



Australian Government
**Department of Industry,
Innovation and Science**

**Anti-Dumping
Commission**

Exemption Inquiry Report: EX0042

Certain Hollow Structural Sections Exported to Australia from the People's Republic of China, the Republic of Korea, Malaysia and Taiwan

Applicant:

**Hunter Valley Signs Pty. Limited trading as Hi-Vis
Signs & Safety**

October 2016

Table of contents

Abbreviations	3
1. Summary and recommendations	4
1.1 Findings and recommendations	4
1.2 Authority to exempt goods	5
1.3 Course of the inquiry and this report	5
2. Background to measures	6
2.1 Investigation, reinvestigation and circumvention inquiry	6
2.2 The goods subject to measures	6
2.2.1 Excluded goods	7
2.2.2 Tariff classification	7
3. Exemption inquiry (like-goods criterion)	8
3.1 Submission addressing like-goods criterion	8
3.2 Exemption inquiry	8
3.3 Goods subject to the application for exemption.....	8
3.4 Claims made in the application	9
3.5 Legislative requirements for an exemption under the like-goods criterion	10
3.5.1 Definition of “like or directly competitive goods”	11
3.5.2 Definition of “custom and usage of trade”	12
3.6 Australian industry’s offer of ‘like’ or ‘directly competitive’ goods	13
3.6.1 Additional Information provided by the RMS	15
3.7 The Commission’s assessment – like or directly competitive goods offered for sale in Australia.....	15
3.7.1 Like or directly competitive goods offered for sale in Australia	15
3.7.2 Findings and Conclusion	17
3.8 To all purchasers on equal terms under like conditions having regard to the custom and usage of trade	17
3.9 The Commission’s assessment - to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.....	19
3.9.1 Finding	19
3.9.2 To purchasers on equal terms under like conditions having regard to the custom and usage of trade	19
3.9.3 Conclusion	19
3.10 Recommendation concerning the like-goods criterion.....	19
4. Exemption inquiry (TCO criterion)	20
4.1 Application addressing TCO criterion.....	20
4.2 Exemption inquiry	20
4.3 Legislative requirements for an exemption under the TCO criterion.....	20
4.4 Assessment.....	21
4.5 Recommendation concerning TCO exemption application.....	21
5. Attachments	22

Abbreviations

Abbreviations/short form	Full reference
ABF	Australian Border Force
ACBPS	Australian Customs and Border Protection Services
Applicant or Hi Vis	Hunter Valley Signs Pty Limited trading as Hi-Vis Signs & Safety
Austube	Austube Mills Pty Ltd
CHS	Circular Hollow Sections
Commission	the Anti-Dumping Commission
Commissioner	the Commissioner of the Anti-Dumping Commission
Customs Act	<i>Customs Act 1901</i>
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
Duties	Interim dumping duty, dumping duty, interim countervailing duty and countervailing duty
Exemption goods	The goods that are the subject of the application as described in section 3.3 of this report
HSS	Hollow Structural Sections
Parliamentary Secretary	The Assistant Minister for Industry, Innovation and Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science
REP 177	<i>International Trade Remedies Report No. 177</i>
REP 203	<i>International Trade Remedies Report No. 203</i>
REP 291	<i>Anti-Dumping Commission Report No. 291</i>
RMS	Roads and Maritime Services, a New South Wales government agency established under the <i>Transport Administration Act 1988 (NSW)</i>
RMS Standard	NSW Transport Roads and Maritime Services Post Design Document for Steel Tube Sign Post Structure (28 March 2014)

1. Summary and recommendations

This report sets out the findings of the Anti-Dumping Commission (the Commission) in response to an application by Hunter Valley Signs Pty Limited trading as Hi-Vis Signs & Safety (Hi Vis) requesting an exemption from interim dumping duty and dumping duty and interim countervailing duty and countervailing duty (the duties) under:

- paragraphs 8(7)(a) and 10(8)(a) of the *Customs Tariff (Anti-Dumping) Act 1975*¹ (the Dumping Duty Act); and
- paragraphs 8(7)(b) and 10(8)(aa) of the Dumping Duty Act.

The exemption was sought in relation to certain hollow structural sections (HSS) (which are described in section 3.3 and hereafter referred to as the exemption goods) exported to Australia from the People's Republic of China (China), the Republic of Korea (Korea), Malaysia and Taiwan.

This report sets out the Commission's findings on which the Commissioner of the Anti-Dumping Commission (the Commissioner) relied to make a recommendation to the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary)² on whether there is a basis to exempt the goods from the duties.

1.1 Findings and recommendations

Like or directly competitive goods offered for sale in Australia

The Commission finds that:

- like or directly competitive goods are offered for sale in Australia; and
- there is no basis for the Parliamentary Secretary to be satisfied that such goods offered for sale in Australia are not offered to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

On that basis the Commission considers that the criterion for granting an exemption in paragraphs 8(7)(a) and 10(8)(a) of the Dumping Duty Act is not satisfied.

Accordingly, the Commissioner recommends to the Parliamentary Secretary that there is no discretion to exempt the exemption goods from the duties under paragraphs 8(7)(a) and 10(8)(a) of the Dumping Duty Act.

Tariff Concession Order in respect of the goods

The Commission finds that no Tariff Concession Order (TCO) under Part XVA of the *Customs Act 1901* (the Act) in respect of the exemption goods is in force.³

On that basis the Commission considers that the criterion for granting an exemption in paragraphs 8(7)(b) and 10(8)(aa) of the Dumping Duty Act is not satisfied.

Accordingly, the Commissioner recommends to the Parliamentary Secretary that there is no discretion to exempt the exemption goods from the duties under paragraphs 8(7)(b) and 10(8)(aa) of the Dumping Duty Act.

¹ A reference to a division, section or subsection in this report is a reference to a provision of the *Customs Tariff (Anti-Dumping) Act 1975* unless otherwise specified.

² The Minister for Industry, Innovation and Science has delegated responsibility with respect to anti-dumping matters to the Parliamentary Secretary, and accordingly, the Parliamentary Secretary is the relevant decision maker. On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science.

³ The relevant TCO, TC 9508551, was revoked by the ABF in September 2015 following application by Austube.

1.2 Authority to exempt goods

The Parliamentary Secretary has a discretion to exempt certain goods from the duties if he is satisfied of any of the criteria in subsections 8(7) and 10(8) of the Dumping Duty Act. An exemption inquiry:

- assesses whether the available information and evidence provides a sufficient basis for the Parliamentary Secretary to be satisfied of any of those criteria; and
- if the available information and evidence provides such a basis, recommends how the Parliamentary Secretary should exercise the discretion.

1.3 Course of the inquiry and this report

On 16 June 2015, Hunter Cargo & Customs⁴ on behalf of Hi-Vis, made an application to the Commission requesting an exemption from the duties (the application) (**Attachment 1**). In the application Hi-Vis sought an exemption under paragraphs 8(7)(b) and 10(8)(aa) of the Dumping Duty Act. Paragraphs 8(7)(b) and 10(8)(aa) of the Dumping Duty Act provide that the Parliamentary Secretary may exempt the exemption goods from the duties if he is satisfied that a TCO in respect of the exemption goods is in force (the TCO criterion).

On 22 July 2015 the Commission initiated the exemption inquiry, publishing the application and ADN 2015/91 on its website.⁵

On 6 November 2015, following revocation of TCO TC 9508551 in September 2015, Gadens Lawyers made a submission on behalf of the applicant seeking to extend the grounds on which the exemption was sought to include the criterion in paragraphs 8(7)(a) and 10(8)(a) of the Dumping Duty Act (like goods submission) (**Attachment 2**). Paragraphs 8(7)(a) and 10(8)(a) of the Dumping Duty Act provide that the Parliamentary Secretary may exempt the exemption goods from the duties if he is satisfied that the exemption goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade (like-goods criterion).

The Commission understands that, following revocation of TCO TC 9508551 and Hi Vis' submission of 6 November 2016, the like-goods criterion became the primary ground on which the applicant sought an exemption.

The Commission's assessment of the application under the like-goods criterion is contained in section 3 of this report. The Commission's assessment of the application under the TCO criterion is contained in section 4 of this report.

⁴ A freight forwarder and customs agent based in Newcastle.

⁵ This may be accessed at <http://www.adcommission.gov.au/cases/Exemptions/EX%200042/002-ADN-Other-Initiation.pdf>

2. Background to measures

2.1 Investigation, reinvestigation and circumvention inquiry

On 3 July 2012, anti-dumping measures were imposed on HSS exported from China, Korea, Malaysia and Taiwan by the then Minister for Home Affairs following the Minister's consideration of *International Trade Remedies Report No. 177* (REP 177). ACDN 2012/31⁶ contains details of the measures imposed, including a description of the goods subject to the measures.

Following a review by the then Trade Measures Review Officer, Australian Customs and Border Protection Service (ACBPS) conducted a reinvestigation into certain findings made in REP 177. *International Trade Remedies Report No. 203* sets out the findings made by ACBPS as a result of the reinvestigation.

On 13 May 2013, to give effect to these findings the then Minister for Home Affairs, published a new dumping duty notice under the *Customs Act 1901* (the Act). This notice was in substitution of the dumping duty notice published on 3 July 2012 (see ACDN 2013/35).⁷ The reasons for the Minister's decision are contained in *International Trade Remedies Report No. 203*.

On 18 March 2016, the then Assistant Minister for Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science goods accepted the recommendations of the Commissioner to broaden the measures to include additional tariff codes for alloyed versions of the goods in respect of four Chinese and one Malaysian exporter to address circumvention of the measures (ADN 2016/24 refers).⁸ The reasons for the Commissioner's recommendation is contained in *Anti-Dumping Commission Report No. 291*.

2.2 The goods subject to measures

The goods exported from China, Korea, Malaysia and Taiwan covered by the current dumping duty and countervailing duty notice are:

“certain electric resistance welded pipe and tube made of carbon steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes. The goods are normally referred to as either CHS (circular hollow sections) or RHS (rectangular or square hollow sections). The goods are collectively referred to as HSS (hollow structural sections). Finish types for the goods include in-line galvanised (ILG), pre-galvanised, hot-dipped galvanised (HDG) and non-galvanised HSS.”

Sizes of the goods are:

- for circular products - those exceeding 21mm up to and including 165.1mm in outside diameter, and
- for oval, square and rectangular products - those with a perimeter up to and including 1277.3mm.

⁶ This may be accessed at <http://www.adcommission.gov.au/notices/Documents/2012/120607ACDN-HSS-FinalMeasures.pdf>.

⁷ This may be accessed at <http://www.adcommission.gov.au/notices/Documents/2013/014-ACDN2013-35.pdf>.

⁸ This may be accessed at <http://www.adcommission.gov.au/cases/EPR%20251%20%20300/EPR%20291/038-%20ADN%202016-24%20public%20Record%201.pdf>.

REP 177 includes the following information to clarify the nature of the goods:

- All HSS regardless of finish is included in the goods description;
- Non-galvanised HSS is typically of painted, black, lacquered or oiled finished coatings;
- CHS with other than plain ends (such as threaded, swaged and shouldered) are also included in the goods;
- HSS is generally produced to either the British Standard BS 1387 or AS 1163 or internationally equivalent standards;
- HSS can also be categorised according to minimum yield strength. The most common classifications are 250 and 350 mega Pascals (MPa);⁹
- HSS may also be referred to as extra-light, light, medium or extra heavy according to its wall thickness.

2.2.1 Excluded goods

The following categories are excluded from the goods:

- conveyor tube (made for high speed idler rolls on conveyor systems, with inner and outer fin protrusions removed by scarfing (not exceeding 0.1 mm on outer surface and 0.25 mm on inner surface), and out-of-round standards (i.e. ovality) which do not exceed 0.6 mm in order to maintain vibration free rotation and minimum wind noise during operation);
- precision RHS with a nominal thickness of less than 1.6mm; and
- air heater tubes to AS 2556.

2.2.2 Tariff classification

The goods are classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

- 7306.30.00 (statistical codes 31, 32, 33, 34, 35, 36 and 37);
- 7306.61.00 (statistical codes 21, 22 and 25);
- 7306.61.00* (statistical code 90)*
- 7306.69.00 (statistical code 10); and
- 7306.50.00* (statistical code 45*).

* These tariff subheadings only apply to the following exporters/suppliers:

- Dalian Steelforce Hi-Tech Co (China);
- Tianjin Friend Steel Pipe Co., Ltd (China);
- Tianjin Ruitong Iron and Steel Co., Ltd (China);
- Rowsell S A R L Limited (China); and
- Alpine Pipe Manufacturing SDN BHD (Malaysia).

⁹ For clarification, the goods subject to the measures include all electric resistance welded pipe and tube made of carbon steel meeting the above description of the goods (and exclusions), regardless of whether or not the pipe or tube meets a specific structural standard or is used in structural applications.

3. Exemption inquiry (like-goods criterion)

3.1 Submission addressing like-goods criterion

This applicant's like goods submission claimed that the goods produced by the Australian industry are not like or directly competitive to the exemption goods.

The Commission understands the applicant's primary argument to be that the exemption goods are designed for their particular application as road sign posts. As such the exemption goods are manufactured to conform to the Roads and Maritime Services (RMS) Post Design Standard (RMS Standard).¹⁰ The applicant claims that Australian producers do not produce or offer for sale in Australia goods that are like or directly competitive to the exemption goods, by necessary implication claiming that that Australian producers do not produce or offer for sale in Australia HSS that conforms with the RMS Standard.

3.2 Exemption inquiry

In addition to the applicant's like goods submission the Commission received the following submissions and information relevant to the like-goods criterion:

- A submission from Austube received on 4 December 2015 (**Attachment 3**);
- A completed questionnaire received from Austube on 21 December 2015 (**Attachment 4**);
- A response from the RMS to questions from the Commission on key areas of contention in the exemption inquiry received on 1 April 2016 (**Attachment 5**);
- A submission from Austube received on 19 July 2016 in response to the information received by the Commission from the RMS (**Attachment 6**); and
- A submission from Austube received on 4 August 2016 in response to further questions from the Commission regarding terms and conditions under which like goods are sold (**Attachment 7**).

3.3 Goods subject to the application for exemption

The exemption goods are described by the applicant as:

Carbon steel road sign-posts having all of the following characteristics:

- (i) electric resistant welded pipe;*
- (ii) cold drawn (manufacturing process);¹¹*
- (iii) hot-dipped galvanised (zinc galvanised finish);*
- (iv) carbon steel non alloy (materials);*
- (v) C250 LO or lighter C350 LO materials;*
- (vi) circular hollow sections (otherwise generally described as pipes or tubes);*

¹⁰ Roads and Maritime Services administers the RMS Standard and is a New South Wales government agency established under the *Transport Administration Act 1988 (NSW)* with responsibility for setting strategic direction and guiding an extended network of public and private service delivery agencies to provide improved transport outcomes.

¹¹ The applicant described the process for manufacturing the exemption goods both as "cold drawn" and "cold rolled", however these are distinct processes.

- (vii) with a cross section diameter of 60.3mm;*
- (viii) cut to lengths of 3.2m, 3.25m or 3.9m;*
- (ix) a wall thickness between 2.9 – 3.2mm;*
- (x) manufactured to Australian Standard AS1163; 2009 (Cold-Formed¹² structural steel hollow sections);*
- (xi) finished by hot-dip galvanised (zinc) coating to Australian Standard 4680 (Hot-dip galvanized (zinc) coatings on fabricated ferrous articles) with an average zinc coating of 40 microns;*
- (xii) with a tensile strength of 235 – 240 mpa; and*
- (xiii) ends drilled prior to hot-dipped galvanising.*

Hi Vis further submits that the exemption goods are required to:

- (i) conform in shape, pre-drilling and size to the standard design that fits with the standard road signs approved in Australia;*
- (ii) have undergone hot-dip galvanised zinc coating to protect against corrosion in the ground or in concrete; and*
- (iii) be of a relatively low tensile strength in order to meet the requirements for frangible road sign-posts.¹³*

The applicant has further described the exemption goods as “seam welded pipe from cold-rolled low-strength (235 MPA) steel, seam welded into circular section, cut to specific (short) lengths, pre-drilled and then hot-dip galvanised with 40um of zinc.”

3.4 Claims made in the application

The applicant claimed that:

- the RMS Standard requires that road signs have all of the characteristics specified in section 3.3 above;
- Australian industry does not produce material that meets the specifications described in section 3.3 above;
- material available from Austube is not identical in terms of its ability to deform on impact compared with the exemption goods and does not come in the sizes and shapes to be fit for the purpose of producing road signs; and
- the products manufactured by Austube have insufficient resistance to corrosion for the purpose of producing road signs.

In support of its claim that like or directly competitive goods are not offered for sale in Australia, the applicant provided the following evidence:

- A copy of the relevant RMS Standard, which it states requires the specifications described in section 3.3 above;
- A OneSteel Duragal technical guide (dated February 2001), which it states supports its claim that DuragGal products¹⁴ are inferior in corrosion resistance as the guide states that “special corrosivity with high to very high corrosion rates occur underground...the selection of a coating system for these conditions is outside the scope of this guide.” The guide is also said to be evidence that the Austube goods are not of the same wall thickness or tensile strength.

¹² Ibid.

¹³ Roads and Maritime Services NSW have advised that both tensile and yield strengths are relevant.

¹⁴ The Duragal products are hot dip galvanized to AS/NZS 4792.

- An Austube product availability guide (effective from 4 September 2015), which it states supports the claim that Austube does not offer for sale the goods hot-dipped with a cross section diameter of 60.3mm and a wall thickness of 2.9-3.1 mm.
- A quote dated 3 November 2015 from a local producer, indicating that the origin of light galvanised pipe is from Thailand or the United Arab Emirates, which is stated to support the claim that the exemption goods are not produced in Australia; and
- A quote from another local producer dated 27 October 2015. This quote indicates “hot dipped gal pipe is no longer manufactured in Australia, most likely source would be from United Arab Emirates or Thailand. This is stated to be further evidence that the exemption goods are not produced in Australia.

The applicant also provided a detailed comparison of the physical, commercial, functional, and production likeness of the exemption goods and the goods produced by Australian industry.

The applicant did not provide information or evidence in support of a position that like or directly competitive goods offered for sale in Australia *were not offered to all purchasers on equal terms under like conditions having regard to the custom and usage of trade*. The application is based on there being no like or directly competitive goods offered for sale in Australia due to the particular characteristics claimed in respect of the exemption goods and outlined in section 3.3.

3.5 Legislative requirements for an exemption under the like-goods criterion

The applicant has applied for an exemption under subsections 8(7)(a) and 10(8)(a) of the Dumping Duty Act.

Paragraph 8(7)(a) provides:

- (7) The Minister may, by notice in writing, exempt goods from interim dumping duty and dumping duty if he or she is satisfied:
 - (a) that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade;

...

Paragraph 10(8)(a) provides:

- (8) The Minister may, by notice in writing, exempt goods from interim countervailing duty or countervailing duty if he or she is satisfied:
 - (a) that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade;

...

The applicant claims that there is a basis for the Parliamentary Secretary to be satisfied that like or directly competitive goods are not offered for sale in Australia (see paragraphs 4 and 7 of the applicant’s like goods submission) and requests that the Parliamentary Secretary exercise the discretion arising to exempt the exemption goods from the duties. If the Parliamentary Secretary is satisfied that like or directly competitive goods are not offered for sale in Australia then the full test is also satisfied

(ie the Parliamentary Secretary can be satisfied that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade).

3.5.1 Definition of “like or directly competitive goods”

Like goods

The term “like goods” is defined in subsection 269T(1) of the Act. Section 6 of the Dumping Duty Act provides that the Act is incorporated and shall be read as one with the Dumping Duty Act. Accordingly, the definition of “like goods” in the Act is applicable to the Commission’s assessment of whether the exemption goods are ‘like goods’ under paragraphs 8(7)(a) and 10(8)(a) of the Dumping Duty Act.

Subsection 269T(1) of the Customs Act defines “like goods” as:

Goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

Chapter 2 of the Commission’s *Dumping and Subsidy Manual* sets out the Commission’s established policy and practice in relation to like goods. Where two goods are identical they are automatically like goods. Where two goods are not alike in all respects the Commission will assess whether they have characteristics closely resembling each other. This assessment will include assessing their physical likeness, commercial likeness, functional likeness and production likeness.

Directly competitive goods

The term “directly competitive” is not defined in the Dumping Duty Act or the Act and has not been the subject of judicial consideration by Australian courts.

Accordingly, assistance in understanding this term can be derived by having recourse to relevant dictionary definitions and case law. Case law suggests an assessment of a “direct” relationship is a question of fact and degree.¹⁵ Drawing on the Macquarie Dictionary and case law, the Commission defines “directly” as:

excluding that which is indirect or remote;¹⁶ absolutely; exactly; precisely.

The Macquarie Dictionary also defines “competitive” as:

*of, relating to, involving, or decided by competition; and
having a feature comparable or superior to that of a commercial rival.*

The phrase “*directly competitive*” can therefore be taken to refer to goods with comparable features that rival each other in a commercial market. The assessment will be one of fact and degree, and the goods will not merely remotely or indirectly compete.

Satisfying the test within paragraphs 8(7)(a) and 10(8)(a) of the Dumping Duty Act

If there are no like or directly competitive goods offered for sale in Australia, then the requirements of paragraphs 8(7)(a) and 10(8)(a) of the Dumping Duty Act are met (and the discretion to grant the exemption arises).

¹⁵ *Adelaide Development Co Pty Ltd v Corporation of the City of Adelaide and Anor* (1991) 56 SASR 497 at [45].

¹⁶ *Ibid.*

If there are like or directly competitive goods then it is necessary to consider whether these like or directly competitive goods are offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

3.5.2 Definition of “custom and usage of trade”

Although the domestically produced goods may be “like or directly competitive goods”, the Parliamentary Secretary may still grant an exemption to duties in circumstances where the “like or directly competitive goods” produced in Australia are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the “custom and usage of trade”.

The term “custom and usage of trade” is not defined in the Dumping Duty Act or the Act. The Macquarie Dictionary defines “custom” as:

a habitual practice; the usual way of acting in given circumstance; and habits or usages collectively; convention.

The Macquarie Dictionary defines “usage” as:

*customary way of doing; a custom or practice;
the body of rules or customs followed by a particular set of people;
usual conduct or behaviour.*

As custom can only be inferred from a large number of individual acts, the existence of a custom and usage of trade must involve:

the multiplication or aggregation of a great number of particular instances; but these instances must not be miscellaneous in character, but must have a principle of unity running through their variety, and that unity must show a certain course of business and an established understanding respecting it.¹⁷

Custom or usage of trade is a term used in common law in the interpretation of implied terms in contracts within a particular trade or industry.¹⁸ When considering what is “custom or trade usage” the courts have concluded that:

1. Custom or usage was established mercantile usage or professional practice: *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 440; and
2. Evidence of actual market practices was crucial to the existence of a custom or usage. However, universal acceptance was not necessary: *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226.

¹⁷ *Anderson v Wadey* (1899) 20 N.S.W.R. 412 at p. 417.

¹⁸ *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468.

3.6 Australian industry's offer of 'like' or 'directly competitive' goods

The applicant claims that Australian industry, specifically Austube, does not produce or offer for sale goods that are like or directly competitive to the exemption goods.

The Commission assesses likeness through four factors: physical likeness, commercial likeness, functional likeness and production likeness. Using this framework, the table below summarises the applicant and the Australian industry's claims regarding whether industry offers for sale in Australia goods that are like or directly competitive to the exemption goods.

Applicant's claims	Australian industry's response
<p><i>Applicant's claims concerning physical likeness</i></p> <p>The Austube 250L0 goods are not of the same wall thickness or tensile strength as the exemption goods. The exemption goods must be a light wall thickness. The tensile strength of the exemption goods is required to be 235-240Mpa.</p> <p>These requirements mean that the exemption goods can be used as road sign-posts and are frangible. The exemption goods are not manufactured to AS1074 as they are not intended to be used for ordinary service and intentionally do not have the strength for such uses.</p> <p>The Austube C350L0 products are not hot-dipped galvanised and therefore not suitable for applications where the posts will be installed in the ground, in contact with the soil or concrete. This is stated on the DuraGal Technical Guide (Annexure B). See for example page 4 and page 6 which states that any point where DuraGal sections enter concrete footings or are below the surface of the soil which gets wet at any time are common problem areas.</p>	<p><i>Australian industry's response concerning physical likeness</i></p> <p>HSS with a tensile strength of 235-240 MPa would be understrength and not compliant with the RMS Standard or with AS/NZS 1163:2009 Grades 250L0 or C350L0.</p> <p>Austube has recently manufactured product conforming to the requirements of AS1163. Austube can also supply to the strength requirements indicated in the exemption goods description.</p> <p>Austube manufactures C250L0 hot-dipped galvanised and C350L0 in Duragal Plus. Austube also supplies HSS products that are pre-galvanised to be hot-dip galvanised by other Australian manufacturers. This is demonstrated by numerous evidence of sales of these goods (claim supported by forty five tax invoices over the period 16 June 2014 – 14 July 2016).</p>
<p><i>Applicant's claims concerning functional likeness</i></p> <p>There is no functional interchangeability. Roads signs must conform in shape, pre-drilling and size to the RMS Standard road signs approved in Australia. They must also have undergone hot-dip galvanised zinc coating to protect against corrosion in the ground or in concrete and be of a relatively low tensile strength in order to meet the requirements for frangible road sign posts.</p> <p>The Austube goods cannot perform the same function as they do not comply with the RMS</p>	<p><i>Australian industry's response concerning functional likeness</i></p> <p>Austube's goods perform the same function as the exemption goods.</p> <p>Austube supplies steel to the strength requirements of the RMS Standard and also those indicated in the applicant's description of the exemption goods.</p> <p>Austube supplies HSS products that are hot-dipped galvanised and pre-galvanised to be hot-dip galvanised by other Australian manufacturers.</p>

Applicant's claims	Australian industry's response
<p>Standard in terms of being frangible, or conforming in size and shape to be fit for that purpose or resistant to corrosion.</p>	
<p><i>Applicant's claims concerning commercial likeness</i></p> <p>The Exemption goods are seam welded pipe from cold-rolled 235 MPa steel, seam welded into circular section, cut to specific (short) lengths, pre-drilled and then hot-dip galvanised with 40um of zinc). The exemption goods are not suitable for construction applications, which Austube's DuraGal Plus 350L0 are used for as the exemption goods are not of sufficient strength for use in these applications.</p> <p>The Austube goods cannot be used for road sign-posts as they do not comply with the RMS Standard (or equivalent) in terms of being frangible, or conforming in size and shape to be fit for that purpose or resistant to corrosion.</p> <p>There is no commercial interchangeability without breaching standards applicable to building and construction or safety and engineering standards.</p> <p>The tubes finished with DuraGal Plus are significantly cheaper than hot dipped galvanised tubes of similar size and lengths because the market recognises the product differentiation owing to the inferior corrosion resistance of the Duragal Plus goods.</p>	<p><i>Australian industry's response concerning commercial likeness</i></p> <p>It is incorrect to suggest that Austube's products do not meet the requirements of the RMS Standard. The RMS Standard is predicated on the Austube range. Austube's HSS meets the requirements of the RMS Standard.</p> <p>Austube supplies HSS products that are hot-dipped galvanised and also pre-galvanised product to be hot-dip galvanised by other Australian manufacturers which may be used for road sign posts.</p>
<p><i>Applicant's claims concerning production likeness</i></p> <p>The exemption goods involve a cold drawn manufacturing process.¹⁹</p> <p>The Austube Goods are manufactured with C350L0 Grade and C250L0 Grade steel, non-alloy.</p> <p>The C250L0 goods are not like or competitive with the exemption goods and the C350L0 goods are not hot-dipped galvanised. The DuraGal Plus coating and galvanising process is different to the process of hot-dip galvanising.</p>	<p><i>Australian industry's response concerning production likeness</i></p> <p>Austube's production process involves a cold form manufacturing process.</p> <p>Austube does not produce goods that are identical in all respects to the exemption goods description due to the descriptor term "cold drawn." The RMS Standard is based on AS 1163:2009 and cold drawn product would not be compliant with AS 1163:2009 or the RMS Standard. The AS 1163:2009 standard references a cold form process.</p>

¹⁹ The applicant described the process for manufacturing the exemption goods both as "cold drawn" and "cold rolled", however these are distinct processes. The Commission notes that the mill certificate supplied in relation to the exemption goods references cold rolled welded pipe. The applicant has stated that the exemption goods comply with Australian Standard AS1163; 2009 (Cold-Formed structural steel hollow sections).

Applicant's claims	Australian industry's response
<p>The DuraGal Plus coating is significantly thinner and less resistant to corrosion. As noted in the DuraGal Technical Guide DuraGal is not suitable for installation underground or where the tube will be in contact with cement or soil.</p> <p>Hot dip galvanising takes place after the sign-posts are drilled and cut to length which means that the surface area of the drill holes and cut edges is also coated with the zinc galvanising during the hot-dip process. DuraGal coating is applied to the Austube Goods without pre- drilling and cutting to length. The exposed surfaces are not protected from corrosion.</p>	<p>Austube supplies HSS that is hot dipped galvanised as well as pre-galvanised product which may be hot dip galvanised by other Australian manufacturers.</p> <p>Post-HSS manufacture processing by an Australian industry (distributor, fabricator, hot-dip galvaniser) can provide HSS with cutting and drilling prior to hot-dip galvanising.</p>

3.6.1 Additional Information provided by the RMS

The applicant's primary argument was that Australian industry does not produce like or directly competitive goods as the exemption goods meet the RMS Standard for use in sign-posts for road signs and the goods produced by Australian industry do not comply with the RMS Standard. Accordingly the Commission contacted the RMS to ask a number of questions that would confirm the Commission's understanding of the RMS Standard. The Commission also inquired whether suppliers to the RMS used Australian produced HSS.

Among other things the RMS provided the following information which was relevant to the inquiry:

- The Australian industry have provided sign posts to RMS in accordance with RMS's requirements (RMS response to Q1, Attachment 5).
- The exemption goods do not conform to the RMS Standard in a number of respects including:
 - the wall thickness of the exemption goods specified at (ix) of the description of the exemption goods in section 3.3 (RMS response to Q2, Attachment 5);
 - the tensile strength of the exemption goods specified at (xii) of the description of the exemption goods in section 3.3 (RMS response to Q3, Attachment 5).

The RMS's full response to the Commission's questions is contained at Attachment 5.

3.7 The Commission's assessment – like or directly competitive goods offered for sale in Australia

3.7.1 Like or directly competitive goods offered for sale in Australia

The Commission has examined the evidence presented in the application and in the Australian industry questionnaire response, and considers that like or directly competitive goods to the exemption goods are offered for sale in Australia.

The following table summarises the Commission's assessment of whether like or directly competitive goods are offered for sale in Australia based on physical likeness, commercial likeness, functional likeness and production likeness.

Factor	Parties' claims	Commission's assessment
<p>Physical likeness</p>	<p><u>Applicant</u></p> <p>The applicant claims that the material produced by Austube is not identical or alike in terms of its ability to deform on impact.</p> <p>The applicant also claims that the Austube goods are unsuitable as they are not resistant to corrosion to the same extent as the exemption goods.</p> <p><u>Industry</u></p> <p>Austube submitted that it has supplied HSS products that are pre-galvanised to be hot-dip galvanised by other Australian manufacturers to the strength requirements as described in the exemption goods.</p>	<p>The Commission is satisfied that, while not identical, local industry's products are physically alike.</p> <p>The required tensile strength of 235-240 MPa as specified by the applicant is not consistent with Table 6 in AS1163:2009 and does not meet the requirements of the RMS Standard.</p> <p>Austube has stated it can supply the alternative strengths specified by the applicant provided that minimum quantities are fulfilled.</p> <p>The Commission is satisfied that Austube's C250L0 goods may be supplied hot-dipped galvanised in Australia.</p>
<p>Functional likeness</p>	<p><u>Applicant</u></p> <p>The applicant claims that the Austube goods cannot perform the same function as the exemption goods (as road signs) as they do not comply with the RMS Standard specifications.</p> <p><u>Industry</u></p> <p>Austube has indicated that it can supply goods in accordance with the requirements of the RMS Standard and that its product can provide the same function as the applicant</p> <p>Austube supplies C250L0 hot-dipped galvanised and C350L0 in Duragal Plus.</p>	<p>The Commission is satisfied that functionally alike goods are offered for sale in Australia.</p> <p>The applicant claims that the exemption goods are required to satisfy the RMS standard.</p> <p>The RMS standard specifies Australian standard AS1163:2009. That Australian standard nominates that CL250L0 grade material must have a minimum tensile strength of 250 MPa and a minimum yield strength of 320 Mpa. The CL350L0 grade material must have a minimum tensile strength of 350MPa and minimum yield strength of 430 MPa. Australian industry produces to this standard and has provided product that has met the requirements of the standard.</p> <p>The Commission is satisfied that the Austube goods can fulfil the function of being resistant to corrosion consistent with the requirements of the RMS Standard. Austube's C250L0 goods are also hot-dipped galvanised.</p>

Factor	Parties' claims	Commission's assessment
Commercial likeness	<p><u>Applicant</u></p> <p>The applicant claims there is no commercial interchangeability between the exemption goods and Austube goods without breaching standards applicable to building and construction or safety and engineering standards.</p> <p><u>Industry</u></p> <p>Austube states that it produces and sells steel meeting the AS 1163:2009 consistent with the specifications of the RMS Standard.</p>	<p>The Commission is satisfied that commercially alike goods are offered for sale in Australia.</p> <p>The RMS has confirmed that the RMS Standard requirements do not differ from the specifications indicated in AS1163:2009 and the locally produced goods are made to this standard.</p> <p>Further, the Commission has confirmed with RMS that Austube has supplied goods that are like the exemption goods, which have been used as sign posts in accordance with the RMS Standard.</p>
Production likeness	<p><u>Applicant</u></p> <p>The applicant has claimed that the exemption goods are cold drawn and Austube's goods are not alike since certain of Austube's goods are not hot dipped galvanised.</p> <p>However, the applicant has also claimed that the exemption goods are cold formed.</p> <p><u>Industry</u></p> <p>Austube has advised that the production process for the exemption goods and the goods is the same.</p> <p>Australian industry provides 250L0 hot-dipped galvanised pipe to AS 4680 and 350L0 in Duragal plus.</p>	<p>The Commission understands that the RMS Standard references cold formed (not cold drawn products).</p> <p>Austube produces cold formed products.</p> <p>The mill certificate provided in respect of the exemption goods references a cold rolled (i.e. cold formed) production process.</p> <p>Therefore the Commission is satisfied that the production process for the exemption goods and the Australian produced product are alike in terms of their production.</p> <p>The Commission is satisfied that the C250L0 Austube goods are hot-dipped galvanised.</p>

3.7.2 Findings and Conclusion

The Commission finds that like and directly competitive goods are offered for sale in Australia. Accordingly it is necessary to determine if the like and directly competitive goods offered for sale in Australia are offered for sale to all purchasers under like conditions having regard to the custom and usage of trade (see sections 3.8 and 3.9).

3.8 To all purchasers on equal terms under like conditions having regard to the custom and usage of trade

The applicant did not provide specific information or evidence in support of a position that the like or directly competitive goods were not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

The Commission understands the application to be based, in effect, on there being no like or directly competitive goods offered for sale in Australia due to the special characteristics claimed in respect of the exemption goods.

However, as Commission has found that like and directly competitive goods are offered for sale in Australia, it is also necessary for it to determine if the exemption goods are offered for sale to all purchasers under like conditions having regard to the custom and usage of trade.

Applicant's claims	Australian industry's response
<p>The applicant claimed that it was not able to obtain like goods at all. As such, no claims were made regarding whether Austube offers for sale the exemption goods on equal terms under like conditions having regard to the custom and usage of trade.</p> <p>The applicant did not provide a response to the information provided by Australian industry.</p>	<p>With respect to terms and conditions, Austube advised that customers are subject to the same list price and have access to all the same models with the same delivery lead times as each other. The key difference relates to the volume of product being purchased, credit worthiness and level of trade.</p> <p>Hi Vis are not direct customers of Austube but are able to access like goods produced by the Australian industry from multiple distributors.</p> <p>Austube sells to distributors via a common price book with its product range equally available to all its distributors including:</p> <ul style="list-style-type: none"> • the product size, grades, thicknesses and coatings; • the pack size; • the pack lengths; • delivery lead time to various locations; • product availability (stock/make to order); • minimum order quantity <p>Austube's has stated that its technical staff could work with the procurement officer from Hi Vis to discuss the various product grade and coating options available to determine the appropriate product for the intended application. Once the appropriate product is identified Hi Vis could contact any of their local distributors to source the most competitive quote.</p>

3.9 The Commission's assessment - to all purchasers on equal terms under like conditions having regard to the custom and usage of trade

3.9.1 Finding

The Commission has examined the evidence and information provided by the applicant and by the Australian industry and considers that there is no basis to be satisfied that like goods offered for sale in Australia are not offered for sale to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

3.9.2 To purchasers on equal terms under like conditions having regard to the custom and usage of trade

Austube provided information concerning the terms and conditions on which the like goods produced by Austube are offered for sale to Australian purchasers (see Attachment 7). That information indicates that terms may vary under different conditions such as the volume of goods sold, credit worthiness of the purchaser and the level of trade. Austube stated that sales to customers that are not direct customers of Austube (such as Hi Vis) are made through a network of distribution outlets and these outlets vary terms of supply based on similar conditions. The Commission considers that variations in terms for the conditions indicated are not inconsistent with the custom and usage of trade in the steel industry (or more generally).

The Commission did not receive any submission, information or evidence from the applicant to counter Austube's information indicating that like goods offered for sale in Australia are offered to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

3.9.3 Conclusion

The Commission finds that the evidence before it provides no basis for the Parliamentary Secretary to be satisfied that like or directly competitive goods offered for sale in Australia are not offered for sale all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

3.10 Recommendation concerning the like-goods criterion

Based on the Commission's examination of the available information and evidence, the Commissioner considers that like or directly competitive goods to the exemption goods are offered for sale in Australia.

Based on the Commission's examination of the available information and evidence, the Commissioner considers that there is no basis for the Parliamentary Secretary to be satisfied that the like or directly competitive goods offered for sale in Australia are not offered to all purchasers in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

Accordingly, the Commissioner recommends that the Parliamentary Secretary has no discretion to exempt the exemption goods from the duties under paragraphs 8(7)(a) and 10(8)(a) of the Dumping Duty Act.

4. Exemption inquiry (TCO criterion)

4.1 Application addressing TCO criterion

The application provided details of TCO TC 9508551. TC 9508551 states that it applies to the following goods (classified to tariff heading 7306.30.00):

TUBES, cold drawn, welded to specification DIN 2393, having BOTH of the following:

- a) carbon content NOT less than 0.06% and NOT greater than 0.4% by weight;*
- b) outside diameter NOT less than 6.4mm and NOT greater than 203.2mm.*

Hi Vis claimed that the exemption goods fall within the terms of TC 9508551.²⁰ Hi Vis noted that TC 9508551 had been in place for 20 years without challenge from the Australian industry producing HSS.

Hi-Vis' claim in support of its application for an exemption from the duties was that a TCO, namely TC 9508551, in respect of the exemption goods was in force.

4.2 Exemption inquiry

In addition to the application the Commission received the following submissions and information relevant to the TCO criterion:

- A submission by Austube was received on 7 August 2015, outlining its objections to the exemption request (**Attachment 8**).
- A completed response to a questionnaire provided by the Commission was received from Austube on 18 August 2015 (**Attachment 9**). In its response Austube stated that it intended to seek revocation of TC 9508551.
- Notification in the gazette on 30 September 2015 that TC 9508551 had been revoked.

4.3 Legislative requirements for an exemption under the TCO criterion

The applicant has applied for an exemption under paragraphs 8(7)(b) and 10(8)(aa) of the Dumping Duty Act.

Paragraph 8(7)(b) provides:

(7) The Minister may, by notice in writing, exempt goods from interim dumping duty and dumping duty if he or she is satisfied:

...

(b) that a Tariff Concession Order under Part XVA of the *Customs Act 1901* in respect of the goods is in force.

Paragraph 10(8)(aa) provides:

(8) The Minister may, by notice in writing, exempt goods from interim countervailing duty or countervailing duty if he or she is satisfied:

²⁰ The application provided a more succinct description of the exemption goods than the description of the exemption goods in the like-goods submission.

...

- (aa) that a Tariff Concession Order under Part XVA of the *Customs Act 1901* in respect of the goods is in force.

4.4 Assessment

On 30 September 2015, following Austube's application for revocation, the ABF published a notice in the gazette that TC 9508551 had been revoked. TC 9508551 was revoked on the grounds that:

"Substitutable goods produced in Australia in the ordinary course of business by Austube Mills, St Leonards, NSW. In transit provisions apply."

As such, the TCO is no longer in force.

On this basis the Commission considers that there are no grounds for the Parliamentary Secretary to be satisfied that a TCO in respect of the goods is in force.

Austube made a submission to the effect that the goods that Hi Vis sought to import did not fall within the terms of TC 9508551. In addition there was some material before the Commission supporting Austube's submission. Given that TC 9508551 has been revoked the Commission has not needed to reach a concluded view as to whether the goods that Hi Vis sought to import fell within the terms of TC 9508551.

4.5 Recommendation concerning TCO exemption application

Based on the Commission's examination of the available information and evidence, the Commissioner considers that no TCO in respect of the goods is in force. Accordingly, there are no grounds for the Parliamentary Secretary to be satisfied that a TCO in respect of the goods is in force.

Accordingly, the Commissioner recommends that the Parliamentary Secretary has no discretion to exempt the exemption goods from the duties under paragraphs 8(7)(b) and 10(8)(aa) of the Dumping Duty Act.

5. Attachments

Attachments	Confidentiality	Title	Electronic public record identifier
Attachment 1	Not confidential	Exemption inquiry application	EX0042/001
Attachment 2	Not confidential	Applicant's submission on like-goods ground	EX0042/006
Attachment 3	Not confidential	Australian industry submission, Austube	EX0042/007
Attachment 4	Not confidential	Australian industry questionnaire response, Austube (Public Record version)	EX0042/008
Attachment 5	Not confidential	RMS response to Commission	EX0042/009
Attachment 6	Not confidential	Australian industry submission, Austube	EX0042/010
Attachment 7	Not confidential	Australian industry submission, Austube	EX0042/011
Attachment 8	Not confidential	Australian industry submission, Austube	EX0042/003
Attachment 9	Not confidential	Australian industry questionnaire response, Austube (Public Record version)	EX0042/004