



**Australian Government**  
**Anti-Dumping Review Panel**

# **ADRP DECISION No. 51**

Resealable Can End Closures exported to  
Australia from India

11 June 2017

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## Introduction

1. Marpac Pty Ltd (Marpac) is an Australian manufacturer of Resealable Can End Closures (the goods). The goods are referred to as TRF ends (Tagger, Ring and Foil end) and can also be known as RLT's (Ring, Lid, Tagger), RLF's (Ring, Lid, Foil) or Penny Lever Ends. The goods are generally referred to as TRF's in this report. Marpac has applied for the review of the decision by the Commissioner of the Anti-Dumping Commission (ADC) to terminate the investigation relating to TRF's exported from India only.<sup>1</sup> The decision of the ADC is a termination decision as defined by s.269ZZN(b) of the *Customs Act 1901* (the Act).
2. The application for review was received by the Anti-Dumping Review Panel (Review Panel) on 10 March 2017. The Senior Member of the Review Panel directed in writing, pursuant to s.269ZYA of the Act, that the Review Panel for the purpose of this review be constituted by me.
3. The application for review was accepted as being in accordance with s.269ZZP and s.269ZZQ and was not rejected pursuant to s.269ZZQA or s.269ZZR of the Act. The review was initiated by publication of a notice on the Review Panel's website on 12 April 2017 in accordance with s.269ZZRC(3).

## Background to the application

4. On 4 April 2016, Marpac lodged an application under s.269TB(1) and (5) of the Act requesting the publication of a dumping duty notice in respect of TRF's exported to Australia from India, Malaysia, the Philippines and Singapore.
5. After receiving further information from Marpac on 15 April, 22 April and 5 May 2016, the Commissioner of the ADC (the Commissioner) decided not to reject the application and notice of the initiation of the investigation was published on 18 May 2016.<sup>2</sup> The investigation period for the investigation was from 1 April 2015 to 31 March 2016, for the purpose of assessing dumping. The injury analysis period was from 1 April 2012.
6. In accordance with the Customs (Preliminary Affirmative Determinations) Direction 2015 (the PAD Direction) the Commissioner published a Day 60 Status Report in lieu of a Preliminary Affirmative Determination (PAD). Details of the

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<sup>1</sup> ADN No. 2017/16.

<sup>2</sup> ADN No. 2016/54.

Commissioner's reasons for doing so are in the Day 60 Status Report dated 18 July 2016 and published on the electronic public record.<sup>3</sup>

7. On 5 October 2016 the Commissioner published a combined Statement of Essential Facts (SEF 350) and PAD in relation to TRF's from India, Malaysia, the Philippines and Singapore.<sup>4</sup> Securities were taken against all exporters from India, Malaysia, the Philippines and Singapore. The Commissioner sought submissions from interested parties in relation to the findings detailed in SEF 350.
8. As a result of considering submissions, the Commissioner published a dumping duty notice terminating the investigation in part.<sup>5</sup> It was stated in the notice that as a result of the ADC's investigation, the Commissioner was satisfied that:
  - a. the goods exported from India by Hindustan Tin Works Ltd (Hindustan) were not dumped and therefore the investigation was terminated in accordance with s.269TDA(1) of the Act, in so far as it relates to Hindustan; and
  - b. in relation to all other exporters of the goods from India, the total volume of goods that have been dumped is negligible and therefore the investigation was terminated, in accordance with s. 269TDA(3) of the Act, in so far as it relates to India.
9. The detailed reasons for the decision are set out in Termination Report No. 320 (TER 320).

## The Review

10. In accordance with s.269ZZT of the Act, if an application for the review of a termination decision is not rejected under s.269ZZQA or s.269ZZR, the Review Panel must either affirm the decision under review, or revoke it.
11. In making a decision under s.269ZZT, the Review Panel must have regard only to information that was before the Commissioner when the Commissioner made the reviewable decision.<sup>6</sup>

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<sup>3</sup> See Document #09 of EPR 350.

<sup>4</sup> This document served as both a public notice under s.269TD(4)(a) of the Act of the Commissioner's PAD and a public notice under s.269TD(5) of the Act of the Commonwealth's decision to require and take securities.

<sup>5</sup> ADN No. 2016/17.

<sup>6</sup> Section 269ZZT(4) of the Act.

12. The Review Panel may also have regard to further information obtained at a conference held under section 269ZZRA or further information provided by the Commissioner upon request of the Review Panel pursuant to s.269ZZRB of the Act.
13. A conference was held under section 269ZZRA of the Act, with Marpac on 31 March 2017 (the First Conference) to clarify the applicant's grounds of review as set out in its application. A further conference was held under s.269ZZRA of the Act, with the ADC on 11 May 2017 (the Second Conference), in order to obtain further information and clarification in relation to the grounds of review raised by Marpac and relating to information before the ADC in Investigation No. 350. The ADC subsequently provided the Review Panel with further information and clarification arising from the Conference. Non-confidential summaries of both these conferences were made publically available.
14. Unless otherwise indicated, in conducting this review, I have had regard to the application (including documents submitted with the application or referenced in the application). I have also had regard to TER 350, and information relevant to the review which was referenced in TER 350, including SEF 350 and documents referenced in SEF 350. I have also had regard to the information and clarification obtained during the Conferences.
15. After the summary of the Second Conference was published, Marpac made a submission to the Review Panel on 29 May 2017, relating to the Second Conference Summary (Marpac's Submission). However, in a termination review the Review Panel must only have regard to information that was before the Commissioner when the Commissioner made the reviewable decision, subject to s.269ZZRA(2) and s269ZZRB(2) of the Act. I therefore did not take Marpac's Submission into consideration.
16. An applicant is required to set out reasons for believing that the reviewable decision is not the correct or preferable decision, and failure to do so may result in rejection of the application. However, as stated in ADRP Report No.15,<sup>7</sup> because an application is not rejected, it does not follow that all grounds advanced in the application are to be reviewed, or have been accepted as reasonable grounds for the reviewable decision not being the correct or preferable decision. It is also pointed out in ADRP Report No.15 that the obligation on an applicant to set out the reasons is linked to the task the Review Panel has in determining whether the ultimate decision (the reviewable decision) was the correct or preferable one.

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<sup>7</sup> ADRP Report No. 15 concerning Wind Towers exported from the People's Republic of China and the Republic of Korea, paragraph 16.

17. On 12 April 2017, a request was made to the ADC to provide copies of confidential documents which were referenced in TER 350 and SEF 350 or were created during the investigation. This correspondence with the ADC was made publicly available. Copies of the documents provided by the ADC were not made publicly available as they dealt with confidential information. Following review of these documents, a further request was made to the ADC on 3 May 2017 to provide copies of confidential documents which fell within the scope of the 12 April 2017 request, but were not provided in the initial document transfer. Copies of the further documents provided by the ADC were not made publicly available as they dealt with confidential information.
18. Subsection 269ZZT(5) of the Act requires the Review Panel to make its decision within 60 days after the publication of the notice under subsection 269ZZRC(3), or such longer period allowed by the Minister in writing because of special circumstances.

## Grounds for Review

19. The grounds of review relied upon by Marpac are set out in its application for review, as clarified during the First Conference:
  - a. The ADC erred in not treating Hindustan as an uncooperative exporter in TER 350;
  - b. The ADC erred in granting the following adjustments in the calculation of Hindustan's normal value:
    - i. Downwards adjustment for rebates of excise duty, service and VAT tax on raw material purchases and input services used in the manufacture and export of the goods to Australia;
    - ii. Removal of upwards adjustment for excise duty not charged on exports of the goods to Australia;
    - iii. Downwards adjustment for interest not charged for purchases of discounted tinplate;
    - iv. Adjustment for purchase of copper wire offsetting sales revenue of scrap copper wire in the calculation of SG&A and profit; and
    - v. Adjustment for other income from non-manufacturing activities removed from the total sales revenue for the purposes of calculating SG&A and profit.
  - c. The ADC erred in its calculation of negative 12.86% for Hindustan's dumping margin, based on the available price of (undiscounted) tinplate in

India for the manufacture of the goods exported to Australia during the investigation period.

## Consideration of Grounds

20. I will now deal with the various grounds of review put forward by Marpac in its application for review.

### *The ADC erred in not treating Hindustan as an uncooperative exporter*

21. In its application for review, Marpac contends that Hindustan should have been treated as a uncooperative exporter, in TER 350, in the same way as it was treated in SEF 350. I shall refer to this as the underlying claim in respect of this ground of review.

22. During the First Conference, Marpac clarified that the underlying claim was substantiated by:

- i. The arguments set out in its submission to the ADC dated 19 August 2016 (Document #21),<sup>8</sup> in response to Hindustan's public record questionnaire response, mainly relating to the failure by Hindustan to provide a sufficient non-confidential version of the exporter questionnaire response. I shall refer to this as the 'first component' of this ground of review; and
- ii. Various instances of alleged procedural non-compliance relating to the meeting between the Indian exporter and the ADC in December 2016, documents submitted by the exporter subsequent to the Statement of Essential Facts (SEF 350) and disclosure of documents on the Public Record. I shall refer to this as the 'second component' of this ground of review.

23. It should be noted that at least implicit in Marpac's submissions, with regard to both the first and second components of this ground of review, is that it was denied procedural fairness. This raises the issue of whether or not the Review Panel has the power to consider whether a denial of procedural fairness is a ground of review to find a reviewable decision is not the correct or preferable decision. This issue was considered by the Review Panel in ADRP Report No.16,<sup>9</sup> which referred to

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<sup>8</sup> Document #21 of EPR 350.

<sup>9</sup> ADRP Report No. 16, Quenched and Tempered Steel Plate exported from Finland, Japan and Sweden, paragraphs 120 – 123.

*GM Holden Limited v Commissioner of the Anti-Dumping Commission*<sup>10</sup> (the *GM Holden Case*) in which Mortimer J considered that it was not part of the function of the Trade Measures Review Officer (TMRO). The following statement of her Honour was quoted:

*“That being the function, there is no basis in the scheme to impose an obligation on the TMRO to consider and deal with a claim of denial of procedural fairness in its own terms. What the TMRO may need to do, as it did in this case, is examine an underlying factual and reasoning challenge articulated by the party said to have been denied procedural fairness in relation to a particular “finding” in the Chief Executive Officer’s report”.*<sup>11</sup>

24. I interpret this to mean that while the Review Panel does not have the power to consider a ground of review based solely on a denial of procedural fairness, the processes leading to the characterisation of an exporter as "uncooperative" may need to be examined to determine if the ADC's decision was reasonable in the circumstances. Indeed, there are instances where the Review Panel has considered challenges to the ADC's characterisation of an exporter as an "uncooperative exporter", where it is implicit in the complaint that there was a denial of procedural fairness.<sup>12</sup>
25. I shall examine the underlying claim of this ground of review, as well as each component thereof, in light of the relevant statement by Mortimer J in the *GM Holden Case*.
26. The expression "*uncooperative exporter*" is defined by s.269T(1) of the Act and depends on the Commissioner being satisfied that:
- the exporter did not give the Commissioner information that the Commissioner "*considered to be relevant to the investigation*" within a reasonable period; or
  - the exporter significantly impeded the investigation.
27. The Customs (Extensions of Time and Non-Cooperation) Direction 2015 (the Non-Cooperation Direction) provides direction on the matters which should be considered when determining whether a party is uncooperative.<sup>13</sup>

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<sup>10</sup> [2014] FCA 708.

<sup>11</sup> Paragraph [175]. The Review Panel in ADRP Report No. 16 acknowledges that there are differences with a review by the Review Panel to that which was conducted by the TMRO, but did not consider that the differences are such that they would lead to a different conclusion to the one her Honour reached.

<sup>12</sup> See ADRP Report No. 24 concerning Power Transformers exported from the Republic of Indonesia, Taiwan, the Kingdom of Thailand and the Socialist Republic of Vietnam, paragraphs 19 - 25.

<sup>13</sup> Direction made under s.269TA(1) of the Act, dated 30 October 2015.



28. In SEF 350 the ADC considered Hindustan to be “an uncooperative exporter” for the purposes of the investigation. The ADC stated:

*“The Commission attempted in-country verification of one exporter of TRFs to Australia from India. This exporter, Hindustan Tin Works Ltd (Hindustan) submitted a response to the exporter questionnaire (REQ) that was considered sufficient for the purposes of verification.*

*The verification team was unable to obtain complete and relevant information within a reasonable time period to complete a timely and efficient verification, which was necessary for the purposes of the investigation.*

*The Commissioner has an obligation to conduct the investigation in a timely and efficient manner and to avoid unnecessary delays, with specific obligations imposed under the Act in relation to considering interested parties’ responses. The Commissioner may, at any time during the conduct of an investigation make a determination regarding the uncooperative status of an interested party.*

*The Commissioner has had regard to the Act and the Customs (Extensions of Time and Non-cooperation) Direction 2015 (the Non-cooperation Direction) in relation to:*

- Subsection 6(b) of the Non-cooperation Direction: Hindustan’s responses were insufficient for the purposes of the investigation and could not, in the Commissioner’s view, be rectified quickly. Further complete and verifiable information is required for the purposes of the investigation.*
- Subsection 8(b)(ii) of the Non-cooperation Direction: Hindustan did provide information within the legislated period, however this information was not complete or accurate and therefore not relevant to the investigation.*

*The Commissioner is satisfied that Hindustan has not provided information considered to be relevant to the investigation because a sufficient degree of information relevant to the investigation was not provided and remains outstanding. This has significantly impeded the investigation in accordance with subsection 10 of the Non-cooperation Direction.*

*As a result, and as directed by subsection 8(b) of the Non-cooperation Direction, for the purposes of subsection 269T(1) of the Act, Hindustan will be considered an uncooperative exporter for the purposes of this*

*investigation and the Commissioner will rely on all other information available in making recommendations and findings in relation to Hindustan. Accordingly, the Commission has had regard to all relevant information and determined export price under subsection 269TAB(3) and normal value under subsection 269TAC(6).”<sup>14</sup>*

29. It should be noted that in ascertaining an export price in circumstances where sufficient information has not been furnished or was not available, the export price *“shall be such amount as is determined by the Minister having regard to all relevant information”* pursuant to s. 269TAB(3). A similar provision is found in s.296TAC(6) in relation to the calculation of normal value. Both these provisions are subject to a qualification that the Minister may disregard any information that is considered to be unreliable pursuant to s.269TAB(4) and s.269TAC(7). As previously observed by the Review Panel, information provided by an uncooperative exporter could be considered relevant information even though the exporter, in order to have been characterised as uncooperative, would have failed to give the Commissioner information he or she considered relevant:

*“It is of course quite possible for an exporter to give relevant information and fail to give other relevant information. However such information provided by an uncooperative exporter (indeed any interested party) runs the risk of being viewed as unreliable and disregarded.”<sup>15</sup>*

30. The finding in SEF 350 that the ADC considered Hindustan to be an *“uncooperative exporter”* resulted in securities being taken in respect of all *“Uncooperative and all other exporters”* from India at an effective duty rate of 48.2%.<sup>16</sup>
31. During the Second Conference, I requested comment from the ADC on Marpac’s underlying claim and, in particular, clarification relating to the ADC’s change from SEF 350, where it regarded Hindustan as an uncooperative exporter with a 48.2% margin, to TER 350 when it came to the view that Hindustan provided complete and accurate data resulting in a different finding of a negative 12.86% margin. The ADC clarified that, in fact, it did not ‘change’ the status of Hindustan after SEF 350, as claimed by Marpac. It made the declaration that Hindustan was an uncooperative exporter under s.8(b)(ii) of the Non-Cooperation Direction, because Hindustan had not provided sufficient relevant information for verification (and that

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<sup>14</sup> See Section 6.3.1 of SEF 350, page 24.

<sup>15</sup> See ADRP Report No. 24 concerning Power Transformers exported from the Republic of Indonesia, Taiwan, the Kingdom of Thailand and the Socialist Republic of Vietnam, paragraph 27.

<sup>16</sup> See Section 1.6 of SEF 350, page 6.

declaration remained in force and unchanged for the purpose of TER 350). Accordingly, in SEF 350 the ADC determined export price under s.269TAB(3) and normal value under s.269TAC(6). According to the ADC, after SEF 350, Hindustan provided the relevant information and documents (including over 100 attachments) in the time period allowed, which the ADC was then required to take into consideration. The ADC stated that normal value was still calculated under s.269TAC(6) for TER 350,<sup>17</sup> but now more relevant information was available to the ADC, leading to its finding in TER 350.<sup>18</sup>

32. After reviewing TER 350 and, in particular, the relevant sections referred to by the ADC in the Second Conference, as well as the subsections of the Act referred to by the ADC in TER 350, it seemed that, indeed, the ADC did not change the “uncooperative” status of Hindustan, declared in accordance with the Non-Cooperation Direction. It is specifically stated in TER 350 that the “*export price for Hindustan was determined under subsection 269TAB(3), as required by subsection 269TACAB(1)(d)*”<sup>19</sup> and the “*normal value for Hindustan was determined under subsection 269TAC(6), as required by subsection 269TACAB(1)(e)*”.<sup>20</sup> Both subsections 269TACAB(1)(d) and 269TACAB(1)(e) are specifically stated to be in respect of “*uncooperative exporters*”. The difference would appear to be that subsequent to the determination that Hindustan was an uncooperative exporter, Hindustan submitted further information (after SEF 350), within the time period allowed, which the Commissioner reviewed and verified, and now regarded as “*relevant*”, taking it into consideration.
33. Notwithstanding that Hindustan had been declared an “*uncooperative exporter*”, I do not consider that it was unreasonable, or contrary to legislation, for the ADC to take into consideration the additional verified information submitted by Hindustan, within the permitted time frame for submitting comments after SEF 350. Therefore, there would appear to be no basis for Marpac’s underlying claim that Hindustan should have been treated as an “*uncooperative exporter*”, since the ADC does not appear to have changed Hindustan’s status as an uncooperative exporter, subsequent to SEF 350. Rather, the additional information submitted by Hindustan

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<sup>17</sup> See Section 3.3.2 of TER 350, page 8.

<sup>18</sup> See Conference Summary dated 11 May 2017.

<sup>19</sup> See Section 3.3.1 of TER 350, page 8. Section 269TACAB relates to export prices and normal values for different categories of exporters, in relation to a dumping duty notice. Subsection (1)(d) provides that if the export price of goods for an “*uncooperative exporter*” is to be worked out in relation to the investigation, that export price is to be worked out under subsection 269TAB(3).

<sup>20</sup> See Section 3.3.2 of TER 350, page 8. Section 269TACAB relates to export prices and normal values for different categories of exporters, in relation to a dumping duty notice. Subsection (1)(e) provides that if the normal value of goods for an “*uncooperative exporter*” is to be worked out in relation to the investigation, that normal value is to be worked out under subsection 269TAC (6).

was regarded as “*relevant*”, and taken into consideration, thus substantially affecting the normal value calculations.

34. I now turn to consider the two components of this ground of review.
35. With regard to the first component of this ground of review, in its application for review Marpac refers to Document #21<sup>21</sup> in support of its claim, in which Marpac argued that:
- a. Hindustan’s public version of the exporter questionnaire response did not comply with the requirements of s.269ZJ of the Act and should be disregarded in its entirety by the Commission<sup>22</sup>; and
  - b. Hindustan’s failure to provide a reasonable non-confidential version of its questionnaire response amounted to a failure to comply with the requirements of the Exporter Questionnaire, a failure to supply the Commissioner with information relevant to the investigation, and a significant impediment to the investigation.<sup>23</sup>

Marpac submitted that Hindustan should therefore have been declared to be an ‘*uncooperative exporter*’ as defined by s.269T of the Act and the Non-Cooperation Direction, and that the ADC should have therefore determined the rate of dumping for Hindustan, based not on the data contained in that Exporter Questionnaire response, but, “*through use of other information, as is the standard practice and policy of the Commission*”.<sup>24</sup>

36. During the Second Conference, I requested the ADC’s comments on Marpac’s contention, supported by its submission to the ADC dated 19 August 2016 (Document #21), that Hindustan did not provide a proper non-confidential summary of its exporter questionnaire response. The ADC pointed out that most of the information requested in the exporter questionnaire is highly confidential

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<sup>21</sup> It should be noted that Document #21 was submitted to the ADC prior to SEF 350. In SEF 350 the ADC considered Hindustan to be “*an uncooperative exporter*”, but for different reasons to those argued by Marpac in Document #21. Marpac argued in Document #21 that Hindustan should be considered to be an uncooperative exporter, due to a failure to provide a sufficient non-confidential version of the exporter questionnaire.

<sup>22</sup> See Section entitled, “Non-Compliance with s.269ZJ” of Document #21, pages 2 – 4, for Marpac’s detailed arguments in this regard.

<sup>23</sup> See Section entitled, “‘Uncooperative Exporter’ due to Failure to Provide a Sufficient Non-Fidential Version of the Exporter Questionnaire” of Document #21, pages 4 – 6, for Marpac’s detailed arguments in this regard.

<sup>24</sup> See Sections entitled, “‘Uncooperative exporter’ as Exporter Questionnaire should have been deemed Insufficient from the Outset” and , “Determining Dumping for Hindustan as ann Uncooperative Exporter” of Document #21, pages 6 – 8, for Marpac’s detailed arguments in this regard.

(particularly to a private company), and it is difficult to determine how to treat it when the information is largely redacted, as the exporter can take the view that anything to do with internal operations is confidential. The ADC stated further that Hindustan was the only exporter from India that submitted information, which was the ‘best information available’ for India, and the ADC would be in a far worse position down the track, if it took a hard-line approach to a redacted exporter questionnaire.<sup>25</sup>

37. With regard to the second component of this ground of review, Marpac further claimed in its application for review that the continued leniency of submissions to the ADC by Hindustan with respect to compliance with the Act showed a lack of transparency and is of “*grave concern to the applicant*”. Marpac claims that this was apparent throughout the investigation, with respect to Hindustan. Marpac claimed that regarding the “*new evidence*” provided by Hindustan, that resulted in termination of the investigation with respect to India, it submits that the ADC’s decision to terminate the investigation into dumped resealable can end closures from India, was based upon a finding that the dumping margin was negative 12.86%, based on a meeting in late December, where documents were provided to the ADC and no record of the meeting or the documents were put on the public record as required under the Act. Marpac submits that Hindustan and the ADC Commission have not met the requirements under the Act to provide a reasonable redacted version of any submissions. Further, Marpac considers that the presentation to the ADC by Hindustan of 26 confidential attachments and over 100 individual documents have served to confuse the ADC in its determination, with none of these documents available on the “public record” for interested parties to understand their relevance, as required by s.269ZJ of the Act. Marpac states that it only became aware of these documents in TER 350. Consequently, Marpac contends that it was not given the opportunity to make a submission on the validity of these documents.<sup>26</sup>

38. During the Second Conference, I also requested the ADC to comment on this second component of Marpac’s claim, in particular Marpac’s contention that none of the approximately 100 documents submitted by Hindustan after SEF 350 were made publicly available before the termination decision. The ADC stated that these were all confidential attachments to Hindustan’s submissions that were made after SEF 350, being the sort of confidential documents that would normally be gathered at verification, such as, invoices and internal costing documents. It was clarified that the submissions themselves (excluding attachments) which

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<sup>25</sup> See Conference Summary dated 11 May 2017.

<sup>26</sup> See Marpac’s application for review, pages 9 – 10.

provided quite extensive non-redacted information, were placed on the public file (Documents #36 and #38) in late October and before publication of TER 350.<sup>27</sup>

39. Marpac's submissions in respect of both Component 1 (that Hindustan did not provide a proper non-confidential summary of its exporter questionnaire response) and Component 2 (that Marpac was not given the opportunity to make a submission on the validity of the documents submitted after SEF 350), appear to be directed at the process undertaken by the ADC or "procedural fairness" rather than at the "reviewable decisions" by the Commissioner, referred to in s.269ZZN of the Act. However, as discussed above, there appears to be no basis for Marpac's underlying claim that Hindustan should have been treated as an uncooperative exporter, and therefore the two components of Marpac's claim seem to be standing only on procedural fairness 'legs'.
40. I consider that these procedural fairness claims fall outside the scope of the powers of the Review Panel. I am limited to affirming or revoking the reviewable decision. I consider that this position is consistent with the *GM Holden Case*.<sup>28</sup>

*The ADC erred in granting various adjustments in the calculation of Hindustan's normal value*

41. I will discuss this ground of review with reference to the 'items'<sup>29</sup> referred to by Marpac in its application for review for the various adjustments referred to in TER 350 that are challenged.

*Downwards adjustment for rebates of excise duty, service and VAT tax on raw material purchases and input services used in the manufacture and export of the goods to Australia (Referred to as Item 1 in Marpac's Application for Review)*

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<sup>27</sup> See Conference Summary dated 11 May 2017.

<sup>28</sup> Marpac indicated in Document #21 that the text of the public document that comprises Hindustan's response to the exporter questionnaire is "redacted in its entirety" and contains no summary of redacted information that would allow for a reasonable understanding of the nature of the redacted information. A review of the public version of this document confirmed Marpac's allegation of complete redaction of the text. While confirming that the procedural claims are outside the scope of the powers of the Review Panel, I nevertheless note that s.269ZJ of the Act imposes an obligation on the Commissioner to "ensure that a claim for confidentiality does not result in inadequate information to interested parties except in very limited circumstances", see *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice and Customs* [2008] FCA 443, paragraphs [91] to [93], which dealt with a similar obligation of the the Chief Executive Officer of Customs (the CEO) under a earlier version of the Act.

<sup>29</sup> These "items" refer to the adjustment claims by Hindustan, to its normal value, set out in the table under Section 3.3.2 of TER 350, page 8.



42. With regard to Item 1, Marpac states that, *“the duties refundable by the Indian Government would only serve to bring the tinsplate and aluminium foil prices back into line with the “Asian Pricing” being paid in the countries where such taxes and duties do not apply, vis a vis the Philippines, Malaysia and Singapore.”*<sup>30</sup>
43. During the First Conference, I sought clarification on this claim from Marpac, as the basis of the claim was not clear to me. Marpac claimed that these deductions should not have been made.<sup>31</sup>
44. I reviewed TER 350 and its Confidential Appendices and could not determine any justifiable reason to challenge this adjustment. Nevertheless, during the Second Conference, I requested the ADC’s comments on this adjustment. The ADC confirmed that after SEF 350 Hindustan demonstrated that it was using the rebates for the exports to Australia and the quantum it was receiving back, by giving the ADC access to the CENVAT credit registers, which shows all taxation debits and credits. The ADC also had access to Hindustan’s monthly tax returns to Indian Customs for verification purposes. Prior to SEF 350, Hindustan had been unable to provide the necessary evidence. The ADC confirmed that it was satisfied with the verification of the documents that related to this claim and identified the files and work sheets on the confidential appendices which reflected this claim, and the percentage amounts of the relevant rebates.<sup>32</sup>
45. I am satisfied with the approach of the ADC and consider that the decision to grant this adjustment is reasonable and in accordance with the legislation and the ADC’s practice, as set out in the Dumping and Subsidy Manual, November 2015 (the Manual)<sup>33</sup>. Therefore, Marpac’s claim that no downward adjustment to normal value should be made in respect of Item 1 fails.

*Removal of upwards adjustment for excise duty not charged on exports of the goods to Australia (Referred to as Item 2 in Marpac’s Application for Review)*

46. With regard to Item 2, Marpac states in its application for review that, *“It would appear to be double counting excise duties shown in item 1 above.”*<sup>34</sup> During the First Conference, Marpac clarified that it challenges this adjustment on the basis

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<sup>30</sup> See Marpac’s application for review, page 10.

<sup>31</sup> See Conference Summary dated 31 March 2017.

<sup>32</sup> See Conference Summary dated 11 May 2017.

<sup>33</sup> See the Manual, pages 62 – 65.

<sup>34</sup> See Marpac’s application for review, page 10.

that it appears to be double counting taking into consideration the reference to “excise duties” in item 1.<sup>35</sup>

47. Since there appeared to be validity in this claim, during the Second Conference, I requested clarification from the ADC on the repeated reference to excise duty in Item 2. The ADC explained that this adjustment related to an excise duty paid on the sale of the finished product, whereas in Item 1 it related to excise duties on inputs, so there was no double counting. The ADC further advised that during verification Hindustan could not provide evidence that there was no excise duty for exports, and so the ADC had made an upward adjustment. The ADC subsequently obtained Indian tax advice and was able to verify that no excise duty is payable on exports. During the Second Conference, the ADC identified the files and work sheets on the confidential appendices which reflected this claim, and the quantum of the relevant rebates. The ADC confirmed that it was satisfied with the verification of the documents and information that related to this claim.<sup>36</sup>
48. I reviewed the relevant confidential attachments and worksheets reflecting this adjustment. I am satisfied with the explanation of the ADC and its approach. I consider that the decision to grant this adjustment is reasonable and in accordance with the legislation and the ADC’s practice, as set out in the Manual. Therefore, Marpac’s claim in respect of Item 2 fails.

*Downwards adjustment for interest not charged for purchases of discounted tinplate*  
(Referred to as Item 3 in the Application for Review)

49. With regard to Item 3, Marpac challenges the ADC’s acceptance of Hindustan’s claim that it is not charged interest for purchases of discounted tinplate, thereby decreasing the cost to make, for the purpose of normal value.
50. Marpac explains that within the industry discounted tinplate refers to secondary grade tinplate, which does not meet the JIS 3303-2008 or other relevant standards for prime tinplate for use with a food or beverage application in Australia. Marpac submits that discounted tinplate could not be considered in the cost of goods (COG) for export to Australia, given the requirements of the end user and the multiple submissions made by the importers and the Can Manufacturers Institute of Australia Inc (CMIA) regarding the strictness of the quality requirements.<sup>37</sup> During the First Conference, Marpac clarified this claim, emphasising that discounted tinplate cannot be used for exports to Australia due

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<sup>35</sup> See Conference Summary dated 31 March 2017.

<sup>36</sup> See Conference Summary dated 11 May 2017.

<sup>37</sup> See Marpac’s application for review, page 10.



to the strictness of the quality requirements for tinplate used in food or beverage application for Australia, so the adjustment, in its submission, is not warranted. Marpac advised that discounted tinplate could be used in the manufacture of other 'general line products' that Hindustan might manufacture, and so Hindustan would have purchased discounted tinplate in regard to manufacturing these products, but not in respect of TRF's exported to Australia.<sup>38</sup>

51. Since there appeared to be validity in Marpac's claim, I sought clarification on this adjustment from the ADC, during the Second Conference. The ADC stated that Marpac misunderstood what was being referred to in the adjustment claim, being a "bill discounting facility" relating to finance charges in respect of tinplate purchases, which has nothing to do with 'discounted' tinplate. Regarding the actual adjustment claim, the ADC advised that after SEF 350 when Hindustan submitted the required information, the ADC was able to verify that the relevant finance charges were already included in the SGA costs, so including these charges in the cost of manufacture amounted to double counting. The ADC provided the approximate quantum of this adjustment (as a percentage of the tinplate cost) and confirmed that it was satisfied with the verification of the documents that related to this claim. The ADC further confirmed that it had verified that all purchases of tinplate for the manufacture of TRF's for export to Australia were of a high grade, and not 'discounted' tinplate.<sup>39</sup>

52. I reviewed the relevant confidential attachments and worksheets reflecting this adjustment. While I consider the wording of this adjustment, as referred to in TER 350,<sup>40</sup> to be somewhat confusing, I accept the ADC's explanation and clarification that this adjustment related to finance charges in respect of tinplate purchases and not to discounted or low grade tinplate. I consider that the decision to grant this adjustment is reasonable and not contrary to the legislation and the ADC's practice. Therefore, Marpac's claim in respect of Item 3 fails.

*Adjustment for purchase of copper wire offsetting sales revenue of scrap copper wire in the calculation of SG&A and profit (Referred to as Item 4 in the Application for Review<sup>41</sup>)*

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<sup>38</sup> See Conference Summary dated 31 March 2017.

<sup>39</sup> See Conference Summary dated 11 May 2017.

<sup>40</sup> See Item 3 of Table 2: Claims Affecting Hindustan's Normal Value in Section 3.3.2 of TER 350, page 8.

<sup>41</sup> During the First Conference, Marpac clarified that this should be a reference to "Item 5" (not "Item 4"). See Conference Summary dated 31 March 2017.

53. During the First Conference, Marpac clarified that this should be a reference to “Item 5” (not “Item 4”).<sup>42</sup>
54. With regard to what I shall now refer to as ‘Item 5’, Marpac disputes the reference to copper wire, which it contends has no use in the manufacture of TRF ends. Marpac claims that copper wire is a product used in can making and on welding lines, but is irrelevant on TRF lines. As clarified during the First Conference, Marpac challenges this adjustment since there is no copper wire used in the manufacture of the product, and therefore, in Marpac’s view, the adjustment cannot be applicable.<sup>43</sup>
55. As there appeared to be a lack of clarity relating to this adjustment, during the Second Conference I requested the ADC to comment on Marpac’s challenge of this adjustment granted to Hindustan, noting the reference to copper wire scrap in Hindustan’s post-SEF submission dated 24 October 2016<sup>44</sup>, in which Hindustan also argued that copper wire is not required for the manufacture of TRF’s.
56. The ADC explained that since there were no domestic sales of TRF’s in India, it ‘constructed’ the normal value for Hindustan. For this purpose, the cost to manufacture related to TRF’s and excluded copper wire as a raw material. The amount of SGA and profit was calculated using the amounts realised by Hindustan from the sale of ‘the same general category of goods’ in the domestic market in accordance with s.44(3)(a) and s.45(3)(a) of Customs (International Obligations) Regulation 2015 (the Regulation). Due to the way Hindustan managed its accounting systems, the ADC utilised all Hindustan’s manufacturing activities as the ‘general category of goods’, which included products that used copper wire in their manufacture (such as complete can units). The ADC further stated that in the pre -SEF calculations, copper wire was not included in the ‘Total Raw Materials’ sum (for SGA and profit calculations), while copper scrap was included in the ‘Total Revenue’ line. This was an error which the ADC corrected in the final calculation.<sup>45</sup>
57. I reviewed the relevant confidential attachments and worksheets reflecting this adjustment. I accept the ADC’s explanation and clarification of this adjustment and I therefore consider that the decision to grant this adjustment is reasonable and not contrary to the legislation and the ADC’s practice. Therefore, Marpac’s claim in respect of Item 5 fails.

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<sup>42</sup> See Conference Summary dated 31 March 2017.

<sup>43</sup> See Conference Summary dated 31 March 2017.

<sup>44</sup> Document #36 of EPR 350, page 15.

<sup>45</sup> See Conference Summary dated 11 May 2017.

*Adjustment for other income from non-manufacturing activities removed from the total sales revenue for the purposes of calculating SG&A and profit (Referred to as Item 5 in the Application for Review<sup>46</sup> )*

58. With regard to what I shall now refer to as 'Item 6', Marpac simply stated in its application that no information is available on the public record so the veracity of this information cannot be checked.
59. As I pointed out during the First Conference, there appears to be no specific argument or evidence to challenge this adjustment, and therefore no apparent basis for this ground of review. Therefore, Marpac's claim in respect of Item 6 fails.

*The ADC erred in its calculation of negative 12.86% for Hindustan's dumping margin, based on the available price of (undiscounted) tinplate in India for the manufacture of the goods exported to Australia during the investigation period*

60. In its application for review, Marpac challenges the ADC's calculation of negative 12.86% for Hindustan's dumping margin in TER 350, based on the available price of (undiscounted) tinplate in India for the manufacture of the goods exported to Australia, during the investigation period. In support of this ground of review Marpac sets out a table indicating 'calculated' raw material pricing for TRF's based on the negative 12.86% dumping margin (Table 1)<sup>47</sup> as well as a graph showing domestic tinplate pricing in the Indian domestic market (Tinplate Pricing Graph).<sup>48</sup> Marpac concludes that the dumping margin cannot be correct, since the prices of tinplate, as calculated by Marpac on the basis of this figure, would be substantially lower than the verified (undiscounted) tinplate pricing in India during the investigation period.<sup>49</sup>

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<sup>46</sup> During the First Conference, Marpac clarified that this should be a reference to "Item 6" (not "Item 5"). See Conference Summary dated 31 March 2017.

<sup>47</sup> See "Table 1: Indicative Raw Material Pricing for TRF's based on the -12.86% Dumping margin," in Marpac's application for review, page 11.

<sup>48</sup> See graph entitled, "Basis for Calculation of Domestic Tinplate Pricing," sourced from Metal Bulletin, the Japan Iron and Steel Federation(Korea) dated 9 March 2017, in Marpac's application for Review, page 12.

<sup>49</sup> Marpac points out in its application for review that within the range of pricing there are subsidies, or rebates that may not have been considered, and removed from the calculations in the re-assessment of the dumping margin for India. See Marpac's application for review, page 12. Marpac, however, presents no further evidence of such subsidies or rebates and there is no indication of a countervailing action relating to the goods, so I will not consider this any further.

61. During the First Conference, in response to my request for clarification with respect to this ground of review as well as an explanation of Table 1 and the Tinplate Pricing Graph:

- Marpac clarified that it challenges the negative 12.86% dumping margin calculation based on the price Marpac calculated (working backwards) that Hindustan would have had to have paid for its tinplate, if that percentage figure was actually the correct calculated dumping margin;
- Marpac explained that Table 1 reflects the estimated price that Hindustan would have paid for tinplate in a number of scenarios, based on the selling price in Australia<sup>50</sup> and working backwards to the local Indian price, using the dumping margin for the calculation<sup>51</sup>. Using a number of scenarios where the percentage of raw materials in the cost to manufacture differed (40%, 50% and 60%), Marpac calculated what the estimated price of tinplate would have had to have been (per tonne USD)<sup>52</sup> for the Indian exporter, based on the negative dumping margin, and compared this to verified “Asian price”<sup>53</sup> in the investigation period. The applicant claims that this resulting tinplate pricing was not available during the investigation period for undiscounted tinplate, and is consistent only with secondary / discounted tinplate (which cannot be used for exports to Australia due to Australian quality requirements in the food and beverage industry);
- Marpac also clarified the relevance of the Tinplate Pricing Graph which reflected the basis of the calculation of Indian domestic tinplate pricing and advised that only the line on the graph showing hot rolled coil (HRC) prices was relevant to the argument. Based on these Indian domestic prices for HRC, Marpac estimated prices (in USD) after conversion to tinplate plus

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<sup>50</sup> In its application for review Marpac states that the estimated local selling price is based on the available data from the ADC and evidence submitted by it to the ADC Commission in its application. See Marpac’s application for review, page 11.

<sup>51</sup> In its application for review, Marpac states that the calculation methodology can be found at the Confidential Attachment 10.3 to its application for review, “Tinplate and Profit Matrix”. Marpac states that a similar matrix was provided to the ADC.

<sup>52</sup> Marpac calculated the estimated price of tinplate (in per tonne USD) in the various scenarios, of a differing percentage of raw materials in the cost of manufacture, as follows:

	73mm	99mm	127mm	153mm
40% raw materials	████	████	████	████
50% raw materials	████	████	████	████
60% raw materials	████	████	████	████

<sup>53</sup> Marpac states in its application for review that the, “verified “Asian price” in the period was █████ US\$ █████

cutting and lacquering, but excluding any profit. Marpac indicated that based on the domestic Indian prices for HRC as reflected in the graph, the approximate average best price of tinplate that could be obtained from the Indian tin mill during the investigation period would be US\$ [REDACTED] ex works (which includes cutting and lacquering but excludes any profit). This is substantially higher than what Table 1 indicates in all scenarios, as calculated backwards using the selling price in Australia and the negative dumping margin.<sup>54</sup>

62. Further clarifications of this ground of review, including in respect of Table 1 and the Tinplate Pricing Graph were made during the First Conference.<sup>55</sup>
63. Since there appeared to some validity in Marpac's calculation of the price of tinplate and discounted tinplate in India, and bearing in mind Marpac's contention that discounted tinplate could not be used in the manufacture of TRF's for export to Australia owing to quality requirements, I sought comments and clarification on this ground of review from the ADC during the Second Conference. In particular, I requested the ADC's comments on the estimated tinplate prices that Marpac calculated would have to have been paid by Hindustan, if the dumping margin is correct, and using the dumping margin of negative 12.86% as the basis for the backwards calculation (Table 1).
64. The ADC responded that its calculations were based on the *actual* prices paid by Hindustan for tinplate, which the ADC had verified to be food grade tinplate.<sup>56</sup> The ADC stated that the type of estimates made by Marpac is generally seen in applications, based on assumptions, when the industry does not have access to the actual data from the country of export, whereas the ADC's calculations are based on actual verified information from the exporter.<sup>57</sup>
65. During the Second Conference, I also requested information on the approximate average price of non-discounted tinplate that the exporter purchased during the relevant period, to determine if it was comparable to the 'verified Asian price' of tinplate, that Marpac referred to. The ADC referred to the relevant worksheet reflecting the actual tinplate prices as purchased by Hindustan. These were

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<sup>54</sup> See Conference Summary dated 11 May 2017. Marpac points out in its application for review that the calculated prices in Table 1 are far from the verified tinplate pricing within the investigation period and are not even close to the USD [REDACTED] that would have only been available for a short period after the investigation period. See also Marpac's application for Review, page 12.

<sup>55</sup> See Conference Summary dated 11 May 2017 for details.

<sup>56</sup> The ADC confirmed that verification included having sight of source documents, including invoices and order statements that specifically referred to the quality of the tinplate. See Conference Summary dated 11 May 2017.

<sup>57</sup> See Conference Summary dated 11 May 2017.

substantially higher than the 'calculated' estimated prices in Table 1 and comparable to the so called 'verified Asian price', taking into consideration various costs that both tinplate prices included.<sup>58</sup>

66. After reviewing relevant documents and spreadsheets and following detailed discussions with the ADC during the Second Conference, I am satisfied that the tinplate prices used in the calculation of Hindustan's normal value were correct and appropriately verified by the ADC, and were in respect of non-discounted / high grade tinplate. I can find no reason to question the ADC's calculation of negative 12.86% dumping margin for Hindustan, notwithstanding the results of Marpac's backwards calculation in Table 1. I agree with the ADC that Marpac's calculation is based on various assumptions of costs incurred by Hindustan, without any knowledge of the actual data, while the ADC's calculation is based on actual verified information from the exporter. In addition, I noted that the actual prices of Hindustan's tinplate purchases were comparable with what Marpac referred to in its application for review, as the 'verified Asian price'.<sup>59</sup>
67. Therefore, I consider that the ADC's dumping margin calculation for Hindustan is reasonable and there is no reasonable basis for Marpac to challenge the calculation, based on the tinplate pricing. Marpac's claim in respect of this ground of review therefore fails.

## Decision

68. For the reasons set out above, the decision to terminate the dumping investigation in so far as it relates to Hindustan and India, is affirmed.



Leora Blumberg  
Anti-Dumping Review Panel Member  
11 June 2017

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<sup>58</sup> See Conference Summary dated 11 May 2017.

<sup>59</sup> During the Second Conference the ADC said the average price paid by Marpac for tinplate during the relevant period was approximately US [REDACTED] per tonne, as contained in the relevant tinplate pricing worksheet.