on the domestic market.

In the later document it was said:

> Dalian Steelforce is unable to sell lower quality HSS to its Australian customers. Non-prime / downgrade material is cleared from the factory by way of being sold on the domestic market.

78 The respondents referred to Appendix 15 accompanying the revised Exporter Questionnaire showing products listed as non-prime and products listed as downgrade.

79 The respondents also referred to an email from the applicants dated 16 June 2015 providing certain material, including the revised Exporter Questionnaire and stating, in respect of a Revised Domestic Sales document:

> … All sales are now properly described as non-prime/downgrade and we have included the ocean freight expenses relevant to CFR sales. As explained below and evidenced by the test certificates, goods described as NOPC or pregal or painted are still classified as 'downgrade' by Dalian Steelforce as they do not meet the specifications or quality required by the Australian Standard (AS1163).
>
> …
>
> For the four selected domestic sales provided with the questionnaire response, the following additional supporting documentation is provided:
>
> i) … Please also note that these are referred to as downgrade product on the test certs even though they are described as NOPC in the domestic sales spreadsheet. …
>
> ii) ….
>
> iii) Painted downgrade test certificates: Unfortunately the other 2 selected domestic sales were also downgrade for aesthetic reasons and not due to mechanical or chemical properties. So Dalian Steelforce have provided 2 further test certificates where the goods were classified as downgrade due to the yield strength not meeting the minimum 350MPa required by the Australian Standard.

80 A further basis for the distinction, the respondents submitted, was to be found in the spreadsheets which were before the Commission and reproduced as Confidential Appendix 7 to the Report suggesting that the shipments described as non-prime were able to be sold by Dalian Steelforce at some level of profit, whereas the downgrade steel was significantly less valuable: from that the inference was available that the downgrade goods were less useful to purchasers and not suitable for the same uses as the non-prime steel.

81 I accept the respondents' submissions in this respect. In my opinion, this material shows that the distinction made in the Report between downgrade and non-prime steel could be found by the Commissioner as a matter of reasonable inference and, therefore, this is not a case of "no evidence" for the purposes of judicial review. In my view, the submissions on behalf of the

applicants in relation to this ground strayed beyond what is encompassed in the "no evidence" ground of judicial review. I refer here particularly to the applicants' written submissions in reply.

82 For these reasons, ground 3 fails.

*Ground 4*

83 This ground claimed an error of law in dividing domestic sales into subsets. The applicants submitted that the calculation of profit based upon select categories of domestic sales of HSS was an error of law. The Commissioner found at page 27 of the Report that: "The Commission considers that Dalian Steelforce's domestic sales of non-prime alloy HSS and non-prime non-alloy HSS comprise the same general category of goods." The applicants submitted that s 45(3)(a) of the *Regulation* required the Minister to work out the profit amount by identifying the actual amount realised by the exporter from "the sale of the same general category of goods" in the domestic market of the country of export. The applicants submitted the Commissioner was not authorised to select *part* of the goods in the same general category for the purposes of the *Regulation*.

84 The respondents submitted that the Report did not find that "downgrade" goods were also in the "same general category" and then exclude them from consideration. Rather, that finding was only in relation to "non-prime" HSS. Properly understood, the respondents submitted, there was a finding that "downgrade" goods were not in the "same general category". It followed that there was no exclusion of any subset of the goods found to be within s 45(3)(a) of the *Regulation*.

85 Section 45 of the *Regulation* is reproduced at [61] above.

86 I accept that on the proper construction of the *Regulation* it is not open to the Commissioner to identify goods in the same general category and then use only part of those goods to work out the amount to be the profit on the sale of goods under s 45 of the *Regulation*. The question is whether that is what the Commissioner did in the Report.

87 Important to discerning what the Commissioner did is the conclusion in para 4.4.3.2 of the Report, as follows:

> Based on the above, in accordance with subsection 45(3)(a) of the Regulations the Commission has added the profit from Dalian Steelforce's sales of the same general category of goods in the Chinese domestic market to the constructed cost to

manufacture and sell the goods domestically.

88 Earlier, at page 27 of the Report, the terms of s 45(3)(a) of the *Regulation* had been accurately reproduced.

89 In those circumstances, a court on judicial review should not be concerned with looseness in the language of the decision-maker and should not read the decision-maker's reasons with an eye keenly attuned to the perception of error. The reasons are meant to inform and their language is not to be scrutinised overzealously: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 272.

90 In my opinion, the Report is to be read as stating that the same general category of goods is comprised by non-prime HSS: That is what is said on page 27.6 of the Report. Downgrade is not mentioned in that statement and therefore should be read as not being comprised in the non-prime HSS. The Report should not be read as stating that the Commissioner had used the sale of only some of the same general category of goods in the domestic market.

91 For these reasons, ground 4 fails.

*Ground 5*

92 The applicants submitted that, contrary to s 45(3)(a) of the *Regulation*, the Commissioner had not used the *actual amounts realised by the exporter* from the sale of the same general category of goods in the domestic market of the country of export. The applicants submitted that the Commissioner assessed the profit on the sale of 1814 tonnes of HSS by reference to the cost of production and sale during the review period only, however Dalian Steelforce did not produce that quantity of HSS in the review period. This incorrectly increased profit because the input cost of HRC had fallen since much of the product was produced. The applicants contended that Confidential Appendix 7 showed that the domestic sales during the review period included goods produced at earlier times. It was this which the applicants submitted involved a misconstruction of s 45(3)(a) of the *Regulation*. Much of the applicants' submissions on this point were directed to demonstrate a factual proposition which the respondents accepted, as next described.

93 The respondents submitted that the Commissioner worked out the amounts realised by comparing the prices received by Dalian Steelforce for the goods with the production costs for goods of that category in the quarter when the sale occurred, so the price received was compared with the contemporary production costs.

94 The respondents referred to an email dated 22 February 2016 from the applicants' agent which stated that: "For the vast majority of domestic sales, Dalian Steelforce has no way of identifying when the goods were produced. … ". It followed that the Commissioner did not have, and was not able to obtain, the data necessary to determine amounts realised in the manner contended for by the applicants.

95 The respondents next submitted that the "actual amount realised" was a question of fact to be determined by the Minister and to establish an error of law it would be necessary for the applicants to show that the Commissioner had misunderstood that statutory language and that the amounts so determined could not properly be said to be the amounts realised on domestic sales. The respondents submitted that the section left the matter for determination by the Minister and left some leeway of choice as to the appropriate method, which may vary according to the circumstances and the information available.

96 Further, the respondents submitted, the purpose of s 45 of the *Regulation* was to assist in constructing a normal value for goods exported to Australia in a particular period. With reference to s 269TAC(2)(c)(ii), the respondents submitted that the profit component of the exercise was a constructed profit on an assumed sale which did not actually take place and it was a construction for the purpose of allocating a normal value to the goods exported to Australia. Section 269TAC(5B) then stated that the amount determined to be the profit on the sale of goods under s 269TAC(2)(c)(ii) must be worked out in such manner as the regulations provided for that purpose. Section 45(3)(a) of the *Regulation* should therefore be understood at least to permit (if not require) the calculation of profit by comparing the prices obtained with production costs in that period. Otherwise, the respondents submitted, the profit component, and hence the constructed normal value, could vary quite fortuitously depending on how long ago the goods sold in the domestic market had been made.

97 In relation to s 45(3)(a) of the *Regulation*, the respondents submitted that the section prescribed the method, and the actual amounts realised were not being deemed by the provision to be the profit but were, rather, an input or a working out of the appropriate amount to be determined as profit. The normal value was a constructed amount which applied to a class of goods and not something which arose transaction by transaction. Next, the respondents submitted that feeding into a determination being made by the Minister was a component in a constructed normal value and that was a process that involved the exercise of judgment at various levels: no method was prescribed for identifying the actual amounts

realised. Further, the respondents submitted because the exercise was directed at constructing a normal value for goods exported to Australia in a particular period, it could not be erroneous to treat the amount realised as denoting the difference between sale prices and production costs in that period. Calculating the amounts realised in that way produced a profit measure which aligned with the purpose for which the profit was being ascertained under s 269TAC(2)(c). It produced an indication of profit margins applicable in the period that was being investigated.

98 I turn to consider these submissions, noting that there seemed to be little or no dispute between the parties as to the manner in which the identification of the amounts realised by the exporter was done for the purposes of the Report.

99 It appears that the construction of s 45(3)(a) of the *Regulation* for which the applicants contend is that when the section sets out the manner in which the decision-maker must work out an amount to be the profit on the sale of goods and applies that provision by identifying the actual amounts realised by the exporter from the sale of the same general category of goods in the domestic market of the country of export, the section requires the decision-maker to work out the amount by identifying the amount of profit by reference to the actual costs, including historic costs, as opposed to contemporary costs, of the sale of the goods in the review period.

100 In my opinion, s 45(3)(a) of the *Regulation* does not require the actual amounts realised to be based on the historic costs for the particular goods the subject of the sales in the review period, at least where there is real difficulty in identifying when the goods were produced. The applicants' contention would require a construction of that provision which would be not only impracticable but also one inconsistent with the purpose of the section. That purpose is to give effect to, relevantly, s 269TAC(2)(c)(ii). It will be recalled that s 269TAC(2)(c)(ii) proceeds on an assumption, that assumption being that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export. It is in that context that the Minister may determine what would be, relevantly, the profit on that hypothetical sale. To adopt the construction contended for by the applicants would be to bring greater precision to the discretion on the part of the Minister, to determine what would be the profit on the hypothetical sale, than that subject matter warrants. In the circumstances of the present case, I am not persuaded that the Commissioner erred in treating the actual

amounts realised as the difference between sale prices and production costs in the review period.

101 For these reasons ground 5 fails.

*Ground 6*

102 The applicants submitted that the Commissioner, in using a benchmark price to determine Dalian Steelforce's cost of production or manufacture, erred in law by using production information from steel mills outside the PRC, contrary to s 269TAC(2)(c)(i) and, if the Commissioner relied upon s 43(2) of the *Regulation*, he misapplied that section in determining Dalian Steelforce's cost of production or manufacture.

103 Section 269TAAD of the *Customs Act* provided, so far as relevant:

> **269TAAD Ordinary course of trade**
>
> (1) If the Minister is satisfied, in relation to goods exported to Australia:
>
> (a) that like goods are sold in the country of export in sales that are arms length transactions in substantial quantities during an extended period:
>
> (i) for home consumption in the country of export; or
>
> (ii) for exportation to a third country;
>
> at a price that is less than the cost of such goods; and
>
> (b) that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period;
>
> the price paid for the goods referred to in paragraph (a) is taken not to have been paid in the ordinary course of trade.
>
> (2) …
>
> (3) …
>
> (4) The cost of goods is worked out by adding:
>
> (a) the amount determined by the Minister to be the cost of production or manufacture of those goods in the country of export; and
>
> (b) the amount determined by the Minister to be the administrative, selling and general costs associated with the sale of those goods.
>
> (5) Amounts determined by the Minister for the purposes of paragraphs (4)(a) and (b) must be worked out in such manner, and taking account of such factors, as the regulations provide in respect of those purposes.

104 Section 43 of the *Regulation* provided, so far as relevant:

> **Part 8—Anti-dumping duties**
>
> **Division 1—Ordinary course of trade**
>
> **43 Determination of cost of production or manufacture**
>
> (1) For subsection 269TAAD(5) of the Act, this section sets out:
>
> (a) the manner in which the Minister must, for paragraph 269TAAD(4)(a) of the Act, work out an amount (the ***amount***) to be the cost of production or manufacture of like goods in a country of export; and
>
> (b) factors that the Minister must take account of for that purpose.
>
> (2) If:
>
> (a) an exporter or producer of like goods keeps records relating to the like goods; and
>
> (b) the records:
>
> (i) are in accordance with generally accepted accounting principles in the country of export; and
>
> (ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;
>
> the Minister must work out the amount by using the information set out in the records.

105 The applicants submitted that s 269TAC(2)(c)(i), reproduced at [60] above, only permitted the Minister to determine the cost of production or manufacture in the country of export. Using the cost of production or manufacture from countries other than the country of export was to take into account an irrelevant consideration and to make an error of law. Section 43 of the *Regulation* could not permit the use of information beyond what was permitted by s 269TAC(2)(c)(i). The applicants also submitted that s 43(2) only permitted the Minister to have regard to the records of an exporter or producer. The benchmark of costs used by the Commissioner had regard to an aggregate of the records of many undefined sellers which might include multiple exporters and producers, and others. Regard to such a benchmark was, it was submitted, not permitted for the purposes of s 43(2). Further, the applicants submitted, s 43(2) did not permit an analytic, comparative process but only permitted use of the information set out in the records referred to there. Assuming the benchmark was otherwise compliant with s 43, the Commissioner should simply have substituted the benchmark price for the applicants' costs of production or manufacture.

106 The respondents submitted that the applicants did not challenge the conclusion in the Report that the prices paid by Dalian Steelforce did not represent competitive market costs. The

effect of the approach adopted in the Report was to estimate the real cost of production of Dalian Steelforce's products as called for by s 269TAC(2)(c)(i). Data from other countries was used to estimate the market value of HRC. Section 43(2) of the *Regulation* did not apply because it had been determined that the exporter's records did not reasonably reflect competitive market costs associated with the production or manufacture of like goods: see page 16.8 of the Report and s 43(2)(b)(ii) of the *Regulation* set out at [104] above.

107 The respondents submitted that the Report used a similar benchmarking method to that followed in Investigation 177. Specifically, as stated at page 16 of the Report, Dalian Steelforce's HRC costs were uplifted by the difference between the price actually paid by Dalian Steelforce for that product and the price of a comparable competitive market benchmark price for that product (taking into account the applicable delivery terms and type of steel purchased). In doing so, as the Report stated, the Commission indexed that benchmark to reflect any movement in the price of HRC between the original investigation period and the current review period. The indexation was based on pricing information from MEPS International Ltd in reference to domestic HRC prices in Korea and Taiwan.

108 The respondents submitted that it did not follow from the reference in s 269TAC(2)(c)(i) to the country of export that a benchmark based on data from elsewhere could not be used in that deduction.

109 In my opinion, s 43(2) of the *Regulation* may be put to one side as it was not used for the purposes of the Report. So much was, in effect, common ground.

110 As to the point of construction, I do not accept the applicants' submission that using the cost of production or manufacture from countries other than the country of export was, per se, to take into account an irrelevant consideration and to make an error of law.

111 In my opinion, the applicants' submission does not take into account the context in which the expression "the cost of production or manufacture of the goods in the country of export" appears. The context is that the Minister is satisfied that the normal value of goods exported to Australia cannot be ascertained under s 269TAC(1) or that the Minister is satisfied, in a case where like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under

s 269TAC(1). In those circumstances, the normal value of the goods for the purposes of Pt XVB is to be, relevantly, such amount as *the Minister determines to be* the cost of production or manufacture of the goods in the country of export (emphasis added.) In my opinion, contrary to the applicants' submission, the provision does not exclude the use of overseas data in an appropriate case. The object of the provision is to determine the cost of production or manufacture of the goods in the country of export but it does not follow that only the cost of production or manufacture of the goods in that country may be used, particularly where it has been found that the costs of HRC provided by Dalian Steelforce relating to the review period do not reasonably reflect competitive market prices: see the report at page 16.8.

112 For these reasons, ground 6 fails.

*Ground 7*

113 The applicants submitted that the Commissioner, having determined that Dalian Steelforce's HRC costs did not reflect competitive market prices, uplifted those costs by reference to the benchmark. This process of uplift resulted in Dalian Steelforce's costs being higher than the competitive market price represented in the benchmark. Accordingly, the applicants submitted, the uplifted price was not the competitive market cost identified by the Commissioner, contrary to s 43(2)(b)(ii) of the *Regulation*; and/or the uplifted price did not reasonably reflect competitive market cost, in contradiction to s 43(2)(b)(ii); and/or the uplifted price was arrived at by way of a methodology that was so unreasonable that no reasonable decision-maker in the Commissioner's position would have used that methodology, because it resulted in Dalian Steelforce's HRC costs being higher than the competitive market price, especially so when the Commissioner could simply have substituted the benchmark HRC price for the HRC price paid by Dalian Steelforce in the first place. The applicants also submitted that the uplift was an error of law as it resulted in the Commissioner, for all but three months in relation to pre-galvanised HSS, determining costs for Dalian Steelforce that were higher than the cost of production or manufacture as determined in the benchmark.

114 The respondents submitted that ground 7 proceeded on a misunderstanding. In the tables set out in the applicants' written submissions at [39] the figures in column A were benchmark *prices* (per tonne of HRC purchased) while the figures in column B were adjusted *costs* (per tonne of HSS produced). The figures were not properly comparable because it generally took

more than a tonne of HRC to make a tonne of HSS. The applicants appeared to accept that the derivation of the benchmark itself was rational.

115 In their written reply the applicants accepted that as a matter of process it took more than one tonne of HRC to make one tonne of HSS but submitted that that was not the explanation for the cost figures. The applicants submitted the uplift method adopted by the Commissioner was unreasonable as it "lacks an evident and intelligible justification.": *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at 367 [76] (*Li*).

116 In my opinion, s 43(2) of the *Regulation* may again be put to one side: see [109] above.

117 Next, as explained in [118] below, this is not a case where it is not possible for a court to comprehend how the decision was arrived at: see *Li* at 367 [76] where Hayne, Kiefel and Bell JJ said, in the passage relied on by the present appellants:

> Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

That being so the relevant ground of judicial review is not made out, the conclusion being within the area where reasonable minds may reach different conclusions: see *Li* at 350-351 [28] per French CJ.

118 The decision was arrived at by calculating updated benchmark prices for HRC for each quarter of 2014 and using them to adjust an input cost. This was effected by taking the data recording Dalian Steelforce's prices for purchase of HRC and working out the variation between the benchmark price and the actual price and then calculating a percentage uplift from that difference. The percentage uplift for each quarter reflected the difference between the benchmark value and Dalian Steelforce's actual, lower, prices. The uplift was applied to the HRC costs to produce an adjusted cost of production.

119 In my opinion, this could not be said to be an irrational process for producing an adjustment to the HRC costs recorded by Dalian Steelforce.

120 For these reasons, ground 7 fails.

*Discretion*

121 In light of my conclusions it is unnecessary to determine the submission made on behalf of the respondents that the Court should withhold relief as a matter of discretion (referring to

s 16 of the *Administrative Decisions (Judicial Review) Act*) in light of the review mechanism expressly provided for in Div 9 of Pt XVB of the *Customs Act* where provision is made for review by the Review Panel established under s 269ZL. Reference was made to *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs (Cth)* [2012] FCA 1192; 131 ALD 291 and to *Kamha v Australian Prudential Regulation Authority* [2005] FCAFC 248; 147 FCR 516. It is also unnecessary to determine whether an application to the Court for judicial review should be made before the Minister has considered a report under s 269ZDA, as was done in the present case. That issue was not raised before me.

122 Although it should be unnecessary to say so, I observe that the present application has been for judicial review and I have not otherwise considered the merits of the applicants' case. That will be for the Review Panel if an application for review is brought to it.

**Conclusion and orders**

123 The application should be dismissed, with costs.

I certify that the preceding one hundred and twenty-three (123) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson.

Associate:

Dated: 9 November 2016

MinterEllison

14 July 2016

[redacted]
OneSteel Ltd
(Administrators Appointed)
Level 6
205 Pacific Highway
St Leonards, NSW 2065

[redacted]

Dear [redacted]

**Review by the Anti-Dumping Review Panel - Steel Reinforcing Bar (Rebar) exported from the People's Republic of China**

**Introduction**

We refer to your letter of 20 June 2016 requesting our opinion on claims made in some current applications to the Anti-Dumping Review Panel (**Review Panel**) in respect of the above matter. Before detailing your request you have drawn our attention to the determination by the Assistant Minister for Science (**Assistant Minister**) that she is satisfied that domestic sales of Rebar in China are not suitable for use in determining a normal value. You have then asked whether, following that determination, there is evidence of any legal error in the acceptance by the Assistant Minister of the finding of the Commissioner in Report 300 that the accounting records of Chinese exporters to Australia of Rebar did not reasonably reflect competitive market costs of production or in the determination by the Assistant Minister that the cost of production of Rebar in the country of export should include a surrogate cost element for steel billet based on a price prevailing in a market other than that in the country of export – namely *Platts Latin American FOB export price* [**surrogate cost**].

In our opinion, for the reasons set out below, there is no evidence of legal error in either of the two decisions made by the Assistant Minister.

In formulating that opinion we had regard to relevant material in Electronic Public Record 300, Final Report 300 (**REP 300**), ADN 2016/39, applications to the Review Panel by all parties other than OneSteel Manufacturing Pty Ltd (**other applications**), Australian case law and World Trade Organisation (**WTO**) jurisprudence.

## Competitive Market Costs

The other applications to the Review Panel do not engage with the history of s.43 of the *Customs (International Obligations) Regulation 2015* [**Regulation**] which specifies, inter alia, how the cost of production in a country of export is to be worked out for the purposes of Part XVB of the *Customs Act 1901* (Cth) (**Act**). The *Customs Regulations (Amendment) 1994* [No. 435] introduced a new Regulation 180 which read, in relevant part, as follows:

> (1) In determining an amount to be:
>
> (a) the cost of production or manufacture of goods in a country of export for the purposes of paragraph 269TAAD(4)(a) of the Act; or
>
> (b) the administrative, selling and general costs associated with the sale of goods for the purposes of paragraph 269TAAD(4)(b) of the Act; the Minister must take into account the matters, and use the methods of calculation, set out in this regulation.
>
> (2) If:
>
> (a) an exporter or other seller of like goods keeps records relating to like goods; and
>
> (b) the records:
>
> (i) are in accordance with generally accepted accounting principles in the country of export; and
>
> (ii) reasonably reflect the costs associated with the production, or manufacture, and sale of like goods;
>
> the Minister must calculate the costs using the information set out in the records.

Article 2.2.1.1 of the WTO *Anti-Dumping Agreement*, also introduced in 1994, provides that for the purposes of ascertaining the ... *cost of production in the country of origin* under Article 2.2:

> *.... costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.*

In 2005, at the same time as Australia acknowledged the market economy status of China and added that country to the list of those to which the economy in transition provisions of s.269TAC(5D) did not apply, the Parliament passed *Customs Amendment Regulation 2005 (No.8)* [SLI 265]. Item 1 of Schedule 1 to that regulation provided for the introduction of the following substituted wording for subparagraph 180(2)(b)(ii):

> *(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods.*

The reason for the amendment is provided in the Explanatory Statement by the then Minister for Justice and Customs:

> *... mandating that the Minister use only the costs associated with the production or manufacture of the like goods narrowed the scope of goods that may be examined in assessing the cost of production or manufacture.*
>
> *The amending Regulations substitute paragraph 180(2)(b)(ii) to prescribe that the Minister only has to use the records relating to the like goods if they reasonably reflect competitive market costs associated with the production or manufacture of like goods. This ensures that the relevant records are only taken into account if they reasonably reflect competitive market costs and not just actual costs.*

With the repeal of Customs Regulations 1926 in 2015, the regulation as amended in 2005 was incorporated as section 43 in the Regulation.

The application of the regulation was considered in *PanAsia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 at [91] by Nicholas J when reviewing a finding by the Minister that the cost in China of primary aluminium, the major raw material used in the production of aluminium extrusions, was not a competitive market cost.

> *In the present case the question is not whether any particular market participant exercises a particular degree of market power, nor whether there is competition in any market for primary aluminium in China. Rather, the question which is required to be answered for the purposes of reg 180 is whether the relevant records reasonably reflect competitive market costs associated with the manufacture or production of the relevant goods. Implicit in the CEO's finding is an approach to reg 180(2) which recognises that the implementation of government policy may drive down particular costs associated with the manufacture or supply of goods such that the costs might not only reflect the ordinary effects of supply and demand but also reflect the impact of government policy aimed at increasing or reducing supply or demand. In my view, this approach was open. In particular, it was open to the CEO to conclude that in the circumstances which he found to exist, the cost of primary aluminium did not reasonably reflect "competitive market costs"...*

This view was affirmed by Nicholas J himself in *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885 at [42]

In the current matter before the Review Panel the Commission observed that[1]:

> *As discussed in Appendix 1, the Commission considers that the significant influence of the GOC has distorted prices in the steel industry and rebar market in China. The Commission also considers that various plans, policies and taxation regimes have also distorted the prices of production inputs including (but not limited to) raw materials used to make steel in China, rendering them unsuitable for cost to make and sell (CTMS) calculations.*
>
> *The Commission considers that the GOC influence in the iron and steel industry is most pronounced in the parts of that industry that might be described as upstream from rebar production. In particular, GOC-driven market distortions have resulted in artificially low prices for the key raw materials, as well as the other inputs associated with the production of the steel billets.*
>
> *The Commission considers that direct and indirect influences of the GOC affect Chinese manufacturers' costs to produce steel billet and therefore that Chinese exporters' records do not reflect competitive market costs. The Commission has found that steel billet costs comprise 80 to 85 per cent of rebar CTMS.*

Based on these observations and the further considerations set out in section 5.7.1 of REP 300 we consider that it was open to the Assistant Secretary to conclude that the records of exporters of Rebar from China do not reflect competitive market costs and that the decision not to use the actual costs in the records is the correct and preferable decision.

Submissions in other applications attacking this decision focus primarily on the terms of Article 2.2.1.1 and some WTO jurisprudence relating to that provision. This approach requires the identification of some ambiguity in the relevant provision of Australia's domestic law as Nicholas J pointed out in PanAsia at [9]:

> *The provisions of Pt XVB of the Act are technical and complex. They must be interpreted in accordance with the settled principles of statutory construction. As always, the interpretative task begins with a consideration of the terms of the relevant legislation (Australian Finance Direct*

[1] REP 300: p.15

> *Limited v Director of Consumer Affairs Victoria (2007) 234 CLR 96 at [34] per Kirby J). Recourse to the international agreements will only be of assistance in resolving the questions of construction in this case where the relevant provisions are ambiguous, and where the international agreements may assist in resolving the ambiguity (see, for example, Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 286-287 per Mason CJ and Deane J).*

In the passage cited above dealing with the subject of competitive market costs and its application to the circumstances of *PanAsia*, his Honour makes no suggestion of the presence of ambiguity and we also note the absence of any such suggestion in the other applications. In these circumstances precedence must be given to the application of unambiguous Australian domestic law informed by the explanatory statement of the responsible Minister.

**Cost… in the country of export**

In the event that a cost of production is found not to be a 'competitive market cost' the administering authority must identify an alternative or surrogate cost to be used in the calculation of … *the cost of production or manufacture of the goods in the country of export* …under s.269TAC(2)(c)(i). In the present case the other applications have argued that the use of the surrogate cost is unlawful because it is not a cost in the country of export under Australian law or a cost in the country of origin for the purposes of Article 2.2 of the Anti-Dumping Agreement.

Although we concede, of course, that a price in Latin America is not literally a cost in China, we submit, with respect, that the arguments advanced in the other applications are based on a misconstruction of s.269TAC of the Customs Act and, while unnecessary for the purpose of formulating a recommendation of the Review Panel affirming the reviewable decision in this matter, the arguments are also based on a misconstruction of the relevant provisions of Article 2 of the *Anti-Dumping Agreement*.

The gold standard for ascertaining normal value is set out in s.269TAC(1) of the Act and is stated to be the price paid for like goods sold, in certain defined circumstances, by the exporter in the country of export. That price is a matter of fact and it is not 'determined' by the Minister. By contrast when the Minister is satisfied that because of the low volume of relevant sales, the unsuitability of such sales or the absence of sales complying with the defined circumstances, that the normal value cannot be ascertained under s.269TAC(1) the Act requires him to proceed by way of determinations[2] taking account of such factors as the regulations provide for[3]. Having decided, in the present matter, that the market situation in China precluded the ascertainment of a price based normal value, the Assistant Minister decided to calculate normal value by reference to the sum of three amounts which s.269TAC(2)(c) requires her to determine. In relation to the first of those amounts – the cost of production – the Act does not say that it is the

[2] *Customs Act 1901*: s.269TAC(2)(c)
[3] ibid., s.269TAC(5A)

exporter's cost of production in the country of export but the amount determined by the Minister to be that amount.

In making such a determination the Minister must apply any of the relevant adjustment provisions of section 43 of the Regulation but the section does not direct, or otherwise provide guidance to, the Assistant Minister on how to work out an amount to be the cost of production in the country of export when the exporter's records … *do not reasonably reflect competitive market costs associated with the production or manufacture of like goods.*

The approach adopted by the Assistant Minister in this case, and by her predecessors in *PanAsia* and *Dalian*, was to identify the cost of production method as the 'appropriate proxy'[4] for the gold standard and to determine the total cost of production in the country of export using benchmark cost elements as substitutes for actual cost elements in China that had been identified as being 'artificially low' as a result of market distortions driven by the government policies. In constructing a normal value in this manner we see no implied restrictions in the legislation concerning the choice of substitute cost elements other than that the substitute elements should reasonably reflect the competitive market costs that would apply in China in the absence of the identified market distortions. In particular we cannot find any justification in the statutory language to suggest that only Chinese cost elements can be used as surrogates.

In summary we consider that s.269TAC(2)(c) requires the Assistant Minister in the circumstances of this case to determine what the total cost of production of the goods would be in the country of export if the *'situation in the market'* of that country did not exist. In doing precisely that the Assistant Minister, in our view, has made the correct and preferable decision.

**EU - Biodiesel**

Claims in the other applications that the Assistant Minister's determination of a constructed normal value contravened the requirement to arrive at a cost of production in the country of export are based primarily on the recent decision of a WTO panel in *European Union – Anti-Dumping Measures on Biodiesel from Argentina*[5] (**EU – Biodiesel**).

While we have already made the point that Australian legal authority requires some ambiguity to be identified in the relevant provisions of the Act and Regulation to justify reference to external jurisprudence, we make the following additional observations in relation to that decision:

1. It is under appeal to the Appellate Body[6].

2. Argentina's claims were that certain provisions of EU legislation were inconsistent with the Anti-Dumping Agreement and certain decisions made by EU authorities

[4] *US Softwood Lumber V*: para 7.278; *EU – Biodiesel*: para 7.233
[5] WT/DS473/R (29 March 2016)
[6] http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154577.pdf

pursuant to that domestic legislation were also contrary to the Anti-Dumping Agreement. The Panel rejected the first of those claims.

3. The EU domestic legislation considered by the Panel has no parallel in Australian domestic law.

4. The Panel's decision relates to an interpretation of the word 'costs' in Article 2.2.1.1 and not to the phrase 'competitive market costs' in Australian domestic law.

5. Whether the Australian regulation is consistent with the Anti-Dumping Agreement is not an issue before the Review Panel and, in any event, we consider that it is not a matter falling within the jurisdiction of the Review Panel.

6. We believe that there is a very strong case to argue that the Panel erred in concluding that the use of an external benchmark as a surrogate cost element resulted in the determination of a cost of production that was not 'in the country of origin'.

7. We also consider that in circumstances where government induced distortions in a domestic market have resulted in certain artificially low cost elements prevailing throughout that market that the Panel's conclusion that Article 2.2.1.1 proscribes the use of external benchmarks renders the provision inutile.

Please contact the undersigned if you require clarification or further information in relation to the above issues.

Yours faithfully
**MinterEllison**

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