CLAYTON UTZ

For Publication

Director Operations 3
Anti-Dumping Commission
1010 La Trobe Street
Docklands VIC 3008

4 August 2014

Attn: Mr Adam Yacono

Dear Sir

Quenched & Tempered Steel Plate exported from, inter alia, Japan

As you know we act for the Japanese Mills (Nippon Steel & Sumitomo Metal Corporation, JFE Steel Corporation and Kobe Steel, Limited).

We refer to the Bisalloy Steel Group Limited (**Bisalloy**) letter to the Anti-Dumping Commission (**Commission**) dated 30 June 3014. Bisalloy's letter essentially raises 2 issues which are worthy of demurrer, namely:

(a) Bisalloy's restructuring announcements of 20 May 2014.

(b) Bisalloy's announcements of 21 and 26 November 2013.

Dealing with the second matter first, it should strike the Commission as curious that Bisalloy claims an *influx* of overseas competitors and Australia is *used as an outlet for surplus production* but:

(a) there is no express reference to **dumping** or **unfair** competition in any of its published notices;

(b) Bisalloy held/maintained market share over the relevant period;

(c) two (2) of the named countries in the statement quoted in Bisalloy's letter, namely the People's Republic of China (PRC) and Korea, were not included in the anti-dumping application. Bisalloy's relationship with PRC firms and its joint venture may possibly explain the reason.

As to the pejorative terms 'influx' and 'surplus production', there is not a scrap of evidence to support those claims. What is and has been proved however is that mining industry investment has reduced so significantly that it has had an affect on the applicant.

As to the first matter, we repeat our prior submission that events outside the investigation period must not be considered either as to dumping or injury: *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* [2002] FCAFC 423.

Bisalloy refers to the Trade Measures Review Officer (**TMRO**) report concerning investigation 188 dated 2 April 2013. That report does not reflect the development of the law on the temporality of facts that can be taken into account in relation to the different decisions that need to be made and that can be made by the Minister at the conclusion of an investigation. Indeed some findings in the TMRO's report and its exposition of the law were rejected by the Federal Court: for example, the Federal Court differed from the TMRO's views concerning s.33(3A) of the *Acts Interpretation Act, 1901* (Cth) in *Panasia Aluminium (China) Limited v AG of the Commonwealth* [2013] FCA 870, a decision that was handed down some months after the TMRO's report.

Level 15, 1 Bligh Street
Sydney NSW 2000

GPO Box 9806
Sydney NSW 2001
DX 370 Sydney

T +61 2 9353 4000
F +61 2 8220 6700
www.claytonutz.com

As a matter of statutory construction, s.269TEA(3)(b) of the *Customs Act* 1901 (Cth) does not have the width that the TMRO suggested. In the *Pilkington* case the Court considered the structure of the Customs Act and referred to the centrality of the investigation period. Section 269TEA(3)(b) cannot be considered to be a freestanding power.

Ultimately, what it was that the TMRO did in that report was to rely on s.269TEA(1)(c) and general policy as the reason why *price* post the investigation could be taken into account in recommending to the Minister the '*extent of any duties that are or should be payable…*". What Bisalloy does, with respect wrongly, is treat the TMRO's statement as giving rise to some broader principle. It does not. The TMRO was referring to the use of *price* post the investigation period for the purposes of deciding about the extent of the measures and NOT to the use of any facts occurring outside the investigation period for the purposes of deciding whether dumping, damage or injury had actually taken place in the investigation period.

At this point it is wise to point out that Bisalloy's original application was that it had suffered damage "*…for a number of years with an increased impact on profits and profitability being experienced during the 12 months period* ***to 30 September 2013*** (see part 8.3 of PAD at page 19) (my emphasis). Taking that at face value, a restructure some 8 months later and, knowing the condition of the Q&T market has declined significantly because of matters raised in our other submissions, calls into question the shifting nature of the applicant's case and its attempts to characterise its lack of performance to dumping and injury.

Yours sincerely

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

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