Director
Anti-Dumping Commission
Customs House
5 Constitution Avenue
CANBERRA ACT 2616

1 October 2013

Our ref 11276/15955/80126545

Dear Director

Submission: Resumed Investigation into Export of Quicklime Exported from Thailand

1. We act for Alcoa of Australia Limited (**Alcoa**).

2. Alcoa is concerned with the basis on which the Anti-Dumping Review Panel ("**Review Panel**") revoked the decision made by Customs to terminate the investigation and thus require the Anti-Dumping Commission to re-determine the matter for a second time.

3. In summary, Alcoa submits that:

   (a) the approach adopted in the Review Panel Report ("**Review Panel Report**") is not consistent with the obligations set out in the Anti-Dumping Agreement - in particular, to have regard to a period of time prior to the investigation period;

   (b) the Report incorrectly states that the decision to have regard to additional information outside the investigation period was consistent with the decision of the Full Federal Court in *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* [2002] FCAFC 423 ("***Pilkington***");

   (c) the Review Panel erred in stating that a finding of 48% dumping in effect outweighed all the acknowledged contrary findings of no material injury;

   (d) the Review Panel erred in revoking the decision by Customs to terminate the investigation because of negligible injury;

   (e) the Review Panel incorrectly stated that in determining the "*correct or preferable decision*" it can consider facts which did not form part of the original decision (when interested parties had no notice of those matters or facts).

What can be reviewed?

4. Customs, in carrying out its re-investigation following the TMRO review, correctly limited its findings on the issue of whether or not the injury was negligible to the investigation period set out in the original investigation.

5. Alcoa made submissions to the TMRO on this question by letter dated 21 August 2012 and repeats those submissions for the purpose of the further re-investigation. Relevantly, as stated in that submission, Alcoa considers that there was no proper legal basis for the TMRO to have concluded that the investigation period specified in the original investigation period can be extended to meet the request of the applicant, Cockburn Cement Pty Limited ("**Cockburn**"). Further, to do so would be inconsistent with the provisions of the Anti-Dumping Agreement.

6. Customs stated that:

> "*Whilst there is no requirement for Customs to consider data outside the investigation period when determining whether dumping has caused injury, for the purpose of addressing concerns raised by the TMRO and the applicant, Cockburn Cement, Customs and Border Protection has conducted further analysis. This additional analysis is to provide satisfaction to all interested parties that all relevant matters have been considered in Customs and Border Protection's decision to support its previous findings and proceed on that basis.*"[1]

7. However, in making its decision to terminate the investigation under section 269TDA(13) of the *Customs Act* 1901 (Cth), it relied on the findings that arose out of the investigation period and not, as described by the Review Panel, the information from the further injury analysis period.

8. The question arises whether it was entitled to consider this period for the purpose of the re-investigation.

9. The Review Panel noted that the further injury analysis period could not be said to have formed part of the decision of the CEO to terminate and so was not open to review.[2] The Review Panel decided however that it would have regard to this information even though it was not part of the CEO's decision because:

   (a) to follow the decision not to consider this information would be an unduly narrow approach and it is desirable for the Review Panel to adopt a more inclusive approach;

   (b) the better course of action was to review the findings made in respect of the further injury analysis period given that although Customs disagreed with such an approach it would address the issue arising from the TMRO decision;

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[1] Page 13 of the Review Panel Report.

[2] Page 17 of the Review Panel Report.

(c) although Customs did not state the legal basis on which it had decided to conduct such an analysis, the Review Panel would conduct such a review as this approach accords with the law as stated in *Pilkington*; and

(d) the Review Panel offered an even broader reason for considering the further injury analysis period namely, Parliament exhibited an intention to determine whether the findings of fact and decisions made were the correct or preferable findings and decisions.

10. Alcoa submits that:

(a) it is evident that Customs did not adopt the recommendations of the TMRO and based its termination decision on the original investigation period;

(b) the Review Panel has not cited any authority for the proposition that it is entitled to review a decision made by the CEO by having regard to information which was not relied upon by the CEO;

(c) there is no legal basis to support the notion that information otherwise not admissible on review should be permitted because not to do so would lead to an "unduly narrow" approach;

(d) Customs did not state a legal basis for having regard to the further injury analysis period because there was no legal basis for doing so. The Review Panel referred to *Pilkington* to support the proposition. However, there is no basis in that case to support the proposition that regard can be had to information outside the investigation period. Alcoa notes that the Review Panel has not cited any reference in that case to support the view it has expressed and fails to heed the clear dictate of paragraph 75 of that decision;

(e) the reference to making the correct or preferable decision cannot be read as authorising the consideration of facts which did not form part of the CEO decision to terminate the case. Indeed to do so would mean that the correct and preferable decision would not be made; and

(f) there is nothing either in the recent amendments or in the accompanying explanatory memorandum which would support the alleged intention of Parliament put forward by the Review Panel.

Findings of Fact

11. The Review Panel noted that a large number of the findings made in the SEF 179 remained largely unchallenged and these findings were listed in paragraph 6 of its report. Amongst the findings that were not challenged was that imports from Chememan Thailand Australia, a related company to Chememan Thailand, accounted for 1% of the Australian market and only 2% of the Western Australian market. Secondly, that the major use of the imports from Chememan had been for testing purposes and replaced very few of Cockburn's potential sales.

12. In respect of this later point, Alcoa contended that the imports were brought in for testing purposes, to determine if the Chememan product was fit for the purpose and to this extent it could not have taken imported sales from the applicant.

13. The Review Panel also made the following findings and comments:

(a) that it agreed with the definition of material injury as being injury which is not immaterial, insubstantial or inconsequential;[3]

(b) that material injury which does not reach this standard is to be considered as negligible and that Customs did not apply a high standard in this regard;[4]

(c) that the Ministerial Direction makes it possible but not determinative to make a finding of material injury where profit is maintained but growth in a market has slowed as the result of dumping. However, such a finding is dependent on the consideration of all the circumstances;[5]

(d) that a determination of injury whether material or negligible must be based on an assessment of injury to the Australian industry as a whole. It is not to be confined to an assessment of a particular segment of the industry;[6]

(e) the applicant was misguided in submitting to the Review Panel that the applicant's production in Western Australia was of limited value given that it did not address the Australian market as a whole;[7]

(f) the approach of Customs in making the assessment in respect of the Australian industry as whole was in fact correct;[8] and

(g) the findings of fact in respect of the original investigation period were not effectively challenged in the renewed investigation of the applicant or interested parties.[9]

14. In respect of particular injury factors, the Review Panel found:

(a) in relation to profit and profitability, that four price reductions occurred in the non-alumina sector and accounted for less than 1% reduction in profit;

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[3] Par 44 of the Review Panel Report.

[4] Par 45 of the Review Panel Report.

[5] Par 47 of the Review Panel Report.

[6] Par 52 of the Review Panel Report.

[7] Par 52 of the Review Panel Report.

[8] Par 52 of the Review Panel Report.

[9] Par 53 of the Review Panel Report.

(b) price depression in the non-alumina sector in 2010 to 2011 represented less than 1% loss of revenue during the investigation period;

(c) no price suppression was found in the non-alumina sector in the 2011 to 2012 year and loss of revenue was less than 1% during the investigation period;

(d) there was no price depression in the alumina sector because, during the period in which imports from Thailand commenced, long term contracts with predetermined prices had been agreed to and were in place;

(e) there was a finding of an increase in revenue in the first 6 months of the investigation period followed by a decrease from the previous 6 months;

(f) there had been price undercutting in both the alumina and non-alumina sectors but, whilst no estimates were made for the alumina sector, they accounted for less that 1% of the volume of quicklime sold in the non-alumina sector; and

(g) there was no threat of material injury found.

Consideration of the Facts

15. In relation to the resumed investigation, the Review Panel noted that when the figures for both the alumina and non-alumina sectors are combined there is a reduction in revenue of less than 1% and that this figure is not disputed by the applicant.[10]

16. The Review Panel noted that no loss of profit was calculated for the industry as a whole because of the lack of data.

17. The Review Panel noted that the applicant did not either during the response to the submission to SEF 179A or in its application for review indicate any estimate for the loss of profit for the industry.[11]

18. The Review Panel noted that only 3 of the other 12 members of the industry responded and stated:

> "*However, it is necessary to acknowledge and take into account that Cockburn Cement had approximately 50% of the Australian quicklime market and that a fall in profit levels, particularly given it operates in a monopolist sector of the total domestic market, may not be reflective of a similar reduction in profit to the whole domestic market.*"[12]

[10] Par 57 of the Review Panel Report.

[11] Par 58 of the Review Panel Report.

[12] Par 58 of the Review Panel Report.

19. The Review Panel also stated that an entry of dumped product into a monopoly market is something which cannot be characterised as being part of the normal ebb and flow of business.[13]

20. The Review Panel noted that the applicant's parent company, Adelaide Brighton, was spending some $24 million on a new kiln and that the applicant had entered into formal agreements in 2011 with a major alumina producer (in effect our client, Alcoa) from July 2011 for a period of 5 to 10 years. This will underpin the long term positioning of the lime operations and lime prices will improve in 2012 as a result of a major alumina producer customer in Western Australia.[14]

21. The Review Panel notes that the interim results support Customs' findings that the sale price of the alumina sector continue to rise in the post 2011 period.

22. The Review Panel found that there was no evidence to support a finding that the applicant suffered injury to "*other economic factors*" such as capacity utilisation or employment or in fact from any other factor under this heading.

23. As noted by the Review Panel:

> "*It is fair to conclude from the 2012 interim results of Cockburn Cement's parent company, that, despite the injuries found to have been caused, the quicklime industry in Western Australia is operating at a profit, that it is operating in an expanding market and that the sale price for quicklime in the alumina sector, which is the largest part of its market, is not only improving but that it is enjoying long term stability.*"[15]

24. It is clear on all these findings that the applicant cannot sustain an argument that it had suffered material injury. Any injury would, at best, be negligible.

25. However, the Review Panel relied on the following arguments to overturn Customs' decision:

(a) in response to the quote above, that "[t]*hose factors however do not address the issue of profitability and in particular whether the dumping has caused a diminution in profits which otherwise may have been generated*";[16]

(b) there was nothing on the public record to indicate that any increase in profitability had occurred;[17]

(c) the dumping margin of 48% is a relevant factor when assessing material injury.[18]

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[13] Par 59 of the Review Panel Report.

[14] Par 60 of the Review Panel Report.

[15] Par 65 of the Review Panel Report.

[16] Par 65 of the Review Panel Report.

[17] Par 61 of the Review Panel Report.

[18] Par 66 of the Review Panel Report.

26. Further, the Review Panel stated that a fall in revenue of less than 1% for the whole domestic market is on the face of it insignificant but that a profit drop of a confidential amount by a producer responsible for 50% of the domestic market suggests a level of injury greater than considering a drop of less than 1% of revenue in isolation.

27. Ironically the Review Panel then proceeded to identify factors which go against such a finding, namely:

(a) an increase in volume of sales prices secured by long term contracts that were concluded post June 2010 in the alumina sector which constitute 70% of the applicant's market;

(b) imported products sell at a higher price than the applicant's product;

(c) there is no evidence that the applicant suffered other economic factors arising from dumping;

(d) the volume of imported product entering the Australian and Western Australian markets is small being approximately 1% and 2% respectively and has decreased since 30 June 2011; and

(e) most of the imported product has been used for testing purposes and there is no evidence that long term supply contracts have been entered into for the imported product even though there is some evidence of storage capacity being established in order to undertake long term entry into the market.

Review Panel reasons for overturning the findings of fact not in dispute or those found by the Review Panel itself

28. The Review Panel has erred in its function and has neglected or de-emphasised the overwhelming weight of evidence that supports a finding that the decision made by Customs was the correct and preferable one.

29. The Review Panel also gave as one reason to revoke the decision that no finding of the total profitability of the Australian industry was made. Curiously however, the Review Panel noted that the applicant itself did not provide any evidence on its profits either during the re-investigation or in the application. It is noted that the applicant lodged the application for the original investigation in its own right and that it clearly had this information in its possession and was easily able to provide it. Its failure to provide such information must be assumed to be because to do so would not assist its case and indeed would show that its profits had not declined (or if they did they did not decline in any significant measure).

30. Customs as well as the Review Panel pointed to a range of factors which demonstrated a strong sub-stratum of evidence which would lead to the conclusion that any loss of profit would have been negligible. The Review Panel's statement that the finding made by Customs on profit decline being negligible was **speculative** is heroic but simply wrong. Customs' finding was the only available inference open.

31. The fact that there may have been a dumping margin of 48% cannot in and of itself override all the contrary indicators of no material injury. To do so would mean that although no particular

injury indicator is, under Article 3 of the Anti-Dumping Agreement or section 269TAE of the *Customs Act* 1901 (Cth), can be determinative of a finding of material injury, the effect of the Review Panel's decision is to elevate the dumping margin finding to this status.

32. In disregarding all the contrary evidence which supports a finding that the injury suffered by the applicant is negligible, the Review Panel has made a finding which would require the Commission to act contrary to the provisions of Article 3.1 of the Anti-Dumping Agreement which states:

> "*3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.*

33. The issue of profit has already been addressed but to re-emphasise a point already made, Alcoa imported product simply to test its suitability. The importation of that product was never used as a basis for lowering price or predatorily. The very nature of the transaction meant that Alcoa was not taking sales away from the applicant.

34. Finally, the Review Panel indicates, but does not positively state, that there was a potential loss of profit. Alcoa would point out that at no stage did the applicant put forward an argument about potential loss of profits in its application, the first review to the TMRO or the second review to the Review Panel.

For the reasons set out above, our client, Alcoa, considers that no material injury was caused and the findings Customs previously made ought to be reaffirmed.

Yours sincerely

Zac Chami, Partner
+61 2 9353 4744
zchami@claytonutz.com

Michael Mulgrew, Consultant
+61 2 9353 3054
mmulgrew@claytonutz.com