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For Public Record

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Dear Mr Gleeson

Reinvestigation - Alleged Dumping of Hot Rolled Coil Steel (HRC) from Japan

1. Introduction

We act for JFE Steel Corporation in relation to the current reinvestigation by the Australian Customs and Border Protection Service (**Customs**) into alleged dumping of HRC exported from Japan. Following the lodgement of an application by Bluescope Steel Limited (**the Applicant**) and an investigation and preparation of Report 188 by Customs, the Minister published a dumping duty notice on 20 December 2012

Subsequently a number of the findings adopted by the Minister were the subject of applications for review to the Trade Measures Review Officer (TMRO) whose recommendations to the Minister were the subject of a report dated 2 April 2013. The Minister's acceptance of the TMRO's recommendations were the subject of ACDN 2013/30 which identified four findings for reinvestigation. On behalf of our client we wish to make submissions in relation to the following two questions posed by the TMRO:

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- *whether it would be preferable to structure the conditions attaching to the imposition of dumping duties on imports for the automotive industry in such a way that imports that are acknowledged by Customs and Border Protection not to be causing or likely to cause injury to BlueScope are not liable to duty under the dumping duty notice in the first instance (and only exempt if subsequently exempted under section 8(7) of the Customs Tariff (Anti-Dumping) Act 1975; and*
- *whether there were in fact sufficient grounds to warrant setting the measures by reference to prices other than those in the investigation period and, if so, the preferable methodology for adjustment of those prices;*

In response to both questions our answers on behalf of our client are in the affirmative.

2. The Dumping Duty Notice – Exports of Pickled & Oiled (P&O) HRC from Japan.

There are four questions to be considered in determining whether P&O HRC from Japan can be excluded from, or excluded from the operation of, a dumping notice applying to other products subject to the investigation.

*A. Does Part XVB of the Customs Act 1901 (Cth) [**Act**] preclude the application of a dumping notice to exported goods that have not been found to have caused material injury?*

The TMRO claimed that ...*[R]ead literally, this provision* [s269TG(2)] *does not provide authority for applying measures to only a sub-set of "like goods"*[1]. With respect we submit that the TMRO's contention is not supported by either the terms of s.269TG or a general construction of Part XVB. S269TG(3) makes it clear that the section is dealing with 'particular goods' for retrospective purposes and 'goods of a particular kind' for prospective purposes..Consequently a retrospective notice under s. 269 TG(1) must identify particular goods and a prospective notice must identify goods that are like to goods of a particular kind. In neither case is there any express or implied restriction on the identification and description process that would prohibit a form of words that excluded pickled and oiled HRC from Japan.

The TMRO further claims that the power to identify goods in a dumping notice *extends to the full range of 'like goods'*[2]. This claim could be justified in an investigation involving a homogeneous product where there is not more than one 'like good' in the goods description

[1] TMRO Report 188 – para 25
[2] ibid: - para 42

originally advanced by an applicant and accepted by Customs. In the present case, however, pickled and oiled product is not a like good to other product(s) included in the goods under consideration. This has already been implicitly recognised by Customs by adopting a micro-analysis process when considering causation and when establishing normal values.

Having established that no injury has been caused by exports of pickled and oiled product, however, it is not open to the Minister to publish a dumping notice that applies to such products.

B. Does the Minister have a statutory discretion as to the imposition of measures on such goods?

The TMRO concluded that the Minister does have such a discretion and we agree with that conclusion and the reasons advanced in support of it. In particular we support his rejection of the claim by Customs that s269TG is an all or nothing provision.

C. Does s269TDA(13) of the Act require the termination of an investigation in relation to such goods?

The TMRO does not appear to have considered this issue, but in the original report to the Minister Customs claimed that the terms of the section precluded the CEO from terminating the investigation in relation to pickled and oiled HRC from Japan because exports of HRC from Japan were supplied to other market sectors. With respect, this appears to be another all or nothing interpretation when there is in fact no restriction, express or implied, in the section on identifying a sub-set of the goods under consideration for the purpose of termination. Furthermore, for the reasons advanced by the TMRO, we submit that a discretion to choose to terminate in respect of a sub-set of the goods exists as a result of the operation of s33(3A) of *the Act Interpretation Act 1901* (Cth).

D. Are there grounds for the exemption of such goods from a dumping notice under the provisions of s.8(7) of the Dumping Act.?

The TMRO did not reach a conclusion on this question although he did indicate that the answer to the question may influence the issue of whether the discretion to exclude automotive HRC from a dumping notice should be exercised.

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We submit that the answer is clear. There is no evidence in the public record that any of the grounds of exemption apply in this matter. Leaving aside the exemption of sample goods, those grounds, with one exception, relate generally to a variety of situations in which equivalent goods are not reasonably available from local production and in particular to situations in which a Tariff Concession Order or By-Law is in force. The further ground is set out in s8(7)(a) of the Anti-Dumping Act and we understand that there have been suggestions in recent dumping investigations that this exemption applies to situations where there are insufficient grounds for a tariff concession order but the product offered by the Australian industry is not suitable for particular uses.

This construction cannot be sustained. The ground of exemption was originally part of the *Customs Tariff (Industries Preservation) Act 1921* (Cth) and was directed at what were perceived to be anti-competitive practices. The exemption was carried over into the *Customs Tariff (Dumping and Subsidies) Act 1961* (Cth) and has remained a part of Australia's anti-dumping legislation since that time. It has no application to circumstances in which the product offered by Australian industry is simply claimed not to meet the requirements of a user.

3. Exercising the Discretion

For the reasons set out in Section 2A & C above we submit that the question of whether the discretion identified by the TMRO should be exercised in this matter is superfluous. However, in the event that the Minister reaches a contrary view, we will now examine the observations of the TMRO at paragraphs 53-59 of his report.

There is firstly, in our submission, an inadvertent distortion of the injury assessment by Customs at section 8.8.4 of Report 188. While all parties accept that long term supply contracts are a feature of the automotive industry nobody has suggested that all those contracts commence and expire at the same time. In a market with four basic vehicle types and an array of different models, with varying model and facelift lives there is a constant pattern of contracts commencing and contracts ceasing. The injury investigation period extended over five years and in that period Customs found no evidence of lost contracts or reduced profits. In short Customs found not only no material injury in this sector but no injury at all. Contrary to the assertion of the TMRO, there is no evidence or even persuasive speculation that future injury is likely.

Secondly the TMRO has raised compliance issues as a potential influence on the content of a dumping notice. While not underestimating in any way the importance of a robust compliance

regime in anti-dumping administration, there is no warrant for such matters influencing the exercise of statutory duties or discretions. In addition, although our client has no objection to the concept of a dumping notice excluding P&O HRC for use in the automotive sector, we question the legality and practicality of introducing end use prescriptions into dumping notices.

4. Prices Outside the Investigation Period

We support the conclusion of the TMRO that there is no legal ground prohibiting the CEO or the minister having regard to prices applying after the end of the investigation period when assessing variable factors. In particular we wish to add additional grounds to the rebuttal of the claim by the applicant that the review and duty assessment provisions of the Act provide an appropriate alternative method for achieving a calibrated dumping regime. The former process involves an initial delay of twelve months, followed by a five month investigation and a thirty day decision making period. Exporting/importing interests must carry the burden of inappropriate variable factors and possible exclusion from the market throughout that period as well as bearing the substantial cost and uncertainty associated with any review process. In the case of duty assessment while the time period is reduced to around twelve months the same disadvantages apply. These processes are not a substitute for the use of contemporaneous data in establishing initial variable factors.

The TMRO has asserted that Customs gave insufficient consideration to the issue of whether prices outside the investigation period should be used. With respect we strongly disagree. There is ample evidence in Section 8 of Report 188 that Customs was familiar with and had forensically evaluated pricing data extending back to 2001 and extending forward beyond the investigation period. It was this data that informed its considered and cogent conclusion that basing the assessment of variable factors on prices in the investigation period ...*would remedy more than the effects of dumping* and would ...*unfairly impact the large number of downstream manufacturers who use HRC as an input*.

5. Conclusion

We submit in the first instance that the CEO should terminate the investigation forthwith into exports of P&O from Japan under s 269TDA(13).

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Alternatively we submit that following the reinvestigation the CEO should recommend to the Minister that he revoke the decision to include P&O HRC from Japan in the dumping notice and substitute a new notice excluding such goods.

We also submit that the CEO recommend to the Minister that he affirm the original decision to use more contemporaneous data in formulating variable factors.

Yours sincerely

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