

AUSTRALIAN CUSTOMS DUMPING NOTICE NO. 2012/54
Resumption of Investigation into Alleged Dumping in Respect of Fully Formulated (FF) Glyphosate
Exported to Australia from the People's Republic of China

1. Introduction

Agrichem Manufacturing Industries Pty Ltd trading as AGRONOMIQ and Australian Independent Rural Retailers Limited (AIRR) are firmly of the view that the Chief Executive Officer of Australian Customs and Border Protection Service should reconfirm his previous decision to terminate the investigation into the alleged dumping of formulated Glyphosate in Australia from the China in view of the following.

2. Behaviour of the Applicant

The behaviour of the applicant, Nufarm Limited may be reasonably described as vexatious when it comes to dumping action against competitors. The manufacture and formulation of agricultural chemicals is a declining industry in western countries as the fulcrum rapidly moves to China (and India to a lesser extent) which not only has a low cost position, but fewer regulatory hurdles. MNCs such as Bayer CropScience, Syngenta, Dow Agrochemicals and DuPont forecast the shift many years ago and established allegiances with Chinese manufacturers which are paying dividends today. Nufarm resisted this change and continues to resist allegiances with China. It is common knowledge that in the past decade Nufarm has rejected two acquisition offers from the two major Chinese producers of agricultural chemicals (ChemChina Group and Sinochem), either of which would have strengthened Nufarm's manufacturing and financial position. Thus Nufarm continues to fight a rearguard action for survival and persistent applications to Australian Customs for protection are an important component of this strategy. Nufarm currently has two anti-dumping actions on foot - this one and another to continue the interim anti-dumping duty on 2,4-D acid for another five years. While Nufarm is to be admired for its perseverance, one cannot help believe that with enlightened leadership the company could flourish with a strategic plan that included China. We are of the view that Nufarm has relied on protection for far too long and even if its arguments were compelling (which they are not), the time has arrived for Australian Customs to deny the largesse that has benefitted Nufarm for the past 10 years.

The ACCC was aware of the fact that Nufarm was using anti-dumping action to disrupt Australian agricultural crop protection market 10 years ago as evidenced by the following extract from its published notes dated 3rd May 2002.

"Whilst the ACCC considered that actual and potential imports did appear to provide a significant constraint upon the parties, the Commission was concerned that the uncertainty about a review or appeal of the Minister for Customs decision ('the Minister's decision') not to impose a dumping duty on glyphosate imported from the People's Republic of China, and the ability of Monsanto and/or Nufarm to pursue or threaten to pursue a new dumping action against imported glyphosate in the future, significantly undermined the credibility of the competitive constraint arising from independent imports of glyphosate.

The Commission's market inquiries revealed that the anti-dumping application had

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already had a negative effect on import competition and that any review of the Minister's decision would be likely to cause further disruption to competition, especially given the length of the review process.

Monsanto and Nufarm then offered section 87B Undertakings to alleviate any competition concerns that the Commission might have in relation to the proposed agreement.

The Undertakings prevent Nufarm and Monsanto from making an application for a review of the Minister for Customs' decision in February 2002 to not impose a dumping duty on glyphosate imported from China.

For the next three years Nufarm and Monsanto must also obtain an opinion from an independent adviser regarding the prospect of success of any proposed glyphosate anti-dumping application prior to lodging such an application. The Undertakings also stipulate that the independent adviser must certify that the proposed anti-dumping application is made bona fide and not frivolously or vexatiously. The independent adviser must be approved by the ACCC and consult with the ACCC in forming their opinion."

The three-year embargo has long passed and Nufarm has resumed its vexatious behaviour to disrupt the market for both Glyphosate and 2,4-D, and having recently disrupted the Trifluralin market in a case that ran for four years.

3. Strong Presumption, Based on Facts, that no Dumping of FF Glyphosate has Occurred

There is a strong presumption that FF Glyphosate is not dumped in Australia based on Australian Customs rejection of a similar application by Nufarm (and Monsanto) in 2001/02. While the 2001 investigation was based on Glyphosate Technical, Nufarm has effectively transformed the current investigation into one of Glyphosate Technical because this is the only way they could argue that there were "like" products in Australia and China. In 2001 the Glyphosate manufacturing industry in China was far less commercial and subject to greater government influence than it is today. Therefore, if Australian Customs was unable to prove that dumping of Chinese Glyphosate into Australia occurred in 2001, they could hardly do so today in an environment where the Chinese Glyphosate producers are aggressively commercial and government influence has waned. Outside of the Chinese producers there is only one other true manufacturer of Glyphosate and that is Monsanto in the US who supplies Nufarm, albeit with Chinese Glyphosate Technical. Monsanto simply does not have sufficient capacity to supply 100% of all of its markets and, indeed, based on current data it accounts for 300,000 MT of global Glyphosate Technical production compared with 400,000 MT produced by Chinese plants¹. Therefore, Chinese Glyphosate (which is of an identical quality to that of Monsanto) will always have a market in Australia.

¹ The Chinese figure includes PMIDA manufactured in China and exported to other countries for production of Glyphosate Technical.

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Under these circumstances why would a Chinese company deprive itself of profits by dumping FF Glyphosate in Australia?

4. Price Increase

Since the investigation of alleged dumping of FF Glyphosate in Australia commenced in January 2012, the global Glyphosate market has moved on. The average price of Glyphosate Technical in January 2012 was around US\$3.80/kg and has since increased to and stabilised around US\$5.60/kg - a growth rate of around 40%. The price of FF Glyphosate is based on the price of Glyphosate Technical. The price increase has been due largely to demand factors and not because of price increases of raw material. The price increase occurred after Australian Customs terminated its investigation in July 2012 because of lack of evidence of dumping. Therefore, if there was no dumping of FF Glyphosate in July 2012 it is even less likely today as Australian companies clamour for additional supply. With the greatest respect, given these circumstances, there is little purpose to be served by re-opening the investigation. Nufarm's problem today is no longer price competitiveness, but like most other suppliers in Australia, its inability to secure sufficient supplies of Glyphosate.

5. Glyphosate 62% weight/weight (w/w) Manufacturing Concentrate

In Australian Customs Dumping Notice No. 2012/05 published 6th February 2012 which initiated the investigation into the alleged dumping of FF Glyphosate in Australia following an application from Nufarm, the "goods" were clearly defined in the following manner:

"The application is concerned with imported Glyphosate in all its fully formulated liquid forms including Glyphosate 360, Glyphosate 450 and Glyphosate 570, and the fully formulated dry forms including Glyphosate 680".

The key word in the above statement is "fully" meaning that the products are available for use by customers who simply dilute the product by adding water or in some cases additional wetter.

Nufarm sought to change the ground rules in the middle of the investigation by introducing Glyphosate 62% w/w manufacturing concentrate into the study. The reason they introduced this product - which is not "fully formulated" - was possibly based on our recommendation that the problem could be resolved equitably for all parties, including Nufarm and Australian farmers, if Customs allowed Glyphosate 62% w/w to enter Australia duty free. If Glyphosate 62% w/w was imported duty free, it would mean that all end-user Glyphosate IPA (360 and 450) could be fully formulated in Australia earning additional profits for toll formulators without any price penalty for Australian farmers. However, Nufarm possibly viewed our proposal differently and envisaged it would lead to greater domestic competition and therefore reduced formulation income for itself.

However, in our view, Glyphosate 62% w/w should not be included in the study because:

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- The product was not covered in the original Terms of Reference and therefore the CEO of Australian Customs was correct in excluding this product from the investigation.
- Glyphosate 62% w/w is not in a form that may be used by farmers.

Glyphosate 62% w/w is not a fully formulated product, but simply aminated² Glyphosate Technical to which value may be safely added in domestic markets by formulators.

6. Section 269TAC(2)(d)

Good Harvest's Normal Value may not be determined under Section 269TAC(2)(d) of the Act which broadly states that if there are insufficient sales of like goods in the country of export, the Normal Value must be determined using price of exports of comparable goods to a third country. The Customs investigation was correct in determining the Normal Value from sales by Good Harvest to the domestic Chinese market as this was the most reliable figure.

This issue has arisen because Nufarm misled Australian Customs into reaching the conclusion that in the year under study (2011) there were "like" goods sold in both Australia and China, noting that the application was concerned with fully-formulated Glyphosate. This notion is incorrect. The predominant Glyphosate product sold in Australia is Glyphosate 450, a fully-formulated product which accounts for 78% of sales.³ The remaining 30% comprises the Potassium Salt of Glyphosate (510, 540 and 570), the Ammonium Salt of Glyphosate (700 WSG) and Glyphosate 360. On the other hand, in 2011, Glyphosate 10% (essentially waste water from Glyphosate manufacturing) comprised 92% of the Chinese market followed by Glyphosate 360 and the Ammonium Salt of Glyphosate (777 WSG). The only product that overlaps is Glyphosate 360 which in Australia is largely used in the domestic market by home gardeners who pay a large premium for the product. Thus for all intents and purposes there were no like goods except for Glyphosate 360 which had captured a very small share of each market. Nufarm convinced Customs that there were "like" products because all products could be distilled down to Glyphosate acid. This notion would have been true if the investigation was concerned with Glyphosate acid (as in 2001/02), but this investigation is concerned with "fully formulated Glyphosate".

AGRONOMIQ/AIRR is not familiar with Good Harvest markets outside of Australia, but if the focus is on Glyphosate 450, the market is somewhat limited because this product is sold in relatively few countries outside of Australia and the USA. Moreover, as far as we know, Good Harvest supplies only Glyphosate Technical to the USA. Glyphosate 360 is the predominant product sold in the EU, Asian and Middle East markets.

² Amination means the neutralisation of Glyphosate acid with Mono-Isopropylamine (MIPA), a base.

³ In the Verification Report, Nufarm claimed that the Australian market for Glyphosate 450 was between 50 and 60 million litres per annum. The total Australian market is around 70 million litres per annum, thus if one takes the mid-point of 55 million from Nufarm's claim and divides by 70, the result is 78%.

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Section 269TAC(2)(d) of the Act is designed to cover relatively simple products where there is no dispute over “likeness” and does not sit comfortably with fully formulated agricultural chemicals which may differ by:

- Concentration, for example Glyphosate 360 vs. Glyphosate 450. Concentration may also legally vary, for example in Australia by + or – 5%.
- Physical state, for example liquid (Glyphosate 450) vs. dry granular (Glyphosate 700).
- Neutralising agent, for example, Mono-Isopropylamine (MIPA), Potassium Hydroxide or Ammonium Hydroxide resulting salts in these names.
- Packaging size, for example 500 ml to 1,000 litres (liquid) vs. 250 gram to 500 kg (granular).
- Packaging type, for example, HDPE drums, aluminium foil in cartons, PVC bags, etc.
- Wetter, for example, Tallow Amine, APG, Betaine or Toxic vs. Low Toxic aquatic.
- Concentration of wetter, for example, the Glyphosate 450 standard is 120 gram of wetter per litre. Formulators will vary the concentration and type of wetter to suit budgetary requirements.
- Method of manufacture of Glyphosate Technical, for example, IDA vs. Glycine route.
- Quality of Glyphosate Technical, for example, Good Harvest manufactures Glyphosate 97.7% vs. Monsanto Glyphosate 95%, noting the higher to purity level the less extraneous material.
- Filler in granular Glyphosate (Good Harvest uses Ammonium Sulphate which also acts as an adjuvant, but different chemicals may be used by other manufacturers).
- Colour and Anti-foaming agents will differ, although these will have negligible effect.
- Credit terms are incorporated with the price and these typically range from sight terms to 120-days of credit from the date of the Bill of Lading.

Thus any attempt to calculate a Normal Value using exports to a third country will result in a meaningless "dog's breakfast" of a number that has no validity whatsoever.

However, from our perspective we believe that Australian Customs would be better served by disregarding Nufarm's claim that the same FF Glyphosate products sold in Australia are also sold in China. Apart from a small volume of Glyphosate 360 (which is clearly not dumped in Australia) this statement is completely untrue under an investigation that covers

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only FF products. Nufarm's claim that there are like products because all products contain Glyphosate acid is true only if the investigation covers Glyphosate acid, which it does not.

Good Harvest's lawyers have agreed with the above submission.

7. Inclusion of Low Volume Unregistered Sales to Calculate Dumping Margin

We have decided to answer this question in principle and therefore the following response should not be interpreted as a comment on the actual allegation which we believe will be satisfactorily answered by the company concerned. The sale of unregistered agricultural chemicals in Australia is a matter managed by APVMA rather than Australian Customs. The sale of unregistered products carries a fine of up to \$33,000 for individuals and \$165,000 for companies as well as recall of the product. Therefore, there should be no products identified as "unregistered" in the market and under these circumstances Australian Customs would be correct in excluding the same from any calculation of a dumping margin.

8. Conclusion and Recommendation

Anti-dumping allegations against Chinese Glyphosate have been made in many different countries (for example, Australia, USA, EU and Brazil) over the past decade by Monsanto, the US company which originally developed and patented the Glyphosate molecule (a patent that has long since expired). None of these allegations has been proven when tested for the simple reason that dumping does not occur. There is also no reason for dumping to occur because, as we learned in 2008 and again this year when Glyphosate prices increased, demand is greater than supply. Despite the fact that the US is currently experiencing its worst drought in 50 years, Monsanto cannot produce sufficient Glyphosate to meet the needs of its domestic market, much less supply Nufarm which formulates Monsanto products under license. Nufarm is Monsanto's surrogate in Australia. Dumping is used to unfairly grow market share, but if demand exceeds supply, the mechanism would be counter-productive. Therefore, consistent with extensive investigations into the alleged dumping of Glyphosate both in Australia and overseas we recommend that Australian Customs confirms the CEO's original decision.