

22 October 2018

Investigations 4
Anti-Dumping Commission
55 Collins St
Melbourne Vic 3000

cc. Paul Sexton

Dear Sir/Madam,

**ADRP 2018/88 - CERTAIN HOLLOW STRUCTURAL SECTIONS EXPORTED FROM THE
PEOPLE'S REPUBLIC OF CHINA, THE REPUBLIC OF KOREA, MALAYSIA AND TAIWAN**

REQUEST FOR REINVESTIGATION

Austube Mills refers to the letter of Panel Member O'Connor (**the Panel**) dated 4 September 2018 requiring the Commissioner, pursuant to s 269ZZL, to reinvestigate certain findings contained in the Commission's report of 3 May 2018 concerning the above review of measures inquiry (**REP 419**).

Reinvestigation Request – Operative or determinative date of export sale

Austube Mills supports the Commission's conclusions reached in REP 419 and is concerned by the nature of the request by the Panel to reinvestigate the date of sale as it related to exports. The observation of the Panel that "[t]he outcome of such a comparison may be in breach of the Commission's obligation to conduct a fair comparison between export prices and normal values" is not supported by any reading of Australian domestic law or precedent on this point of an investigating authority's obligations.

Such obligations were specifically addressed by the Federal Court in *Al Abdullatif Industrial Group Co Ltd v Minister for Justice & Customs* [2000] FCA 758 where the applicant unsuccessfully argued:

that as a Minister and the Chief Executive Officer, the respondents have a duty imposed by the statutory scheme to make appropriate adjustments under the section. The duty to adjust appropriately imposes a corresponding duty to investigate whether or not any relevant factor affects price comparability so as to trigger the operation of the legislation. Therefore, the applicant contends, the fact that the exporter does not provide relevant information at the appropriate time does not excuse the Minister and the Chief Executive Officer from performance of that duty to investigate the issue and a failure to do so is a failure to take into account a relevant consideration amounting to an error of law. [21]

The argument of the respondent, the ACS (Australian Customs Service), as paraphrased by O'Connor J. was that:

The respondent acknowledges correctly that there is not, in a legal sense, any onus on Abdullatif to prove its case by providing relevant material. However, the respondents do have a legal duty to make decisions on the basis of persuasive material made available in the context of the operation of the anti-dumping scheme. ... [W]hen a party seeks a particular outcome and has the opportunity to make submissions within a known statutory scheme, the decision-maker is entitled to expect that a party affected will, in the ordinary course, draw all relevant material to the decision-maker's attention, particularly where it has knowledge of the material which would substantiate its position. This approach, the respondent contends, is the one taken in Enichem Anic Srl v Anti-Dumping Authority (1992) 39 FCR 458. To create an implied duty to investigate would make such a scheme unworkable in many cases. [22]

Finding for the respondent investigating authority, O'Connor J. observed:

Later submissions were not considered as a matter of discretion and the right to do this is not questioned. The approach taken by ACS was not unreasonable and should, it argues, be characterised as conclusions which were open to a reasonable person on the material available. It is conceded that there may be some circumstances where a failure to institute further enquiries could be unreasonable. This was the conclusion reached in GTE (Aust) Pty Ltd v Brown (1986) 14 FCR 309. This is in my view a very different case. In the GTE case material had been specifically furnished in time and was disregarded, here the material provided in time was considered and rejected or regarded as inadequate. There is not, in this situation, a legal obligation to institute further enquiries, particularly considering the strict timetable of the scheme. The imposition of a general duty to enquire which is wider than the enquiries of the applicant in a case such as this would make the scheme unworkable. It follows that a failure to make such enquiries in the context of this case does not amount to an error of law. [27] [emphasis added]

Applied here, Ursine was required, when responding to the exporter questionnaire, to provide at Parts B and D, extra information with regard to domestic sales if a date different to that of the invoice date was chosen. Such information was not provided by Ursine.

The exporter questionnaire notes that [t]he purpose of a verification is to verify the information submitted in response to this questionnaire. It is not meant to be a chance for you to provide new or additional information. The Commission expects your response to the questionnaire to be complete and accurate.

Ursine's interests were represented by an experienced consultant, knowledgeable in the evidentiary requirements, of the review inquiry process. Ursine had been informed of the

information required after verification yet did not provide such information until some 55 days later and 21 days past the SEF.

Ursine's case can be distinguished from the facts and circumstances of those of GTE in *GTE (Aust) Pty Ltd v Brown* (cited above), where material had been provided in time, but nevertheless disregarded.

Ursine's case aligns with the facts and circumstances set out in *Abdullatif* at paragraph 27, in relevant part, "*here the material provided in time was considered and rejected or regarded as inadequate*".

Austube Mills is also concerned that the matters referred to in paragraphs [8] and [9] of the Panel's conference notes dated 24 August 2018 move even further away from the judgement in *Abdullatif* in placing the onus on the Commission to conduct detailed investigations of every issue raised regardless of the evidence provided and the timeliness of the provision of such evidence.

Of particular concern is the statement that an on-site verification may be required when Ursine has already had its opportunity to provide evidence to support its views during the original verification activity.

The Panel's request to the Commission to reinvestigate the issue goes against the view expressed *Abdullatif* at [27] that *[t]here is not, in this situation, a legal obligation to institute further enquiries, particularly considering the strict timetable of the scheme*. Yet contrary to this clear pronouncement of Australian domestic law, the Panel is instructing the Commission to do so.

Should the Commission act on this direction of the Panel, then it will be clearly doing so in serious error of law, and in such a manner as will materially prejudice Austube Mills.

Furthermore, even if Australian domestic law was not sufficiently clear on this point, then the approach suggested by the Panel is also contrary to the requirements of the Anti-Dumping Agreement. WTO jurisprudence culminating in *EU – Footwear (China)(DS405)* [at 7.282] have consistently maintained that it is the exporter's responsibility to make substantiated requests for due allowance adjustments.

Indeed, the Anti-Dumping Review Panel (*ADRP*) has itself, previously, concluded (in *ADRP* Report No. 48 at [59]) that "*[I] note the onus is upon the exporter to provide evidence demonstrating a difference which affects price comparative [sic] for which an allowance or adjustment must be made*".

Moreover, the Commission's practice of requesting details of adjustment claims (or in this instance date of sale) to be included in the exporter questionnaire response accords with all the aforementioned authorities as does the observation in the *Dumping and Subsidy Manual* at p. 61 that:

Austube Mills Pty Ltd
ABN 21 123 666 679

Head Office - Industrial Drive, Mayfield NSW 2304
PO Box 156, Newcastle NSW 2300
Ph: +61 2 4935 4498



[E]xporters making adjustment claims also have a responsibility to provide evidence in support because this information is usually in their possession. Claims should be provided in a timely manner to enable an examination of the circumstances and to verify the supporting accounting information. If an adjustment claim is made after the verification visit to the exporter, the Commission will assess its appropriateness having regard to the reliability of the information provided and the remaining time available to complete the report.

For and on Behalf of AusTube Mills