

**For Publication****Email**

5 December 2022

The Director, Investigations 3  
Anti-Dumping Commission  
GPO Box 2013  
Canberra ACT 2601  
**investigations3@adcommission.gov.au**

Dear Sir / Madam

**Anti-Circumvention Inquiry into the Slight Modification of Goods: Concrete Underlay Film (CUF) exported to Australia from Malaysia – Case No. 606**

We act for Davmar Industries Pty Ltd (**Davmar**) in the above matter concerning the circumvention activity (slight modification of goods) alleged to have occurred in respect of CUF exported to Australia from Malaysia, following an application lodged by LCM General Products Pty Ltd, trading as Cromford Film (**the Applicant**).

We refer to the Statement of Essential Facts (**SEF**) published on 15 November 2022.

Davmar takes issue with a number of the findings made by the Commissioner of the Anti-Dumping Commission (**the Commissioner**) and submits that the Commissioner's proposed recommendation is both unreasonable and illogical.

1. **Consideration of the scope of Anti-Dumping Public Notice number 2021/149**
- 1.1 Firstly, Davmar is concerned that the anti-circumvention inquiry conducted in this case amounts to an inappropriate enlargement of the scope of Anti-Dumping Public Notice number 2021/149 (**the original notice**), which was published on 17 December 2021 after consideration of Final Report number 554.
- 1.2 The Minister's power to issue Anti-Dumping Public Notices arises pursuant to section 269TG of the *Customs Act 1901* (Cth) (**the Act**). Section 269TP of the Act provides that "*a notice under subsection 269TG(2)... in respect of a kind of goods, may ... apply to goods of that kind exported from a particular country*" (emphasis added).
- 1.3 As observed at paragraph 2.2.2 of the SEF, the original notice was made in respect of "*Black concrete underlay film (also marketed as builders' film), manufactured from either recycled and/or virgin resins, with a thickness ranging between 150-230 microns, and a width from 2-6 metres*" (emphasis added).
- 1.4 Investigation in case number 554 (**the original investigation**) was clearly confined to goods with the specifications outlined at paragraph 1.3 above and at paragraph 2.2.2 of the SEF. The scope of the investigation remained consistent from the date that the application was filed, being 15 July 2020, until the publication of the original notice on 17 December 2021. At no point did the original investigation, and therefore the original notice, contemplate or otherwise consider builders' film with a width outside the range of 2-6 metres.
- 1.5 The Commissioner's decision in the original investigation to impose a specific and confined width range to the investigation (as adopted from the Applicant's application) reflects a clear intention to identify and narrow the scope of the application of the notice. Such an intention is

consistent with the apparent purpose of Question A-3(1) in “Form B108 – Application for dumping and/or countervailing duties” which requests that an applicant:

*“Fully describe the imported product(s) the subject of your application:*

- *Include physical, technical or other properties.*
- *Where the application covers a range of products, list this information for each make and model in the range.*
- *Supply technical documentation where appropriate.”*

1.6 The Commissioner’s recommendation in this case is problematic because it has the effect of broadening the width range specified in the original notice to “1-7 metres”. For the aforementioned reasons, such an effect cannot be reconciled with the clear intention of the original notice to confine the width range to 2-6 metres.

1.7 Davmar submits that the Commissioner’s recommendation creates a dangerous precedent and precarious environment where exporters who understand the importance of, and incur significant costs to comply with, the Anti-Dumping Public Notices are also required to pre-empt any possible alterations to an original notice to avoid retrospective penalties. It also creates the risk that findings from the comprehensive investigation undertaken to establish a causal link between alleged dumping and injury, may incorrectly extend to apply to goods that were outside the Commissioner’s contemplation at the time the original assessment was made.

1.8 To this point, Davmar urges the Commissioner to also reconsider the concerns raised by the Government of Malaysia which are noted at paragraph 3.2.2 of the SEF.

## 2. Findings based primarily on submissions of the Applicant

2.1 Secondly, Davmar is concerned that the findings made by the Commissioner at paragraphs 4.2.2.4 – 4.2.2.13 of the SEF are primarily, and in some paragraphs wholly, based on the claims, evidence and modelling submitted by the Applicant. It is submitted that the Commissioner should have had reference to the best available information in respect of goods the subject of the original notice.

2.2 Although Davmar did not prepare an interested party submission in this case number 606, it reasonably expected and believed that the Commissioner would have had regard to the information submitted by Davmar during the original investigation. In particular, Davmar submits that documents 16 and 34 on the electronic public record of the original investigation remain highly relevant and material to the Commissioner’s decision making in relation to this inquiry but which appear to have been overlooked. The proposed recommendation in the current inquiry has significant consequences on Davmar’s business operations and therefore any relevant material previously submitted by Davmar must be considered.

2.3 Davmar also submits that, given that the original notice was designed to remain in force for five years, the information submitted by Davmar in 2020 / 2021 during the original investigation is still relevant and should have been considered by the Commissioner before the recommendation made in the SEF in this case.

## 3. Goods predetermined as “contravention goods” before examination of consignments

3.1 Thirdly, it appears that the Commissioner had, before inspecting the consignment, already made a predetermination that any CUF with a width of 1.95 metres would be categorised as “contravention goods”. This is reflected in the SEF at paragraph 3.5, where it is stated that:

*“Commercial documentation accompanying the shipment described the goods as black low density polyethylene (LDPE) film (concrete underlay film), medium and high impact with a width of 1.95 metres, consistent with the circumvention goods.*

*A physical examination confirmed the contents of the shipment matched the description provided in the commercial documentation.*

*On the basis of the examination, the commission was satisfied that the shipment contained circumvention goods imported from Malaysia.”*

3.2 Davmar is alarmed by this evidence which shows that the Commissioner had, as early as July 2022 and before the investigation was complete, concluded that the goods subject to the investigation were “circumvention goods” purely because the CUF was 1.95 metres in width.

3.3 Davmar also submits that it is unreasonable and inappropriate for the Commissioner to classify the Consignment Inspection Report (**the Report**) as a ‘Confidential Attachment’ in circumstances where it was relied upon to make findings adverse to Davmar and where Davmar has not been afforded the opportunity to review and respond to the Report. The Report should form part of the public record to allow interested parties to prepare fulsome submissions that address the findings of the Report.

#### 4. **Effect on volume of goods imported into Australia**

4.1 Davmar observes that the data tabled at Figure 1 in the SEF, which models volume of CUF exports to Australia from Malaysia, does not directly support the conclusion made by the Commissioner at paragraph 4.2.1 of the SEF.

4.2 The Commissioner states that *“since the then Minister published the original notice in the fourth quarter of 2021, there has consistently been a volume of goods imported into Australia from Malaysia declared as exempt from the original notice.”* Figure 1 clearly depicts a decrease in the quantity of exempt goods since the introduction of the original notice in the fourth quarter of 2021 when compared to the data for the third quarter of 2021.

4.3 It is then noted that the *“commission observed that declarations **often, but not always, included the width**, colour and thickness of concrete film for relevant consignments in the goods description field”* (emphasis added). It is apparent from paragraph 4.2.1 of the SEF that the Anti-Dumping Commission relied on these exporter declarations to obtain data on the widths of CUF consignments before and after the original notice was issued. Given the concession that the widths of CUF were not always included in the declarations, Davmar submits that it was inappropriate for the Commissioner to definitively conclude, in satisfaction of section 48(2)(a) of the *Customs (International Obligations) Regulation 2015 (Cth) (the Regulations)* that:

- (a) *“[i]n the period prior to the original notice, no consignments described concrete film with a width of 1.95 metres (or any other width outside of 2-6 metres)”;*
- (b) *“since the Minister published the original notice ... exporters have commenced exporting the alleged circumvention goods at widths outside of 2-6 metres since the original notice”;* and
- (c) *“[b]ased on this information, the commission considers that exporters commenced exporting the alleged circumvention goods to Australia from Malaysia since the imposition of the original notice.”*

4.4 The assumptions underlying the data at Figure 1 were also relied on by the Commissioner to draw contentious conclusions at paragraph 4.2.2.10 of the SEF and in respect of section 48(3)(j) of the Regulations. In short, there is no reliable evidence to support the assertion that exporters only commenced exporting the alleged circumvention goods after the original notice was issued.

5. **Actual use of the CUF in the 1.95m width**

5.1 Davmar customers have provided written responses listing the primary uses of 1.95m width CUF. Those customer have suggested a different use, application and segmentation of the market for the product. Davmar has indeed created and exploited a different market segment to the one that the Applicant services and relies on. Davmar's customers report use of CUF in the 1.95m width in the agricultural, horticultural and general purpose industries. Such use of CUF in the 1.95m width includes, but is not limited to:

- (a) as a packaging and protectant of goods for transport or storage
- (b) in gardening and landscaping (including as temporary protection for plants from wildlife and frost);
- (c) as protection for floors, walls, roofs, vehicles and public park outdoor surfaces;
- (d) acting as a flooring moisture barrier under timber floors and carpets in accordance with Australian Standard recommendations;
- (e) on construction sites as a barrier to screen areas under construction and as weather protection;
- (f) in asbestos removal and dust control; and
- (g) in waterproofing.

5.2 Customers responded that CUF in the 1.95m width is used more frequently for the purposes outlined at paragraph 5.1 above than it is for use in concreting underlay. This suggests that the Commissioner's recommendation will have a disastrous effect on several businesses across multiple industries who rely on CUF in the 1.95m width to conduct their daily operations, which is divorced from use as concrete underlay. The Commissioner's recommendations will also unfairly penalise Davmar for supplying its customers with a versatile and heavy duty product.

5.3 We annex copies of Davmar's customers' written responses which highlight their grave concerns at the prospect of the Commissioner's recommendations being implemented.

6. **Conclusion**

7. Davmar urges the Commissioner to:

- (a) reconsider its recommendation to the Minister; and

The Director, Investigations 3, Anti-Dumping Commission

5 December 2022

- (b) terminate the investigation of case number 606 by exercising the power conferred under section 269ZDBEA of the Act.

Yours sincerely



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

**Sarah Aljassim, Lawyer**  
+61 2 9353 4369  
saljassim@claytonutz.com

Our ref 11276/22553/81027841

## Annexure to submissions of Davmar Industries Pty Ltd in Case No. 606

### INDEX - ANNEXURE TO SUBMISSIONS OF DAVMAR INDUSTRIES PTY LTD IN CASE NO. 606

| Document description                 | Date             | Page number |
|--------------------------------------|------------------|-------------|
| Letter from [REDACTED]               | Undated          | 1           |
| Letter from [REDACTED]               | Undated          | 2           |
| Letter from [REDACTED]               | 1 December 2022  | 3           |
| Letter from [REDACTED]               | 1 December 2022  | 4           |
| Email from [REDACTED]                | Undated          | 5           |
| Letter from [REDACTED]<br>[REDACTED] | Undated          | 6           |
| Letter from [REDACTED]               | 30 November 2022 | 7           |
| Letter from [REDACTED]               | 30 November 2022 | 8           |
| Letter from [REDACTED]<br>[REDACTED] | Undated          | 9           |
| Letter from [REDACTED]<br>[REDACTED] | Undated          | 10          |