

Ms Joanne Reid  
Director, Operations 2  
International Trade Remedies Branch  
Australian Customs and Border Protection Service  
Customs House  
5 Constitution Avenue  
CANBERRA ACT 2601

5 April 2013

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Our ref 11276/80137008

Dear Ms Reid

**Submission in response to statement of essential facts – grounds of exemption from interim measures**

We act for Ace Gutters Pty Ltd (**Ace Gutters**) and have made previous submissions in relation to the question of material injury and the exemption of unchromated aluminium zinc coated product.

In addition to our client, the Statement of Essential Facts (**SEF**) refers to OneSteel Coil Coaters (**OneSteel**) also seeking an exemption from measures of unchromated aluminium zinc coated steel. The exemption is claimed under s.8(7)(a) of the *Customs Tariff (Anti-Dumping) Act 1975*, in particular, that like goods are not offered for sale to all purchasers on equal terms.

**1. Grounds for exemption**

**1.1 Our client claims that BlueScope:**

- (a) does not offer for sale to third party customers in Australia unchromated aluminium zinc coated steel; and
- (b) will not offer for sale unchromated aluminium zinc coated steel on commercial terms.

**1.2 Our client acknowledges (and has previously submitted) that BlueScope produces unchromated aluminium zinc coated steel. Our client has also claimed, correctly, that BlueScope does so only for its own internal use on its own paint lines. Our client's claim and its submission has been proved by Customs to be eminently correct.<sup>1</sup>**

**1.3 Customs has, after much complaint by our client (and others), unearthed a "one off sale of a small quantity [of unchromated product] to an independently operated [BlueScope] related entity during the investigation period..."<sup>2</sup> (our emphasis).**

**1.4 The analysis and conclusion of Customs otherwise recorded by Customs in the SEF at page 38 concerning a quote issued to OneSteel as being on *reasonable commercial terms* is however devoid of merit and fails to grasp basic economic principles. The following peculiar characteristics and logic employed in the analysis is noteworthy:**

<sup>1</sup> Page 38 at [2] of SEF.

<sup>2</sup> Page 38 at [3] of SEF.

- (a) the quote provided by BlueScope to OneSteel for the unchromated product was higher than the painted chromated product (painted aluminium zinc coated steel);
- (b) Customs accepted that chromated product is more refined and "*undergo[es] further processing*" than unchromated product;
- (c) implicit in the above conclusion is that chromated product is more costly to manufacture;
- (d) despite the higher manufacturing cost of the chromated product, it is reasonably commercial for BlueScope to quote a price for its less refined unchromated product that is higher (the percentage margin is not disclosed) than its refined chromated product; and
- (e) BlueScope is justified in quoting a higher price for the less refined unchromated product in comparison to the more refined chromated product (despite the higher manufacturing cost of that product) because this is "*explained by market demand*" and this is "*acceptable commercial practice*".

1.5 The analysis above is fatally flawed at a number of levels:

- (a) first, there is no market demand at the quoted price because a sale did not eventuate;
- (b) second, it is not commercial reality to quote a price for an unrefined product that is higher than the finished product;
- (c) third, OneSteel, to whom the quote was issued, has publicly stated, and the record indicates, that the price was unrealistic and uncommercial;
- (d) fourth, Customs has not queried or explored an alternative rationale for the price quoted, namely that BlueScope never intended to supply, because:
  - (i) it did not wish to see its flagship product (painted aluminium zinc coated steel) being ceded to its competitors – being OneSteel and Ace Gutters; and
  - (ii) the quote was so uncommercial that it would make OneSteel's competing product uneconomic in the marketplace; and
  - (iii) as long ago as 2007, BlueScope refused to supply our client with unchromated product *unless* it removed its paint line;
- (e) fifth, a large plank of BlueScope's argument and Customs' eventual finding on material injury rested on an import parity pricing strategy and policy – it is difficult to see how the quote is consonant with such a policy when it is so obviously out of kilter with the price of imported unchromated product; and
- (f) sixth, if the price quoted to OneSteel is higher than the price paid in connection with the "one off sale" to BlueScope's independently run related entity then that fact should lead to the conclusion that the product is not offered to all parties on *equal terms* and the exemption should be granted to our client without any further impediment or investigation.



- 1.6 In short, Customs' conclusion does not reflect commercial reality and the evidence it has unearthed accords with the contention advanced by our client (and OneSteel), namely, BlueScope does not supply and does not intend to supply its competitors. As submitted by our client on a prior occasion, BlueScope does not have a price list or any publicly available brochure for its unchromated product. That fact, combined with the fact that its only sale of this product was to a related entity, speaks loudly of its unwillingness to sell to third party competitors such as our client. Regrettably (if not disappointingly) these issues were not explored by Customs in the SEF.
2. **Evidence supplied by Ace Gutters**
- 2.1 Our client does not believe that the summary at the foot of page 38 of the SEF does justice to the force or content of our client's submissions. Ace Gutters filed submissions and the public record shows that:
- (a) BlueScope closed our client's account because our client opened its own paint line and, since then, BlueScope has refused to supply unchromated aluminium zinc coated product to it.
  - (b) BlueScope has not at any stage sought to reignite its business relationship with our client since the installation of the paint line.
  - (c) BlueScope exhibited predatory and injurious behaviour against our client by stating that it would "*crush [it] like a grape*". It went as far as seeking to oppose a planning application by our client in the NSW Land & Environment Court even though it had no legal standing to do so. Our client's interpretation of that behaviour was that BlueScope intended to maliciously injure its business.
- 2.2 Despite the seriousness of these matters, BlueScope has not filed any document on the public record refuting the above facts.
3. **No Evidence that BlueScope would not supply Ace Gutters**
- 3.1 The finding that there is no evidence that BlueScope would not provide a quote to supply the material if requested is, respectfully, bewildering and misfires. It cannot be credibly suggested that our client must prove a negative. In any case, the finding is against all the weight of evidence put forward by our client – not only in formal written submissions on the very points referred to about BlueScope's behaviour but also orally at the meeting held with Customs when these issues were discussed.
- 3.2 It defies logic, in the light of the evidence that has been placed on the public record and not contradicted or challenged by BlueScope, that Customs says there is no evidence that BlueScope would not now provide our client with a quote. Indeed, even if BlueScope did provide a quote, of what evidential value would it be, given the timing of it – a quote given after the SEF has been published suggesting a possible course of action by which BlueScope could stultify our client's exemption application is worthless. The more poignant question is (1) what evidence is there that BlueScope has marketed its unchromated product to third parties and, if so, (2) was the price quoted commercially acceptable and (3) on equal terms to all actual (and putative) purchasers. The answer to those questions is, we suggest, none, no and no.

4. **Claim that BlueScope supplies unchromated aluminium zinc coated steel on reasonable terms**
- 4.1 At no time during the course of the dumping investigation did BlueScope ever contend that it priced its product based on *market value* rather than a cost of production basis - whether selling to other parties (for which there is no evidence) or internally (using transfer pricing systems). As stated above, there was no market value in respect of the quote issued by BlueScope because the willing buyer (OneSteel) was not prepared to pay the exorbitant price demanded by the seller (BlueScope). The concept of market value is, respectfully, contrived, unreal and displays a tailoring and shifting of the evidence - which diminishes its credibility.
- 4.2 Additionally, Customs refers to bench marking the internal transfer price by BlueScope to its paint lines as a guide to what is reasonable. In our opinion, whilst such a benchmarking exercise would be a good indicator of the reasonableness of the commercial price of the product, no conclusion is drawn by Customs on this very point. Our client implores Customs to reconsider this issue.
- 4.3 Of significant concern to our client is Customs' willingness to embrace an expression that has not been analysed or explored in any meaningful way – the *acceptable commercial practice*. The argument seems to be that BlueScope's price for supplying the unchromated zinc coated aluminium steel (unpainted steel) is higher than its chromated product price (painted steel) because the higher price for the unpainted steel:
- (a) is not determined by the cost of production;
  - (b) is determined or justified by the fact that the unchromated product is an input for the higher value painted product, namely the painted steel;
  - (c) is the product of market value.
- 4.4 The illogicality of the above argument is so breathtaking that even BlueScope did not make such a submission. It is a nonsense to suggest on the one hand that the highly refined painted product is priced according to some formula which leaves it exposed to import competition but the main ingredient (unpainted steel) is in effect a separate industry, and is being materially injured even though the price for the unpainted steel is not referable to its cost to make and sell but because the finished product (painted steel) is of high value.
- 4.5 There is no logical, rational or evidential basis for Customs to say that the price of the unchromated product is acceptable commercial practice. There is no evidence referable to BlueScope's internal records that appears to have been accessed by Customs that would allow it to conclude that it is acceptable commercial practice to price the unchromated product based on a (non existent) market value test.
5. **The grant of Ministerial exemption**
- 5.1 There is no evidence to suggest that BlueScope is prepared to supply Ace Gutters with unchromated zinc coated aluminium steel and nor is there any evidence to suggest that it is prepared to supply such a product to any company other than itself or its related entities on any commercial terms. That is a fact reflected in history, reflected in OneSteel's submission, reflected in the SEF and reflected in our client's dealings with BlueScope.



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5.2 Our client believes, and justifiably so, that there is no reasonable basis for the Minister not to consider and accede to our client's request for exemption under section 8(7) of the *Customs Tariff (Anti- Dumping) Act 1975*.

Yours sincerely



**Zac Chami, Partner**  
+61 2 9353 4744  
[zchami@claytonutz.com](mailto:zchami@claytonutz.com)

**Michael Mulgrew, Consultant**  
+61 2 6279 4054  
[mmulgrew@claytonutz.com](mailto:mmulgrew@claytonutz.com)