

Mr Michael Keena
Manager
Trade Measures Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
CANBERRA ACT 2600

28 November 2011

Doc ref: 11/16/15955/80125500

Dear Sir

Certain Structural Timber exported from the Republic of Austria, Canada, Czech Republic, Republic of Estonia, Federal Republic of Germany, Republic of Lithuania, Sweden and the United States of America

We act for Stora Enso Timber Australia Pty Ltd (**Stora Enso**) and its related entities (collectively, **Stora Enso Group**). We refer to the Australian Customs and Border Protection Service (**Customs**) investigation into alleged dumping of certain structural timber exported from the above captioned countries following an application lodged by Building Supplies Group Holding Pty Ltd (**BSG**), Hyne & Sons Pty Ltd (**Hyne**) and Gunns Limited (**Gunns**), domestic manufacturers of structural timber (collectively, **Applicants**).

The purpose of this submission, which we consider to be compelling, is to demonstrate that:

- (a) the investigation ought to be terminated - we consider that the application filed by the Applicants is so lacking in detail and devoid of merit that Customs Consideration Report No. 176 was tainted with legal, factual and evaluative errors. We contend that Customs ought to approach the Applicants' arguments and assertions with great caution; and
- (b) there is no cogent evidence that would satisfy or enable Customs to make a preliminary affirmative determination (**PAD**).

Significantly, we note that a PAD must not be made by the Chief Executive of Customs (**CEO**) at any time prior to day 60 of the initiation of an investigation and the CEO is only required to have regard to submissions received within 40 days after the initiation. In respect of submissions received after day 40, we note the text of the Dumping Manual which provides:

There is not [an] obligation to have regard to any submissions received after day 40 if to do so would, in the CEO's opinion, prevent the timely consideration of the question whether or not to make a PAD. Nevertheless Customs and Border Protection will not disregard relevant

¹ Section 2691D of the *Customs Act 1901* (CA).

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available determinative information prior to any request by CDO and make in respect of making a PAD or not to issue a PAD in this regard.

Notably, Stora Enso requested and received an assurance that it may file its submission by 2 November 2011. We trust therefore that Customs will have regard to this submission when considering the question of whether or not to issue a PAD.

Contentions

1.1 On the basis of the information set out below and contained in the exporter questionnaires, which have now been submitted to Customs, we contend that:

- (a) there is no dumping of structural timber in the Australian market; and
- (b) any injury allegedly suffered by the Applicants is not referable to goods sourced by our client from jurisdictions the subject of the investigation being undertaken by Customs.¹

1.2 We contend that, having considered the available evidence, the dumping investigation ought to be terminated for at least the following reasons:

- (a) the Applicants were unable to provide the information necessary to determine whether dumping has occurred and, in consequence, there are no grounds to support the publication of a dumping notice in respect of exports of structural timber;
- (b) our client is not dumping structural timber into the Australian market – as is or will be demonstrated by the responses to the export questionnaires that will ultimately be verified by Customs;
- (c) the claim of material injury must fail if there is no dumping;
- (d) the material injury claimed to have been suffered by the Applicants (which is denied) cannot be attributed to dumping but rather, from other factors, such as the quality and service (or lack thereof) of the local product and domestic suppliers, the global financial crisis (GFC), low levels of new home starts and a decreasing demand for structural timber;
- (e) contrary to the Anti-Dumping Agreement and the *Customs Act 1901* (Cth), the Applicants allege that dumping occurred during a timeframe that is one year before the investigation period; and
- (f) the calculation of the dumping margin presented by the Applicants is based on incorrect assumptions, conjecture and incomplete information. We are confident that a correctly calculated dumping margin will prove to be negative.

¹ Dumping Margin, page 109

² Our client has never sourced structural timber from Canada or Germany and on occasion did source timber from the USA but not during the investigation period.

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- 1.3 Once the facts are verified, the current investigation should be terminated.
- 1.4 A more detailed consideration of the above issues as well other matters is addressed further below.

2 Background

- 2.1 The Stora Enso Group is the largest timber producer in Europe.
- 2.2 Stora Enso is a wholly owned subsidiary of Stora Enso Wood Oy Ltd and a member of the Stora Enso Group. It operates from 4 distribution centres located in Melbourne, Brisbane, Adelaide and Gosford. Sales are also made in Perth through partner distributors.
- 2.3 The main product range supplied by Stora Enso is timber framing material for wall and truss manufacturing. This is supplied mostly from Stora Enso Group sawmills in the Baltics and Central Europe. Other products include weatherboards and a limited range of joinery products, which are mostly supplied from the Stora Enso Group Nordic sawmills.
- 2.4 Stora Enso's vision is to maintain and further develop its position as the number one quality supplier of European softwoods in the Australian market.

3 Information necessary to allow the CEO to make a decision as to dumping and material injury not provided by the Applicants

- 3.1 Customs found that the Applicants' application contained the information necessary to satisfy the requirements of sections 269TB and 269TC of the *Customs Act*. We contend that the information was deficient in many respects and not uniform for all 3 applicants. The information not provided by the Applicants at the time of publication of the Continuation Report (and yet to be provided) does not allow the CEO to reliably assess, nor form a satisfactory opinion that there are sufficient grounds for publishing a dumping duty notice conformably with subsection 269TD(1) of the *Customs Act*.
- 3.2 As stated in the Consideration Report at 6.6.2, the Gunns and Hyne financial accounts are kept in accordance with the financial year, while BSG operates on a calendar year system. Whilst BSG and Hyne provided information in respect of the investigation period, Gunns has yet to do so and no explanation was or has been proffered. As a consequence of this the information provided in the application does not permit an analysis of the last quarter of the 2010/11 financial year.
- 3.3 Further, information about domestic sales of structural timber by one of the applicants during the investigation period was limited, with sales figures provided only for its highest selling structural size of timber. No explanation was provided as to why that applicant only provided this limited amount of information.
- 3.4 The Consideration Report records at 6.6.4 that BSG and Hyne each completed Appendix 7 regarding movements in assets, capital investment, capacity, capacity utilisation, employment and productivity, stocks, cash flow measures and wages⁴. Notably, no such information was

⁴ It is notable that both Hyne and BSG are private companies and the financial reporting requirements are not subject to the same level of detail or stringency as those of an Australian publicly listed company.

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included for Gunns despite it being, by the Applicants' own admission, a significant member of the domestic industry.

- 3.5 On reviewing information published in the economic public file, we note that:
- (a) the extract of weekly market intelligence reports was compiled by only one of the Applicants;
 - (b) the application included the offer prices of only one of the applicants and sought to contrast it against a prominent importer of structural timber, but did so only in relation to two 'popular' sizes of structural timber;
 - (c) reference is made to price lists but there is no indication of the status or reality of these price lists namely, whether discounts are given for volume, discounts on offer etc;
 - (d) the same comment in (c) above applies to the price lists of importers; and
 - (e) consideration of competitive offers has only been provided by one member for one State, Victoria - despite the geographic spread of the Applicants' main business activities throughout Australia and the separate and distinct markets in various regions within Australia.⁵
- 3.6 In this way, and in circumstances where the Applicants have been unable or unwilling to provide additional and outstanding information, we contend that there is an insufficient basis for the publication of a dumping notice in respect of exports of structural timber.
- 3.7 In relation to the reliability of the information provided by the Applicants, for the purposes of making a PAD, the Dumping Manual indicates that "sales information" provided by the importer may allow for a preliminary assessment of price undercutting. Significantly however, the Dumping Manual also provides that verified information from importers would allow for a better assessment to be made as to whether any claimed decline in market share has been taken up by imports from the nominated country.
- 3.8 We note that the following information was provided by the Applicants to support an argument of price undercutting:
- (a) extracts of weekly market intelligence reports supported by market intelligence summaries;
 - (b) a comparison of the offer prices of one of the Applicants and offer prices of a prominent importer of structural timber; and
 - (c) a number of price lists published by importers/wholesalers of imported structural timber.

⁵ Hyne, Gunns and BSG each focus their sales efforts in the states where their mills are physically located. This in turn creates segmentation of the Australian market.

Mr. Michael Kenia, Australian Customs and Border Protection Service, 2 November 2011

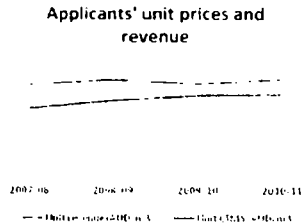
3.9 On the basis of these materials, Customs noted that there appears to be evidence of price undercutting. In making that statement it correctly (and indeed appropriately) made an express caveat, namely that its preliminary conclusion was not based on actual sales information. As discussed above, actual sales information is the minimum required, while verified sales could provide a better assessment of, and more accurate determination of, issues such as price undercutting. In the absence of contracts of sales information relating to actual sales, the finding of price undercutting is flawed and no conclusion should have been drawn about price undercutting.

4. **Material injury and price depression and price suppression**

4.1 Customs in its Consideration Report at 8.4.2 stated:

"Price suppression occurs when price increases, which otherwise would have occurred, have been prevented. An indicator of price suppression may be the margin between revenues and costs."

4.2 At page 27 of that report a chart is included which shows the movement in unit revenue in comparison with unit cost to make and sell unit (CTMS) for the injury investigation period. That chart is reproduced for convenience:



4.3 Customs further stated that:

- (a) the applicants' weighted average selling prices of structural timber rose in 2008-09, fell slightly in 2009-10 and rose marginally in 2010-11; and
- (b) weighted average unit costs have increased each year since 2007-08, most notably in 2008-09 and 2009-10. The pattern is similar for both untreated and treated timber.

4.4 The conclusion reached by Customs in its Consideration Report by reference to the chart is that:

¹ Consideration Report at page 26, paragraph 8.4.1

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The unit costs increased over the four years while unit prices declined after 2008-09. Customs and Border Protection is satisfied that based on the information submitted in the application, the applicants suffered price suppression in 2009-10 and 2010-11."

1.5 Further, at 87-6 of the Consideration Report, Customs assessing it was that

The GFC clearly impacted on the Australian manufacturers in 2008-09 but it appears that the market recovered in 2009-10. The increase in market share, apparent price undercutting and price suppression indicates that the allegedly dumped imports caused the injury to the Australian industry."

1.6 The evidence supplied by the Applicants and relied upon by Customs to conclude that there is evidence of price suppression is wrong in number of respects:

- (a) first, one immediately notices the use of the word *'apparent'* as a pre-qualification to the finding of price suppression, indicative that Customs was not positively satisfied of the fact and the finding made was a hesitant one;
- (b) second, there is no evidence that any *apparent* price suppression was attributable to the impact of alleged dumped imports;
- (c) third, the chart shows that unit costs were stable in 2009/10 and 2010/11 while the Applicants' unit revenues per m³ of timber increased. This belies any finding of price suppression;
- (d) fourth, Customs acknowledges that the market in 2009/10 may be considered to have recovered from the effects of the GFC but ignores or gives little weight to the fact that:
 - (i) costs were the same in both 2009/10 and in 2010/11 and yet price/unit revenue in fact increased to a level above all previous years; and
 - (ii) costs as a trend were increasing over the whole of the injury analysis period but there was no equivalent increase in prices to reflect those costs. This shows that there were other competitive forces operating in the market which limited the ability of the Applicants to raise their prices to cover cost increases that had nothing to do with the importation of goods by our client; and
- (e) fifth, it is axiomatic that in a local market concentrated in the hands of a few businesses, the Applicants could raise prices at will. However, the mere fact that they are constrained from doing so because of competition cannot lead to the conclusion that there is price suppression. The Consideration Report does not engage with this issue and the issue of costs (as it impinges on price suppression) is not addressed in its analysis.

Mr. Michael Kerina, Australian Customs and Border Protection Service, 2 November 2011

5 Alleged material injury and the investigation period

5.1 The analysis of material injury undertaken by the Applicants correctly includes a period other than the investigation period.

5.2 The claim for when material injury commenced is, according to the Applicants, in or during the financial year 2009/10. The *investigation period*⁷ is however the 2010/11 financial year.

5.3 An industry may be injured by a number of events or sources, including dumped imports. However, determining whether the injury is relevantly material or not requires an assessment and consideration of all *other factors*. Such a finding can only be made if the other factors are eliminated or are determined to be non-causative. Only if the injury is the direct effect of dumped imports does there then need to be an assessment of the materiality of that injury. If there is no injury then there can be no material injury as required by the *Customs Act* and the Anti-Dumping Agreement.

5.4 To isolate the effects of variables other than dumping, Customs may study information on underlying factors and market conditions for a period of three years prior to the investigation period, the investigation period in this instance being the 2010/11 financial year. The period that is the *injury investigation period*⁷ includes both the investigation period and the preceding 3 years. The functional role of this period is to allow the CEO of Customs to assess whether there is sufficient causality between dumping and the alleged injury supposedly experienced by the domestic market.

5.5 We note that any events outside the investigation period are usually not taken into account when making an assessment as to dumping.⁷ Therefore, the only basis for making a finding of dumping is in respect of those goods imported during the investigation period.

5.6 Section 269(1)(2AD) of the *Customs Act* provides:

"The fact that an investigation period is specified to start at a particular time does not imply that the Minister may not examine periods before that time for the purpose of determining whether material injury has been caused to an Australian industry or to an industry of a third country."

5.7 Section 269(1)(2AD), while it permits the Minister to examine a time period before the investigation period, does not displace the requirement that in order for Customs to find material injury, it must have regard to and deal with the question of non attribution. In other words, it is necessary to have regard to all injury factors over the course of the injury investigation period in order to determine if there are any other underlying injury factors arising during the investigation period which are not related to the dumped imports.

5.8 This point was made eloquently in the report of the TMRO in *"Certain Clear Float Glass from the People's Republic of China, Indonesia and Thailand dated 21 March 2011"* when, after referring to the provisions of section 269(1)(2AD), the TMRO said:

"60 It is therefore within the discretion of Customs and Border Protection to base their analysis of whether material injury was caused by dumping on trends since

⁷ Dumping Manual, page 10

Mr Michael Kent, Assistant Customs and Border Protection Service Officer, 17 November 2011

June 2009. It would seem reasonable to analyse a profit system, which was caused by dumping by reference to, period prices for the relevant commodity, which are shown in that analysis only, before that might affect its effect properly (emphasis added)

5.9 Further the Dumping Margin states

'Generally, Customs and Border Protection will examine causation factors coinciding with the injury analysis period. All available evidence will be examined in establishing whether a causal link between the dumped/subsidised imports and the injury to the Australian industry exists. This includes the effect of injury factors set out in the relevant articles in the Agreements (and generally reflected in s. 269T of the Act).'

5.10 To summarise, the purpose of section 269T(2A)(i) is to ensure that proper regard is had to the issue of causation and other injury factors so as to ensure a proper determination of material injury during the investigation period.

5.11 In this case, at A8 of their application, the Applicants under the heading 'Estimate the date when material injury from dumped imports commenced', stated that 'Material injury from the dumped imports from structural timber commenced in 2009/10'.

5.12 Under Heading 5 'Describe how the injury factors caused by dumping and suffered by the Australian industry are considered to be material', the Applicants stated that they have experienced a reduction in profit of almost 50 per cent over the last two years (i.e. 2009/10 and 2010/11). However, the legal position is that only the reduction that can be attributed to alleged dumped imports for the year 2010/11 is relevant.

5.13 There is also a critical flaw in the Applicants' logic. By reference to the chart supplied by the Applicants (and referred to above), given costs were stable over this period, and given revenues per m³ of timber increased over this period, it must logically follow that the profit decline is not referable to the imports of structural timber but some other cause, for instance borrowing costs, one off write downs, capital expenditure, or some other economic factors. These are matters that Customs ought to investigate. What is notable, however, is that any reduction in profit and profitability in 2009/10 was the result of (caused by) the fall in demand for new houses and other factors such as the GFC, as conceded by the Applicants' own evidence. In this way, the reduction in profit for the year 2009/10 points to factors other than alleged dumping and the attempt to attribute such injury to dumping is wrong in law, conjectural and based on an unduly superficial analysis.

5.14 We also note that the failure of the Applicants to correctly attribute to the dumped imports only the injury said to be experienced by them during the investigation period has resulted in a significant distortion of the assessment of material injury and the perceived causal link with imports of structural timber. The assessment needs to take into account the correct investigation period. The importance of the point cannot be understated – the information provided by the Applicants relies on the year 2009/10 to demonstrate price undercutting from dumped imports. However, because this conclusion is based on information that relates to a year that is one year before the investigation period, the correlation drawn by the Applicants between changes in prices and perceived dumping is wrong in law.

Mr Michael Kennd, Australian Customs and Border Protection Service _____ 2 November 2011

6 **Customs must consider factors other than dumping in making an assessment as to whether material injury is the result of dumping**

6.1 As discussed above, in order to make a determination that the alleged dumped imports caused material injury to a domestic industry, Customs, as the dumping administrator, is required to have regard to any other factors that may have caused injury to a domestic industry so that those other factors are excluded from consideration. In simple terms, the injury from those other source or sources cannot be attributed to the impact of dumped imports.

6.2 Section 269(1A)(2A) sets out a non-exhaustive list of factors that Customs must consider in coming to a view about whether there are other factors at play that cause injury to an industry - i.e. factors other than the goods the subject of the dumping application. The *Customs Act* provision reflects Article 3.5 of the Anti-Dumping Agreement, which was considered by the appellate body in United States - Anti Dumping Measures on Certain Hot Rolled Steel Products from Japan AB-2001-2. The relevant extract of this decision is as follows:

"223. ...[T]o ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties..."

6.3 To illustrate the point, the Applicants' statement that their profits had fallen each year from 2007/08 led Customs to conclude that the Applicants' profits in 2010/11 were 50% below those in 2007/8. The real point is, given the intervention of the GFC, there was only a small difference between the year after the GFC, namely 2009/10, and 2010/11. If regard is had to the indices on profit variations, and regard is had only to the 2009/10 and 2010/11 years, the difference is between 53.7% and 51.8%, which is only 1.9%. If the same analysis on profitability is undertaken for the same two years, the difference is 2.4%. What this shows is that, when regard is had to factors outside the investigation period, the actual evidence is that the effect on profit and profitability was insignificant and inconsequential. Additionally, the variations of 1.9% and 2.4% have to be discounted once proper weight is given to the other injury factors.

7 **An assessment of significant factors that are the cause of the material injury experienced by Australian industry**

GFC impact on the housing market and Australian industry

7.1 Apart from the material injury factors referred to above as having an impact on any causal link analysis, the two predominant issues identified by the Applicants were the GFC and its impact on the housing market.

Mr Michael Kerka, Australian Customs and Border Protection Service

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- 7.2 The Consideration Report does not address these factors in any real or meaningful way despite their acknowledged critical significance to the Applicants to the overall performance of the industry.
- 7.3 The application went into some detail about the overall effect of the housing market and underlying government policies that impact in this area. The Applicants provided charts in the application on the decline in new housing starts and acknowledge the state of the market during the investigation period. The Consideration Report does not engage with these issues and the Applicants do not in any way seek to give any quantitative assessment of the impact of that downturn in relation to the indicators of material injury that they rely on, including profit and profitability.

Housing Approvals January 1999 to January 2011

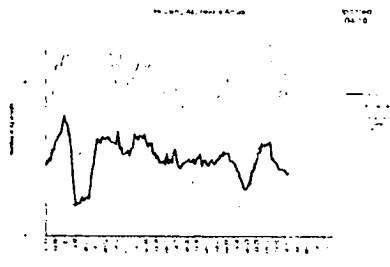
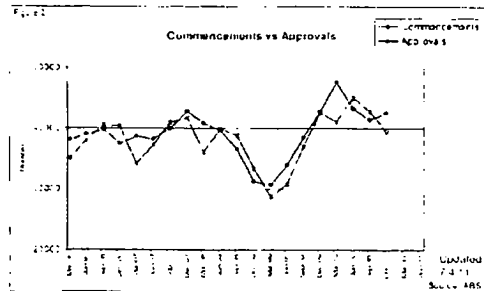


Figure 2 - Housing Commencements v Approvals



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7.4 In the application, the Applicants stated, under the heading "Source of predicted demand":

"The main source for demand for structural sawn timber products within Australia is residential detached housing activity (i.e. building). As a lead indicator, housing approvals are recorded at local council level and published by the Australian Bureau of Statistics ("ABS"). This monthly published number helps to determine the level of housing demand state by state and nationally (approximately lagged by three months).

On the demand side, the building industry accounts for approximately 70 per cent of total sawn timber usage and the industry is subject to the cyclical fluctuations of housing construction. The building cycle follows a long term underlying trend, and often runs counter to government and central bank economic management policies such as interest rates and taxes (Source: BRS Shrapnel, Sawn Timber). Further analysis of the factors affecting the market follows" (emphasis added)

7.5 The charts depicted above, show strong cyclical trends. That cycle was particularly evident during the investigation period and the injury analysis period. A close examination of the detached housing approval line⁸ in the "Housing Approval Actual" chart, shows:

- (a) a sharp downturn in December 2007 to about January/February 2009 from marginally less than 10,000 approvals for detached dwellings to approximately 7,500 such approvals; and
- (b) after a brief spike for a period of 12 months from January 2009 to January 2010, a sharp decline again then ensued when closer to 8000 detached dwellings were approved by about March 2011.

7.6 The Applicants continued:

"Economic factors affecting building demand

In the short term, the most significant influences on the building cycle are interest rates and housing affordability. The level of housing interest rates and affordability has an effect on dwellings because it influences the size of the mortgage that can be serviced by a given income. Interest rates and rental returns also affect investment in non-dwelling buildings."

7.7 When asked to consider other factors that may have caused injury other than dumped imports, the Applicants stated that Australian industry is cognisant of a small contraction in the size of the Australian market, having previously said that the Australian market appears to have contracted by approximately 7% in 2010/11 (i.e. the investigation period). That contraction is more than a small contraction. The reduction in the demand for the Applicants' timber has in large part been due to the significant downturn in the housing market - a fact acknowledged by the Applicants to be the major driver of demand for structural timber.

⁸ Note the Applicants statement at [8.1] that "The main source for demand for structural sawn timber products within Australia is residential detached housing activity".

Mr Michael Kempf, Australian Customs and Border Protection Service, 2 November 2011

- 7.8 This downturn would have a significant impact on cost of production and profit and profitability. The Consideration Report however, did not give this fact any, or any significant or proper weight. Indeed it is clear that the major reason for injury experienced by the industry is in fact the slump in new and detached housing approvals.
- 7.9 Although the Applicants acknowledged the state of the housing market as having a major influence on demand and prices, they also acknowledged a significant contraction in the housing market during the investigation period. Inexplicably, and despite these 2 very significant matters, the Applicants wrongly claim that all the alleged injury was caused by the allegedly dumped imports. Such a claim lacks credibility and substance.

8 Market share

- 8.1 At 8.7.2 of the Consideration Report, Customs repeats the claim, supplied by the Applicants, that the market share of imports from the nominated countries have risen from 12.5% in 2008/09 to 19% in the year 2010/11 and, given that imports from other sources have been relatively stable, the loss of market share is attributable solely to imports from the nominated countries. Contrary to the Applicants' claims, there are several reasons other than imports from the nominated countries for the Applicants' loss of market share:

- (a) **the decline occurred before investigation period** - in large part, the decline occurred in a period prior to the investigation period, therefore the Applicants' loss of market share was due to factors that cannot be causally linked to the alleged dumped imports. This again calls into question what underlying forces were at play in the Australian marketplace. However, this issue is yet to receive the attention it warrants;
- (b) **plurality of supplier choice** - local timber merchants and suppliers are keen to ensure that they have access to structural timber products from overseas suppliers such as Stora Enso to ensure that they are not solely dependent on the domestic industry, especially given the quality of and the special characteristics of the overseas product;
- (c) **contracting market (demand decrease)** - the applicants note that the Australian market has contracted some 7% during 2010/11 which would be due to the downturn in the home building market. This fact was again confirmed by Gunns in its 2011 annual report in which it stated that "*...total Australian softwood demand decreased by 8% off the 2009/10 peak. The decline in softwood demand was largely off the back of another year of constrained (sic) new dwelling commencements.*"
- (d) **contracting market (substitutable product)** - as set out in part 13 below, there is an increasing use of substitutable product including laminated veneer lumber (LVL); and

¹ Gunns Limited Annual Report 2011 at page 15

² <http://www.gunns.com.au/~/media/Gunns/Annual%20Reports/2011%20Annual%20Report.pdf>

Mr Michael Kent, Australian Customs and Border Protection Service

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- (c) **Applicants are engaged in export to detriment of local market** – as set out in part 11 below, the Applicants are increasingly supplying the export market. Hyre, for example, states on its website that it is a major Australian exporter of softwood to the Middle East, Asia and the Pacific Rim with monthly exports of 10,000 cubic metres. Similarly, Gurns exported a significant amount of softwood logs. BSG is a very significant exporter of softwood to the overseas market. However, as a foreign owned proprietary company, its publicly available accounts information is limited.
- 8.2 One matter of significance noted in the Consideration Report is the reference to imports from “other sources” being stable.⁷ That statement is apt to mislead. This is because the imports from those other sources are not like goods. In particular the imports from New Zealand (and Chile) are used for high end decorative and external timber construction. In this way, the reference to stability of imports from those countries is a red herring and not properly comparable.
- 9 **Price undercutting**
- 9.1 We refer to our comments above about the inadequate and incomplete nature of the information provided in the application by the Applicants to support the claim of price undercutting.
- 9.2 In relation to the question of evidence on price undercutting for the purpose of making findings relevant to a PAD, the Dumping Manual states that while “sales information” provided by the importer may allow for a preliminary determination of price undercutting, “verified information” from the exporters makes for a better assessment as to whether any claimed decline in market share has been taken up by imports from the nominated country.⁸
- 9.3 We contend that only verified sales information can be considered cogent and probative evidence, not the incomplete and threadbare information provided by the Applicants.
- 9.4 Finally, two matters of significance must be borne in mind before the making of any PAD:
- (a) first, given the punitive economic effect of a PAD, Customs ought to be persuaded to a high degree before making such a finding. The consequence is a serious one for our client and therefore the cogency and the weight of the evidence must be proportionate to the finding; and
- (b) second, regard must be had to other factors. That is, factors other than price when analysing the extent to which the non price effects have on sales. *Siam*

⁷ See Consideration Report at 8.3.2 at page 26 and Part A9 of the Applicants application at page 24.

⁸ Gurns Limited Annual Report 2011 at page 14 states that “Radiata pine log exports from Bunnock totalled 71 thousand cbm with 5,000 cbm of E. minor plantation logs”.

⁹ See Consideration Report at 8.3.2 at page 26 and Part A9 of the Applicants application at page 24.

¹⁰ Dumping Manual, page 110.

Mr Michael Kemp, Australian Customs and Border Protection Service _____, 2 November 2011

Polycythine Co Ltd v Minister of State for Home Affairs (No. 2).¹⁵ As Customs itself noted recently, in Report No 173 by *Investigation Into Alleged Dumping of Consumer Pineapple exported from Thailand: the Thailand Pineapple Canvassing Co Ltd*, factors such as quality differences should be assessed and findings of undercutting must be discounted if such factors are in play. There has at this time been no evaluation of factors other than price.

10. **Poor cost-competitiveness of Australian industry**
- 10.1 Australia's competitiveness in forest product manufacturing is poor. There are a number of reasons for this:
- (a) first, Australia's domestic costs of production are well above global lowest cost benchmarks;¹⁶
 - (b) second, Australia's relatively small market and thus its capacity to reduce unit costs contribute to its high costs structure. Australia's position as a net importer of forest products reflects this, the major exceptions being woodchips, paperboard and MDF;
 - (c) third, local manufacturers are under-investing in research and development (R&D). Forestry and forest product R&D expenditure has declined in both real terms, and shifted significantly away from corporate generated expenditure to Commonwealth and State government sources;¹⁷
 - (d) fourth, local manufacturers have under-invested and been unable to attract new investment into long rotation plantations thus limiting supply and expansion of Australia's softwood processing sector;¹⁸ and
 - (e) fifth, Australia now operates in a global market for timber - a fact recognised by the local industry and reflected in increasing export volumes and revenue.
- 10.2 Whilst competition per se is not a relevant factor in a dumping determination, the above factors demonstrate that the increased imports of structural timber (and the consequent loss of market share by the Applicants) is not the product of dumping but, rather, numerous other factors with historic origins which are feeding into current circumstances. Under investment, high costs structures, the failure of managed investment schemes and an increasingly worldwide contestable market for sawn timber is a reality that the local manufacturers face

¹⁵ (2009) 258 ALR 515 at [76]

¹⁶ See *Report: Australia's Forest Industry in the year 2020* - Prepared for Department of Agriculture Fisheries and Forestry (12 December 2007) at page viii: <http://www.daff.gov.au/2007/12/2007-08-2020-report-07-12-2007>

¹⁷ *ibid* at page xiv.

¹⁸ While Timber Investment Management Organisations and other investors have demonstrated a strong interest in investing in existing plantation estates, they have not invested in green field plantation establishment. With a few exceptions, managed investment schemes have generally been unsuccessful in attracting investment into long rotation plantations.

Mr Michael Kern, Australian Customs and Border Protection Service _____ 2 November 2011

and have to contend with. To divorce the reality of these facts from the analysis of loss of market share only conceals other underlying issues.

1. Australian timber is of a different quality (the special qualities of our client's timber)

1.1 Structural timber produced and imported by our client is a superior product to the Australian product and in demand. This is so for at least the following reasons:

- (a) Australian softwood timber is sourced from Australian grown pine (radiata and slash), as opposed to Baltic pine which, in Europe, is harvested after 80 to 110 years of growth, compared to the Australian harvest time of around 25 years;
- (b) Baltic pine is more form stable and has fewer visual defects than the Australian product; and
- (c) market perception is that Australian softwood is not as good a quality as the overseas product.

1.2 Non-price and other factors that have made our client an attractive supplier in the Australian market place include:

- (a) it has developed a national distribution base over time - it first became a distributor in 2002, some 9 years ago;
- (b) it has a strong customer focus and, with its distribution network, can supply its customers on a pack by pack basis;
- (c) it ships containers of structural timber into ports all around Australia;
- (d) it is able to offer an increased and increasing product range - it has the focus to be a one stop shop for all timber merchants;
- (e) it supplies the national timber and hardware groups - the national hardware groups have confidence in our client delivering on quality, price and logistics;
- (f) it can meet any increase in demand and supply same within minimal timeframes; and
- (g) it has access to worldwide resources (supply and technical) and R&D to help timber take market share from steel, concrete and plastic.

1.3 Overall the service offered by Stora Enso is preferred by a large number of customers to that provided by the Applicants and other saw mill operators. The advantages that our client enjoys feed into its success in the marketplace.

12. Strategic sourcing has resulted in an increase in imported timbers

12.1 Customers have taken the rational and sensible strategic position of wanting to ensure that they have an alternative source of supply. They do not wish to be captive customers of a homogenous and oligarchic Australian domestic industry. This is especially true after BSG (Carter Holt Harvey) purchased the Weyerhaeuser Group (Pine Solutions).

Mt Meelee Kenia Australian Customs and Border Protection Service

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12.2 The Applicants have argued that there has been a change in direction by some companies (presumably our client) in more recent times which has resulted in

"the importer investing in importing (rather than using a local manufactured stock and have seen a need to dramatically grow market share." (emphasis added)

12.3 The statement is made against the backdrop of an earlier statement by the Applicants to the effect that the market had been traditionally supplied by the domestic industry and imports by importer agents. The inference or implication of the statement, albeit wrong, is that our client has been motivated by the need to dramatically grow market share by importing dumped product and undercutting the domestic industry. The implication is without foundation.

2.4 As stated earlier, our client first commenced operations in Australia in 2002 and opened its first warehouse in Melbourne in 2002, its Brisbane warehouse in 2004 and became a 100% subsidiary of Stora Enso Group in 2005. All this occurred prior to the commencement of the injury investigation period. Stora Enso has since set up a warehouse facility in Adelaide in 2008, a New South Wales warehouse in 2010 and relocated its operations in Queensland this year.

12.5 Our client's growth in the Australian marketplace has been steady and consistent. Our client is responding to the growth in consumer preference of having access to overseas structural timber. Indeed, the Applicants are not in a position to supply the needs of the structural timber market in Australia and end users of structural timber require imported product to make up for the shortfall.

13 **Substitutable goods are taking domestic market share from producers of structural timber**

13.1 At A3 of the Applicants' application it is made clear that, among other things, "laminated veneer timber" and "glue laminated timber" is not included as the subject of complaint.

13.2 LVL is a wood product that is gaining popularity and is a substitute for softwood stick timber. Although it is an engineered softwood product, it is capturing market share from both soft and hardwood sales. LVL uses include flooring bearers, joists, roofing and lintels.

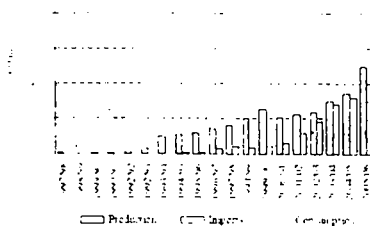
13.3 Each of the Applicants offer LVL or engineered timber products. Unsurprisingly, the use of LVLs is capturing market share and the Applicants have geared themselves to service this sector of the market. Whilst our client makes no complaint about this, it points out that local production and consumption has increased significantly as is evident from the graph below:⁴

⁴ See Applicant's application, Part A4 at page 13.

⁵ "Report: Australia's Forest Industry in the year 2020" Prepared for Department of Agriculture Fisheries and Forestry (12 December 2007) at page 48. http://www.daff.gov.au/~/media/Files/2007/12/2020/2020_07_12.pdf

Mr Michael Keane, Australian Customs and Border Protection Service, 2 November 2011

Figure 4-21: Apparent consumption of LVL in Australia



Source: ABARE, *Forest Products and Timber in Australia*, 2010

- 13.4 In the face of such production and consumption increases of LVL, here is now another reason that explains the Applicants' declining market share in the softwood structural timber market. As the Applicants geared themselves to produce and offer for sale a competing product line, it must follow that they are contributing to the contraction in the market for structural timber. In this way, it is totally natural for the Applicants' market share to reduce as they concentrate their efforts on LVLs.
- 14.1 **Impact of domestic industry increasing its export of logs**
- 14.1 Another reason for the decline in market share by the Applicants is their inability to supply the domestic market. In part this is due to the fact that they are increasingly exporting logs for sale in overseas markets that would otherwise be used to make and sell structural timber locally. While the Applicants contend they do not export the "goods that are... the subject of the application",⁴ they do not divulge their export of logs.
- 14.2 International demand from Asia, particularly China, is driving forest product including logs and pulp. Data published by the Australian Bureau of Statistics and made available through the Australian Bureau of Agricultural and Resource Economics and Science demonstrates that, in the three years preceding the investigation period, Australian exports of roundwood and sawnwood increased 28% from 1,383,100 cubic metres in 2007/08 to 1,764,700 cubic metres in 2009/10. We note that over this same period the value of roundwood and sawnwood exports increased 17% to reach \$263.3 million in 2009/10. This is displayed graphically below:

⁴ See Applicants' application, Part A7 at page 21

Mr Michael Kenny, Australian Customs and Border Protection Service

2 November 2011

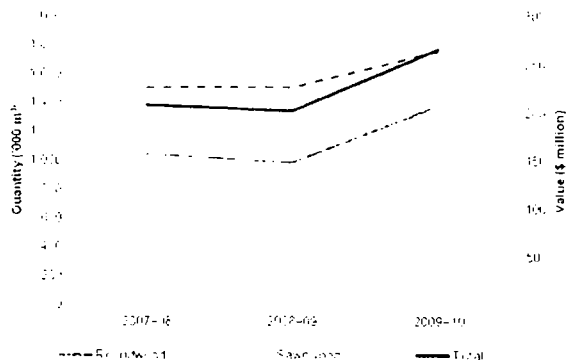


Figure 1: Roundwood and Sawwood Exports

Source: ABARE, Australian forest and wood product statistics, September and December quarters 2010

- 14.3 A significant portion of the growth in exports can be attributed to an increase in demand out of China, with exports reaching 1,089,000 cubic metres in 2009/10, an increase of 84% on 2007/08 figures. The total value of exports of roundwood and sawnwood to China increased 86% to reach \$138,373,000 over this same period (see Figure 2 below).
- 14.4 We are instructed that Gums, Hyne and BSG operate vertically integrated forestry plantations and are likely beneficiaries from the recent increase in demand in forestry products out of Asia. We note that any increase in export volumes and earnings by the Applicants resulting from the export of roundwood and sawnwood (and potentially other forestry products) would act as a key contributor to any loss in domestic market share. In simpler terms, Australia has a softwood deficit and therefore any softwood that is exported needs to be made up through imports. China's increasing demand for logs and the Applicants' willingness to service that demand was to their disadvantage in the local market. Sawnwood exports also increased as Australian producers were chasing higher returns for simple products.
- 14.5 We contend that any analysis by Customs regarding loss of domestic market share by the Applicants should have due regard to the growth of the export markets for sawnwood and roundwood products which the Applicants are servicing.

Mr Michael Kennell, Australian Customs and Border Protection Service

2 November 2011

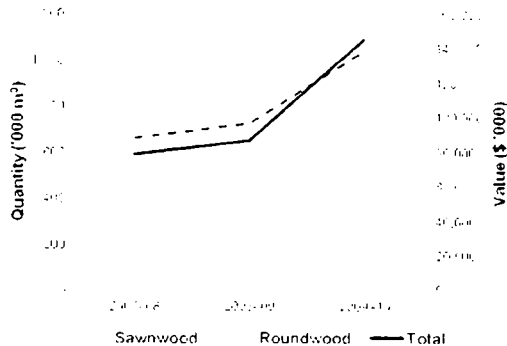


Figure 1: Australian exports to China.
Source: ABARE, Australian forest and wood product statistics, September and December quarters 2010.

15. **Growth in imported product from the nominated product when compared to the stable market share of the product imported from New Zealand**

15.1 The Applicants have contrasted the growth in imports of structural timber into the Australian market with the steady market share of imports from New Zealand. The inference sought by the Applicants appears to be that there must be a reason why New Zealand imports have stayed about the same while imports from other countries have increased, namely that our client dumped product into Australia and engaged in price undercutting to gain market share.

15.2 The underlying assumption is that the New Zealand imported product is a "like good" to those the subject of the application and compete in the same market. The reality is that, as Customs will discover through its investigations, imports from New Zealand are not a like and fungible product. The New Zealand product goes into a different market, namely high end decorative and external timber (see generally paragraph 8.2 above). In short, the reference to New Zealand imports is irrelevant and liable to distort and mislead.

16. **Sales made to Stora Enso by its overseas related parties are at arms length permitting the use of export price**

16.1 The *Customs Act* provides that the export price is the price paid or payable for the goods by the importer, less costs associated with the transport of the goods from their place of export, and consideration of a deductive export price must only occur where it can be established either that the transaction did not occur at arms length or the importer itself has exported the goods.²⁷

²⁷ Section 269(1B) of the *Customs Act*.

Mr Michael Keena, Australian Customs and Border Protection Service, 2 November 2011

16.2 We note that, in arriving at deductive export prices prescribed by subsection 269T AB(1)(b) of the *Customs Act*, the Applicants state a belief that the relationship between domestic and overseas entities of the Stora Enso Group has influenced the price paid or payable for the goods. No evidence was provided to support that belief and it remains a bare assertion.

16.3 Notwithstanding, our client reiterates the claim and, with reference to section 269T AA, notes the following:

- (a) no consideration is paid for or in respect of structural timber supplied to Stora Enso other than the price;
- (b) the price is not influenced by a commercial or other relationship between Stora Enso or its associates and its related party suppliers or its associates; and
- (c) Stora Enso does not derive, either directly or indirectly, any reimbursement, compensation or other benefit for, or in respect of, the whole or any part of the price of the subject goods subsequent to the purchase or sale.

16.4 The following information and material is available to support Stora Enso's position.

- (a) evidence of arms length prices could be provided via a comparison with prices of other transactions that Stora Enso makes with non-related parties; and
- (b) Stora Enso Group Transfer Pricing documentation/policy.

16.5 We contend that Customs should rely on actual export sales when determining export prices to be used in any assessment of dumping margins, as is required by the *Customs Act*.

17. Conclusion

17.1 For the reasons outlined in this letter we contend that:

- (a) there is no justifiable or legally plausible case in support of dumping;
- (b) in the immediate term, a PAD should not be imposed; and
- (c) in the short to medium term, the investigation ought to be terminated (i.e. upon Customs undertaking its verification procedure).

Should you wish to discuss this matter in more detail, please do not hesitate to contact us

Yours sincerely,

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