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By email

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Dear Mr Brasic

Non-Confidential

Anti-dumping investigation – formulated glyphosate exported from the People's Republic of China

As you know, we act for China Chamber of Commerce of Metals, Minerals & Chemicals (**CCCMC**), which, in turn, represents, amongst others, exporters of glyphosate from the People's Republic of China (**China**), in relation to this investigation.

We refer to Australian Customs Dumping Notice No. 2012/54. That notice advised that the dumping investigation in relation to formulated glyphosate exported to Australia from China had resumed, and invited submissions from interested parties to assist in the publication of a Statement of Essential Facts.

Specifically, submissions were sought on the Trade Measures Review Officer's (**TMRO**) recommendations that:

- consideration be given to including 62% IPA salt and unregistered goods as 'like goods';
- consideration be given to whether the low volume of domestic sales of unregistered goods by Rainbow, adjusted under s.269TAC(8) of the *Customs Act 1901* (**Customs Act**), was nevertheless sufficient to allow a proper comparison to be made for the purposes of determining a dumping margin; and
- substantive consideration be given to whether Good Harvest's normal value should be assessed in accordance with s.269TAC(2)(d) of the Customs Act.

These issues are addressed below.

1. Like Goods

The TMRO's reasons for recommending that consideration be given to including 62% IPA salt and unregistered goods as 'like goods' appear to be captured in the following statement in his report:

"I am not satisfied that the alteration required to put 62 per cent IPA salt to the same end use as the fully formulated glyphosate products is sufficiently complex to preclude 62 per cent IPA salt being considered a 'like good' to the goods the subject of the application."

We would respectfully submit that when considering this issue it appears that the TMRO has asked himself the wrong question. The question which is called for by the relevant legislation is whether 62% IPA salt is identical to fully formulated glyphosate and, if not, whether it has characteristics that closely resemble fully formulated glyphosate: definition of 'like goods' in s.269T(1) of the Customs Act.

62% IPA salt clearly is not identical to fully formulated glyphosate.

The issue, therefore, is whether it has characteristics that closely resemble fully formulated glyphosate. In our submission, it clearly does not have such characteristics, because it requires additional processing through the addition of a surfactant and water to enable it to bind to weeds and kill them. Without the addition of a surfactant and water, 62% IPA salt cannot be used as a weed killer. 62% IPA salt does not have chemical characteristics that closely resemble fully formulated glyphosate. It, like glyphosate technical, is not a 'like good' to fully formulated glyphosate.

The ease or difficulty by which 62% IPA salt can be converted into fully formulated glyphosate is an irrelevant consideration. The definition of 'like goods' does not call for consideration as to the ease by which one product can be converted into another.

Australian Customs and Border Protection Service's (**Customs**) finding in this regard in Termination Report No. 183 was correct and should be maintained. To adopt the TMRO's reasoning would constitute an error of law.

In relation to formulated glyphosate with a surfactant that is unregistered in Australia, we understand that none of the investigated exporters manufactured and supplied formulated glyphosate with unregistered surfactants to the Australian market in the relevant period.

Further, we understand that of those exporters that were investigated only Rainbow produced and sold formulated glyphosate with an unregistered surfactant in China in small quantities (a matter discussed in more detail below).

Accordingly, treating formulated glyphosate with an unregistered surfactant as a 'like good' is not just incorrect, but also likely to be irrelevant to the consideration of whether exported goods have been dumped.

2. Low domestic sales by Rainbow

We understand that the only domestic sales of fully formulated glyphosate by Rainbow were of a fully formulated glyphosate for which the surfactant was unregistered in Australia, and that the volume sold of that fully formulated glyphosate was less than 5% of the volume of the fully formulated glyphosate exported to Australia.

As Customs would be aware, footnote 2 to Article 2.2 of the WTO Anti-Dumping Agreement provides that:

"Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the

determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide a proper comparison.”

This is reflected in s.269TAC(14) of the Customs Act.

What these provisions require, where domestic sales of like goods by an exporter are less than 5% of the volume exported to Australia, is that Customs be positively satisfied, based on the evidence, that such low domestic sales still provide a proper comparison with export sales to Australia. In our submission, for reasons including those outlined below, it is not reasonably possible for Customs to be satisfied in that way.

We understand that Rainbow's sales of fully formulated glyphosate were to only one customer in only four transactions during the investigation period. We also note that those sales were of a product that had different physical and chemical properties to the fully formulated glyphosate exported to Australia. Finally, we note that even if 62% IPA salt is included in the domestic sales transaction, Rainbow's domestic sales transactions are still less than 5% of export sales to Australia.

Four sales transactions to one customer at volumes significantly less than 5% of export sales to Australia of a fully formulated glyphosate that has different physical and chemical properties cannot on any view provide a proper comparison between domestic sales and export sales.

For these reasons Customs should adhere to the methodology it adopted in Termination Report No. 183 as the proper method for determining normal values for Rainbow.

3. Harvest's normal value

The reasons for the TMRO's recommendation that substantive consideration be given to whether Good Harvest's normal value should be assessed in accordance with s.269TAC(2)(d) of the Customs Act were expressed in his report as follows:

“This is because s269TAC(2)(c) expressly states that it can only be applied where paragraph (d) does not apply, namely where the Minister has not directed that paragraph (d) applies. In order for the Minister to properly consider whether he should make such a direction it would be necessary for Customs to consider the appropriateness of calculating the normal value in accordance with s269TAC(2)(d) as opposed to s269TAC(2)(c).”

Consideration of whether a normal value should be assessed in accordance with s.269TAC(2)(d) of the Customs Act would require:

- (a) an investigation into whether export prices in third country export sales were affected by factors not present in export sales to Australia. For example, such factors might include significantly higher registration fees, or a third country market which is significantly different from the Australian market, where that difference affects export prices. In other words, there would need to be an investigation into whether any particular third country export sales provided a proper basis for comparison with

export sales to Australia, just as domestic sales need to be investigated for the same purpose; and

- (b) even with such an investigation, that Customs be confident that in comparing export prices to third countries with export prices to Australia it was not comparing two dumped prices.

In relation to the matters discussed in paragraph (a) above, we note that Customs has no evidence before it as to the suitability of export sales to third countries in the calculation of normal values. In this regard, we draw Customs' attention to the fact that registration fees in the [] [country] and [] [country] range from US\$[] to US\$[] whereas the registration fee in Australia is around US\$[]. This difference in registration fees significantly affects both export prices and domestic prices in the [] [country] and [] [country]. In addition, for some countries, such as [] [country], the domestic market is entirely different to the Australian market as fully formulated glyphosate is used primarily in domestic gardens.

Accordingly, we submit that if Customs wished to determine that a normal value should be assessed in accordance with s.269TAC(2)(d) of the Customs Act, it would need to investigate whether any particular third country export sales provided a proper basis for comparison with export sales to Australia in the same way as domestic sales need to be investigated for the same purpose.

We submit that this is unnecessary given that normal values can be readily calculated under s.269TAC(2)(c) of the Customs Act using verified information.

4. Conclusion

We submit, for the reasons set out above, that Customs should adhere to its findings in Termination Report No. 183 and terminate this investigation.

Further, as previously found by Customs any injury incurred by the Australian industry was not caused by dumped imports from China but was caused by other economic factors such as those set out in our previous submission.

Please let us know if you have any queries.

Yours faithfully

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