Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

[1] By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. **Applicant's details**

Applicant's name: Irwin Packaging Pty Ltd

Address: 8-10 Yulong Close, Moorebank, NSW 2170

Type of entity (trade union, corporation, government etc.): Proprietary Company

2. **Contact person for applicant**

Full name: John Irwin

Position: Managing Director

Email address: john.irwin@irwinpackaging.com.au

Telephone number: +61 2 9600 7800

3. **Set out the basis on which the applicant considers it is an interested party**

Irwin Packaging Pty Ltd, (herein referred to as "IP") is an importer of resealable can end closures exported from India and the Philippines.

4. **Is the applicant represented?**

Yes

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. **Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:**

☒ Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐ Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐ Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐ Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐ Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐ Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐ Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐ Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. **Provide a full description of the goods which were the subject of the reviewable decision**

The goods the subject of the application (the goods) are resealable can end closures (referred to as tagger, ring and foil (TRF) ends, or TRFs) comprising:

- a tinplate outer ring with or without compound;
- an aluminium foil membrane for attachment to the outer ring; and
- a plug or tagger, which fits into the outer ring.

7. **Provide the tariff classifications/statistical codes of the imported goods**

The goods are classified to tariff subheading 8309.90.00, statistical code 10, in Schedule 3 to the Customs Tariff Act 1995.

8. **Provide the Anti-Dumping Notice (ADN) number of the reviewable decision**
   If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

Anti-Dumping Notice 2017/20 is attached at **Attachment A**.

9. **Provide the date the notice of the reviewable decision was published**

The attached ADN 2017/20 was published on 24 March 2017.

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☐

10. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.**

Please refer at **Attachment B**.

11. **Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.**

Please refer at **Attachment B**.

12. **Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.**

Please refer at **Attachment B**.

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: 

Name: JOHN BRACIC

Position: DIRECTOR

Organisation: J.BRACIC & ASSOCIATES PTY LTD

Date: 20th April 2017

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative: Mr John Bracic

Organisation: J.Bracic & Associates Pty Ltd

Address: PO Box 6203, Manuka, ACT 2603

Email address: john@jbracic.com.au

Telephone number: +61-0499056729

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

Refer to **Attachment C** for signed letter of authority.

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:……..

(Applicant's authorised officer)

Name:

Position:

Organisation

Date: / /

J.BRACIC & ASSOCIATES
TRADE REMEDY ADVISORS

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20 April 2017

Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601

Review of a Ministerial decision – Resealable Can End Closures exported from the Philippines.

1. INTRODUCTION

On 22 April 2016, Marpac Pty Ltd (Marpac) lodged an application for the imposition of interim dumping duties on exports of TRFs from India, Malaysia, Singapore and the Philippines. The Anti-Dumping Commission (the Commission) notified on 18 May 2016 of its decision to not reject the application.

On 5 October 2016, the Commissioner of the Anti-Dumping Commission (Commissioner) made a preliminary affirmative determination (PAD) and imposed provisional measures on imports of TRFs from the nominated countries, entered for home consumption on or after 6 October 2016. On 5 October 2016, the Commission also published its preliminary findings of the dumping investigation in Statement of Essential Facts Report No. 350 (SEF 350).

On 20 March 2017, following the Commission's investigation, the Assistant Minister for Industry, Innovation and Science (Assistant Minister) made the decision under subsections 269TG(1) and 269TG(2) of the *Customs Act 1901* (the Act) to impose interim dumping duties in accordance with Section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* on like goods exported from Malaysia, Singapore and the Philippines. Notification of the Parliamentary Secretary's decision was made on 24 March 2017.

Final Report No. 350 (Report 350) contains the material findings of fact and reasoning that forms the basis for the Assistant Minister's decision to impose duties.

2. REASONS FOR BELIEVING THAT THE REVIEWABLE DECISION IS NOT THE CORRECT OR PREFERABLE DECISION.

IP seeks a review of a following findings and conclusions which led to the decision of the Minister to publish a dumping duty notice:

- **Ground 1:** The Commission erred in concluding that the Australian TRF industry was not established at the time Marpac entered the industry, and as a consequence incorrectly considered whether the industry was materially hindered in its establishment.
- **Ground 2:** The Commission erred in concluding that the Australian TRF industry was not established during the investigation period, and as a consequence incorrectly considered whether the industry was materially hindered in its establishment.
- **Ground 3:** The finding of hindrance is not correct or preferable due to a failure to properly isolate and distinguish a number of critical factors other than the dumped exports including:
    a) Impact of non-dumped export prices from India;
    b) Marpac's inefficient operation and lack of economies of scale;
    c) Marpac's inability to negotiate competitive steel input prices;
    d) Marpac's inability to supply TRFs with higher technical specifications;
    e) Injury to Marpac from lost supply contracts by can filling customers.
- **Ground 4:** The finding of hindrance is not correct or preferable due to a lack of evidence demonstrating that dumped exports materially hindered the establishment of the industry.

Ground 1: The Commission erred in concluding that the Australian TRF industry was not established at the time Marpac entered the industry, and therefore incorrectly considered whether the industry was materially hindered in its establishment

In its application, Marpac stated that it was the sole producer of TRF's in Australia, commencing production of 73mm TRFs at its newly established manufacturing facility in January 2014. Marpac claimed that dumped imports were hindering its establishment and as the sole member of the Australian industry, the Australian industry was itself being materially hindered in its establishment.

Following initiation of the dumping investigation, interested parties informed the Commission that another local producer, VIP Packaging Pty Ltd (VIP), existed and had been producing 73mm, 99mm and 153mm TRFs in Australia for some time prior to Marpac's entry into the industry. The Commission subsequently verified and confirmed that VIP did indeed undertake the manufacture of 73mm, 99mm and 153mm TRFs at its manufacturing facility in Davenport, Tasmania.

The Commission found in REP 350 that the Australian TRF industry 'consist of two manufacturers of like goods, Marpac and VIP'. Notwithstanding that domestic production of like goods was being undertaken at the time of Marpac's commencement of production in early 2014, the Commission concluded that Marpac had entered an unestablished TRF

industry and that as a consequence, the Australian TRF industry was an unestablished industry that could be materially hindered by dumped imports.

IP considers the Commission's interpretation and determination that the Australian TRF industry was not established at the time of Marpac's entry to be incorrect, as it is counter to the clear evidence demonstrating that TRF production has been undertaken in Australia in various forms over the past 30 years and continued to occur during the investigation period.

Characteristics of the Australian industry

Does prior manufacture of like goods preclude an industry from being unestablished?

The Commission has confirmed that during the investigation period, Australian production of TRFs was undertaken by Marpac and VIP. The Commission also accepts and agrees that the Australian can manufacturing industry previously manufactured TRFs for captive production of complete can units. However, the Commission 'considers that even if there was an established Australian TRF industry, that industry largely ceased when can-manufacturers moved to importing TRFs. The fact that VIP continued manufacturing an insignificant volume of TRFs solely for self-supply and for entry in the downstream TRF market indicates that the industry became unestablished and was unestablished when Marpac commenced TRF manufacture.'

Firstly, IP contends that the question posed by the Commission is incorrect. The Commission ought to have asked itself 'whether the continued manufacture of like goods by an already established industry precludes that industry from being unestablished following the arrival of a new entrant to the industry?' That is, as demonstrated by the timeline below and previously supplied to the Commission, TRF production in Australia has been ongoing for over 30 years and continued to occur at the time that Marpac commenced operations in 2014.

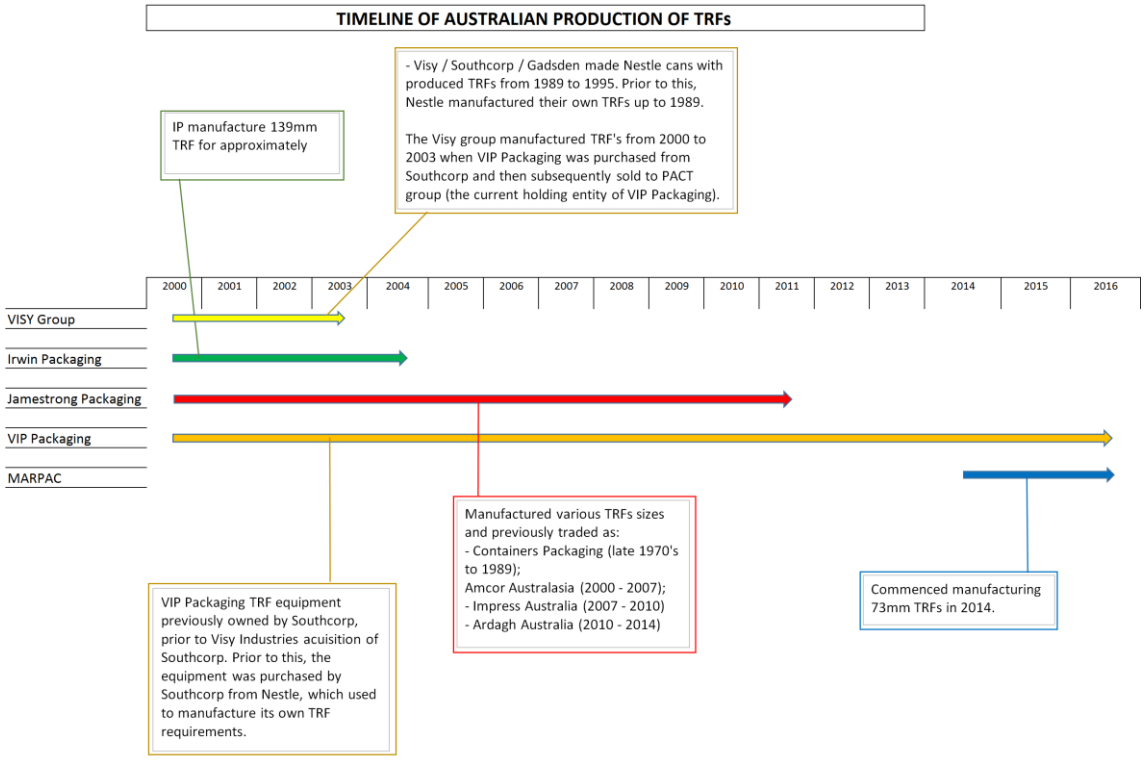

Figure 1.

IP accepts that in the circumstances where an established industry totally ceases production of like goods and a new entrant subsequently commences production sometime later, it is open to that new industry member to claim that as the sole member of the Australian industry, it is not yet established and apply for the imposition of dumping duties on the basis of a claim of hindrance. However, those circumstances do not apply in this case.

In this particular circumstance, the established industry which has produced like goods for over 30 years has continued to exist up to the point of Marpac's entry and beyond to the investigation period. Therefore, the only question to be answered is whether the Australian industry producing like goods at the time of Marpac's entry into the Australian market, was established or unestablished.

The Commission's view that the '*previous*' industry became unestablished appears to rest solely on its consideration that TRF production ceased by a large portion of the then Australian TRF industry. By its own assessment, the Commission accepts that the Australian TRF industry did not cease production prior to Marpac's entry but instead only '*largely ceased*'. This confirms that the existing Australian TRF industry continued, albeit on a smaller scale.

This would suggest that a critical consideration and factor in the Commission's assessment as to whether the 'previous' industry became unestablished is the level of TRF production that was occurring in Australia just prior to Marpac's entry. The importance given to the level of TRF production by the Australian industry at the time of Marpac's entry is highlighted by the Commission's reference to the Australian industry having '*largely ceased*' and VIP's manufacture of '*an insignificant volume*'.

However, IP submits that the apparent weight given to the existing TRF production volumes at the time of Marpac's entry is unsound. As the Commission correctly points out:

> *The references to production and manufacture in subsection 269TB(6), as well as the words "Australian industry producing like goods" in section 269TG support a view that the Australian industry in section 269TG means an industry that has commenced some production or manufacture. There is also no express requirement for the industry to have carried out a particular level of production (or no production) in order for it be an industry...'*

Given no requirement for a particular level of production to be an industry, the Commission should have concluded as fact that the TRF industry producing like goods was an established industry for over 30 years and continued to exist at the time of Marpac's entry. As outlined earlier, in this circumstance the only relevant question to be answered is whether the Australian industry producing like goods prior to Marpac's entry was established. If the industry represented by VIP was established at the time of Marpac's entry, then the conclusion must be that Marpac was simply a new entrant to an already established industry.

<u>Is the Australian TRF industry an established industry?</u>

Instead of seeking to answer whether the Australian industry prior to Marpac's entry was established, the Commission sets out to answer a much broader question which includes an assessment of Marpac's operations and capabilities. The Commission acknowledges this by highlighting that it *'considers that an industry being "established" is not determined at a single*

point in time prior to or after the initiation of production. Rather, the assessment of whether an industry is established or not, is a broad assessment of the industry informed by the particular facts of the case.'

To repeat its earlier point, the IP contends that if the Commission was to properly assess whether the Australian industry producing like goods was established prior to Marpac's entry, then it stands to reason that the industry continued to be established after Marpac's entry and throughout the investigation period. IP considers this a critical flaw in the Commission's assessment as it then heavily bases its finding of an unestablished industry on Marpac's particular circumstances, and with no regard to whether the industry was already established prior to Marpac's circumstances.

IP also considers the Commission's assessment of the five indicia outlined in REP 350 to not be correct, as it overlooks VIP's particular circumstances in undertaking a true and accurate assessment of the status of the Australian industry prior to, during and after the entry of Marpac.

i. Length of production

The Commission acknowledges and accepts that VIP has been manufacturing TRF's prior to 2013. As shown in the timeline at Figure 1, VIP has been producing TRFs since before 2000. The Commission notes that a long period of production may indicate an established industry and IP agrees that the 16+ years of production confirms that VIP was a member of an establish industry up to circa 2013 and subsequently was the sole Australian producer of the established TRF industry prior to Marpac's commencement of production in 2014.

ii. Volume and stability of production

The Commission has concluded that '*VIP's production for the downstream market is stable as it had secure and anticipated production volumes during the relevant periods and it is likely that there will be no self-supply changes resulting from customer demand in the downstream market in the immediate future.'* IP agrees with this assessment and considers that it supports the view that the Australian TRF industry represented by VIP, was stable prior to Marpac's operations commencing.

IP disagrees with the Commission's approach of conducting its assessment against this second indicia on the sole basis of Marpac's circumstances. It is unreasonable for the Commission to conclude that production by the Australian TRF industry was unstable and therefore unestablished on the sole basis of Marpac's activities, when the evidence and conclusion by the Commission is that production by the Australian TRF industry prior to Marpac's entry into the market was stable and therefore established on the sole basis of VIP's activities.

It is illogical to consider that the Australian industry was a stable and established industry when represented solely by VIP prior to Marpac's entry, but then became an unstable and unestablished industry following Marpac's commencement of production. Instead this merely confirms that Marpac entered into an already established industry represented by VIP which at the time had an established customer base requiring consistent volumes across various TRF sizes. By contrast, Marpac's production instability is consistent with a normal company entering an initial start-up phase but its volatility was exacerbated by its decision

to focus on a single TRF size and the quality and supply issues highlighted in ground 3 of this application.

iii. Operational scale and stable market share

As with indicia two, IP again considers the Commission's approach to be flawed by basing its assessment of indicia three by having regard to Marpac's circumstances only, as it masks the fact that the Australian industry represented by VIP prior to Marpac's entry was stable and established.

iv. Sustainable "break-even" point

IP disagrees with the Commission's sole reliance again on Marpac's circumstances and sales of TRFs into the direct market only for assessing the industry's profitability in indicia four. The Commission's reasoning for relying on direct market sales is that '*even if self-supplied TRFs are profitable as a component, the profit accounted for in the downstream market is applied to the complete can unit and not the TRF.*'

The Commission's reasons and its overall conclusion overlooks two important considerations. Firstly, TRFs represent approximately 35%-45% of the costs of a complete can unit so it would be reasonable to apportion the profit achieved by VIP on its complete can sales by the TRF's proportional cost of the total can cost.

Secondly, in assessing whether the industry is achieving a financial break-even point the Commission has ignored and overlooked statements made to the investigation by relevant Australian can makers which were previously members of the Australian TRF industry. As explained to the Commission, the primary reason for those members of the Australian can making industry, other than VIP, ceasing production of TRFs is that it became uneconomical and financially unviable to do so in Australia.

This inability to reach a sustainable and financial break-even point does not suggest or indicate that the industry was unestablished at that time. Instead it simply highlights that TRF production in Australia had lost its competitive advantage in the global market given that the key raw materials are volume driven globally traded commodities, production is labour intensive and manufacturing throughput time is hampered by the relevant machinery and equipment. It should be noted that since Bluescope Steel ceased production of packaging tinplate in Australia in 2007 then all packaging tinplate is sourced from off-shore.

These same issues would be relevant during the investigation period and also explain why Marpac is unable to attain a sustainable financial break-even point. IP does not consider that an inability of Marpac to attain a sustainable break-even point is indicative of an unestablished industry. Instead it confirms the past experience and views of the previous TRF industry members that an established industry is unlikely to achieve sustainable profits when it no longer possesses a competitive advantage.

v. A new product line?

IP contends that the Commission has incorrectly framed the question to be addressed in this indicia. The Commission's question focuses solely on whether the production activity is a new product line. Instead, the question to be answered is whether the activities of the

applicant are truly a new industry or merely a new product line of any already established industry or established firm.

On the basis of the evidence submitted during the investigation, the facts clearly demonstrate that Marpac's activities are simply the commencement of a new product line in an already established industry. There has been an industry producing TRFs in Australia for over 30 years, which has continued to exist by VIP before Marpac's entry into the market in 2014.

Conclusion

The Commission ultimately concludes '*that Marpac is not a late entrant in an established TRF industry and that the Australian TRF industry is an unestablished industry that could be materially hindered by dumped imports.*' IP considers this finding to be totally inconsistent with the evidence which clearly shows that Australian production of TRFs has been taking place for over 30 years and has continued before and after the commencement of Marpac's operations in 2014.

On that basis, it is evident that Marpac is merely a new entrant with a new product line to an already established industry. The Commission's analysis and findings from the five considered indicia merely demonstrates that since commencing production, Marpac's performance is reflective of a combination of normal start-up difficulties and self-inflicted factors relating to supply and quality issues.

Ground 2: The Commission erred in concluding that the Australian TRF industry was not established during the investigation period, and as a consequence incorrectly considered whether the industry was materially hindered in its establishment.

For the reasons outlined above in ground 1, IP contends that the Commission erred by finding that the Australian industry was not established at the time of Marpac's commencement of TRF production in early 2014. It considers that Marpac joined the existing and established Australian TRF industry with the establishment of a new production line in early 2014. Notwithstanding this view, IP submits that the Commission erred by finding that the Australian industry was not established during the investigation period, when Marpac had been in operation for nearly 2 years and was actively engaged in production and sales of commercial quantities.

This is supported by the findings in REP 350[3] that Marpac had been supplying TRFs to a can manufacturer, [redacted], to fulfil a supply contract to a food producer. In addition, REP 350 highlights and confirms that Marpac was utilising its manufactured TRFs as a component in its self-produced complete can units.

Whilst the concepts of 'hindrance' and 'establishment' are not well defined in either domestic legislation or the international agreements, IP reiterates that in its view the hindrance and material retardation rules are not applicable where a new entrant commences production and joins an already established domestic industry producing like goods. This is

[3] REP 350, section 7.6.1, page 56.

supported by views of WTO Members during Rules Group Meetings (**Attachment D**)[4], which discussed options for clarifying the current rules around material retardation.

It is also worth noting the views of delegates from WTO Members at what point an industry ceases to be "in establishment" so that the provisions of actual injury apply:

- *Most delegates were comfortable with the need for "a genuine and substantial commitment of resources" to have been made by the domestic industry; and were of the view that some production of the good in the importing country was ok and that the concept of "commercial volumes" was a viable proposition (as a ceiling)…;*
- *A few delegates considered that if there was any production, then the situation fell outside the definition of "industry in establishment". The situation then fell into an actual or threat of material injury determination;*

IP considers that Marpac's circumstances confirm that it had moved beyond the mere stage of seeking to establish itself. Marpac's application[5] confirms that its TRF production increased by 532% between September quarter 2014 and December quarter 2015, and sales increased by 738% between March quarter 2014 and December quarter 2015. This confirms that Marpac had complete designs of its TRFs, was actively sourcing and processing raw materials, implemented production and quality control mechanisms, and was actively marketing and distributing its finished products after agreeing to sales terms and conditions.

In IP's view then, by any reasonable measure Marpac was an established member of the established Australian TRF industry. Conversely, it is not reasonable to suggest that establishment only occurs when a new entrant such as Marpac achieves or reaches its projected or planned production capacity and/or performance targets.

Ground 3: The finding of hindrance is not correct or preferable due to a failure to properly isolate and distinguish a number of critical factors which had a material impact on the Australian industry's performance including:

a) Impact of non-dumped export prices from India
b) Marpac's inefficient operation and lack of economies of scale;
c) Marpac's inability to negotiate competitive steel input prices;
d) Marpac's inability to supply TRFs with higher technical specifications;
e) Injury to Marpac from lost supply contracts by can filling customers;

Ground for appeal

In order to publish a dumping duty notice, subsections 269TG(1) and (2) of the Act requires the Minister to be satisfied that the subject goods are dumped, and that as a result of the dumped goods "*…material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered*".

[4] Friend of the Chair Report – Rules Group Meeting March 2011 - *"A number of members also considered that some of these situations simply don't warrant a material retardation determination. For instance, the material retardation provisions were never intended to cover new producers in an already-established industry wishing to develop themselves to meet increasing domestic demand."*

[5] EPR 350, Record 001, pages 21, 29.

Subsection 269TAE(1) of the Act sets out a non-exhaustive list of matters that the Minister may have regard to in assessing and determining whether material injury to the Australian industry is being caused by dumped exports. Determinations under subsection 269TAE(1) are subject to subsections 269TAE(2A) and (2AA) of the Act. Subsection 269TAE(2A) of the Act requires that injury caused by factors other than dumping not be attributed to the dumped goods, whilst subsection 269TAE(2AA) of the Act requires that the material injury determination "*must be based on facts and not merely on allegations, conjecture or remote possibilities*".

This provision is reflected in Article 3.1 of the WTO Anti-Dumping Agreement (ADA) which states:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

IP contends that the material injury analysis and assessment in Report 350 is flawed as it makes no attempt to ensure that injury caused by the other factors outlined below were not attributed to the dumped imports, and is not based on affirmative or credible evidence which provides a reliable link between the dumped exports and the Australian industry's injury.

The obligation to ensure non-attribution is found in Article 3.5 of the ADA and has been interpreted by the Appellate Body in US – Hot rolled steel[6], which ruled:

> *The non-attribution language in Article 3.5 of the Anti-Dumping Agreement applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry at the same time. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties.*
>
> *We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement. What the Agreement requires is*

[6] Appellate Body Report, US – Anti-Dumping Measures on certain Hot-Rolled Steel products from Japan, WT/DS184/AB/R, para 223; pages 74-75.

> *simply that the obligations in Article 3.5 be respected when a determination of injury is made.*

The Appellate Body added[7]:

> *[A]lthough this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.*

To that end, IP contends that the Commission did not properly separate and distinguish the injurious effects of the following other known causal factors.

a) Impact of non-dumped export prices from India.

In assessing the causes of the identified hindrance, the Commission appears to have overlooked or disregarded the impact of non-dumped imports from India, which the Commission has identified as being the largest exporting country and holding the largest share of the TRF market in Australia.[8] As the Commission has correctly established:

> *Can manufacturers have dual suppliers – a primary and a secondary supplier for the purposes of ensuring constant TRF supply volumes of TRFs, which is particularly relevant for imported TRFs that require long lead times between order and delivery.*

Given the decision of can manufacturers to dual source their TRF requirements from multiple suppliers, and the Commission's observed shift in imports from Malaysia and Singapore to non-dumped imports from India during the investigation period[9], it is reasonable to conclude that non-dumped Indian import prices played a predominant role in setting prevailing market prices in Australia.

This is further supported by the Commission's finding that:

> *Buying power is diluted as a result of dual supply, as TRF volumes must be split across the size range and across two suppliers. This means that a can manufacturer will have two price "sets" across the TRF range (a price set from each manufacturer) and as price is dependent on volume, the primary supplier will supply the higher volume (with a lower price) and the secondary supplier will provide a lower volume resulting in a higher price.*

As the non-dumped Indian imports were the largest import source and held the largest market share in the Australian TRF market during the investigation period, the Commission's conclusion that the higher volume supplier will supply at the lower price confirms that Indian imports must have been the price setter in the Australian market and the primary source preventing Marpac from achieving its forecasted selling prices and sales volumes.

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[7] Ibid., para 228, page 76.

[8] REP 350, Figure 5, page 40.

[9] Ibid., page 40 – *"The Commission also observes the change in supply origin from Malaysia and Singapore to India (undumped goods), which is consistent with information received by the Commission during the course of its enquiries."*

Further evidence to support the conclusion that non-dumped Indian imports were a predominant factor which affected Marpac's ability to achieve its forecasted performance indicators is IP's verified purchase prices of imported TRF's supplied by the non-dumped exporter from India, Hindustan Tin Works (Hindustan), and Genpacco Inc. (Genpacco), the dumped exporter the Philippines. IP's import prices for 73mm TRFs from these two sources were identical during corresponding months.

This is supported by IP's inventory cost report provided to the Commission and which is summarised in the table below, showing that unit import prices for TRF's from the Indian exporter Hindustan, and the Philippines exporter, Genpacco, were identical at A$[redacted] per unit.

[CONFIDENTIAL PRICING INFORMATION DELETED]

The above data is further confirmed by the Commission's pricing analysis at Figure 11 in SEF 350[10] which shows that export prices from India and the Philippines were equivalent for the majority of the investigation period, with non-dumped Indian imports being substantially lower than imports from the Philippines in the first quarter of the investigation period.

Therefore, based on the Commission's conclusion that competition between the can manufacturers utilising a TRF closure is fierce, and non-dumped Indian imports represented the largest share of the Australian market, it is undeniable that the non-dumped Indian imports were a primary and predominant factor impacting on Marpac's ability to attain its projected levels of economic performance. It is also clear then that the Commission's causation assessment is flawed as it makes no effort to distinguish and isolate the effects of non-dumped Indian imports, to ensure that those effects are not attributed to dumped imports.

b) Marpac's inefficient operation and lack of economies of scale.

Since commencing TRF production in early 2014, Marpac has concentrated solely on the manufacture and supply of 73mm TRFs, with its production volume relative to the total Australian market being very small. As the Commission has correctly noted in REP 350:

[10] SEF 350, Record 032, page 33.

> *The TRF accounts for approximately 35 – 45 per cent of the cost of a complete can unit. As the majority component, can manufacturers have a preference to consolidate purchases across the range of TRFs required, from as few suppliers as possible. This maximises buying power as an increase in purchase volume will result in a reduction in price (per thousand TRFs).*

So given the preference of can manufacturers to consolidate purchases across the complete range of TRF sizes, and Marpac's inability to produce and supply TRF sizes other than 73mm, it is reasonable to conclude that Marpac did not achieve its forecasted financial performance targets due to its limited manufacturing capabilities. This has no relevance or link to TRF imports or import prices.

In addition to its narrow and confined production base of 73mm TRFs, Marpac has opted to focus on the manufacture of 73mm TRF that are not suitable for all industry users. Marpac's 73mm TRF are designed specifically to be seamed onto a composite can with a greater wall thickness than that of steel cans. Therefore, Marpac's tinplate specification does not in all cases meet the can making industry's requirements.

On this specific issue, the Commission held the view that:

> *Accordingly, whilst Marpac currently offers one specification which is currently used for composite can manufacturing, this is due to customer requirements and Marpac is not precluded from manufacturing and selling TRFs for customers in steel can manufacturing based solely on the physical attributes of its current TRFs.*

The key factor overlooked and not properly addressed or considered by the Commission, is that rectifying this issue would require a substantial further investment by Marpac to ensure that its dies are able to comply with the various tolerances required for steel can manufacture. This again highlights the limitations in Marpac's current operational capabilities and the significant obstacles unrelated to imports or import prices that have contributed to preventing Marpac from achieving its business performance targets.

Finally, given its relatively small and restricted production capacity, Marpac is understood to be a high cost operation dependant on a very narrow customer base. As the Commission's comparative pricing analysis shows, Marpac's net selling prices of 73mm TRFs during the investigation period were up to 40.4%[11] higher than corresponding non-dumped Indian import prices. Given the Commission's conclusion that competition amongst can manufacturers utilising a TRF closure is fierce, it is entirely illogical to conclude that dumped imports are hindering Marpac's establishment when the largest supplier of TRFs during the investigation period was non-dumped and its import prices were undercutting Marpac's equivalent prices by up to 40%.

It is also important to note that Marpac's net selling prices were substantially higher than a notional non-dumped import price from the Philippines. The Commission's price undercutting analysis showed that imports from the Philippines undercut Marpac's equivalent prices of 73mm TRFs by up to 21.5%. With the inclusion of an effective dumping duty rate of 12.8%[12] on imports from the Philippines, those imports will continue to undercut Marpac's net selling prices by up to 9%.

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[11] Ibid., Table 3, page 34.

[12] REP 350, Table 7, page 72.

c) Marpac's inability to negotiate competitive steel input prices;

IP contends that the Commission has overlooked the impact of Marpac's high cost structure in hindering its ability to manufacture TRFs and negotiate prices at competitive levels. Interested parties including IP highlighted to the Commission that the relative small production volumes and narrow production base will have a detrimental impact on Marpac's ability to source the required steel inputs at competitive prices to alternative suppliers. This is particularly important given that steel accounts for over 50% of the manufacturing cost of TRFs and will have a direct consequence on Marpac's ability to keep its cost of production low.

This is supported by the Commission's finding that:

> *The price of TRFs is affected by the costs of manufacture – raw materials, manufacturing overheads and labour. Tinplate costs are the major portion of the cost to manufacture and hence the price of TRFs. Tinplate is no longer manufactured in Australia and all tinplate purchases (whether for TRFs or steel can bodies) are imported by the Australian TRF and can manufacturing industries.*

It is accepted industry practice that purchased volume of steel has a negative correlation to the corresponding purchase prices. That is, a TRF producer's ability to purchase greater volumes will generally result in their ability to negotiate lower pricing. In Marpac's case and given its relative small production volumes, it is reasonable to expect that it would be unable to negotiate strongly to procure steel at favourable prices relative to that of the investigated exporters, which are ordering steel in substantially larger volumes.

Marpac's inability to purchase steel at competitive prices directly impacts on its ability to manufacture and sell TRFs in the Australian market at competitive levels. As highlighted earlier, this is demonstrated by non-dumped Indian import prices undercutting Marpac's net selling price by up to 40%, and non-dumped import prices from the Philippines also continuing to undercut Marpac's equivalent prices.

d) Marpac's inability to supply TRFs with higher technical specifications;

IP raised on numerous occasions throughout the investigation, the impact of Marpac's lower technical specifications of its manufactured TRFs on its inability to negotiate with and supply TRFs to IP for use on its complete can units. Since its establishment in early 2014, Marpac has continued to offer supply of TRFs manufactured with a tinplate thickness below IP's minimum requirements, and as explained on numerous occasions to the Commission, the inability of Marpac to supply and meet IP's specification requirements continues to be a primary cause of its inability to increase sales.

In manufacturing its complete can units, IP has always procured and used TRFs with a tinplate thickness (gauge) falling within a range of 0.21mm-0.22mm. By contrast, Marpac's TRFs are produced to a thinner tinplate gauge of 0.18mm. IP's preference for thicker gauge TRFs is based on its 82+ years and fourth generation can-making experience and its understanding that thinner gauge TRFs present a stronger likelihood of increased rates of failed cans, which jeopardises and puts at risk the entire supply contract for the finished complete cans.

Quality is and always has been a critical issue to IP's TRF purchasing decisions. That is because 100% of the TRF's IP use in the manufacture of cans are destined for food

packaging, and IP refuses to compromise the food product integrity, and face the repercussions that come with doing so (possible product recalls), by downgrading its specifications.

It is important to note that the decision by Marpac to purchase thinner tinplate is clearly an economic one, with 0.18mm tinplate being cheaper than 0.22mm tinplate. However, whilst it allows Marpac reduce its overall cost of production, in IP's view it comes at the expense of quality which is so important to IP and highly sought by the industry can-makers, food fillers and food brand companies. Ultimately then, in a market where IP and its customers have a preference for higher quality thicker gauge tinplate, Marpac's decision to offer thinner gauge products inevitably places it at a disadvantage and restricts its ability to offer a comparable and competitive product.

In response to the impact of differences in TRF specifications, the Commission has simply dismissed the significance and materiality of the issue by highlighting that '[p]rice is the determining consideration when selecting a supplier (due to retail demands) and once price is agreed, technical specifications, testing and other contract arrangements are negotiated.'

The Commission further considered:

> *…that whilst Irwin may have a preference for a higher specification TRF, end users value price above other considerations and therefore this dictates supplier selection. The Commission found that end users do not have specific demands regarding the technical specifications of the can body or the componentry – as long as the complete can unit is functional and fit for purpose. Price and technical specifications are the offering of the can manufacturer.*

In IP's view, the Commission continues to ignore the fact that IP is the customer and purchaser of TRFs being supplied by Marpac. As the can maker, purchaser and customer of the TRFs, IP's TRF requirements and preferences are the primary factor in determining whether Marpac is able to sell it TRFs, and as highlighted in its statements on the public record, 'under no circumstances would IP source TRFs with lower specifications than its current standard.'

Therefore, it is irrelevant whether end-users are willing to accept thinner gauge TRFs in their purchasing of complete can units from can manufacturers. It is the decision of IP as the can manufacturer, to not manufacture complete cans with inferior quality thinner gauge TRFs, that determines and directly impacts on Marpac's ability to sell its TRFs. This is supported by the fact that notwithstanding that Marpac had ultimately agreed to reduce its prices to meet prevailing import prices, IP refused to purchase TRFs from Marpac as it was unable to meet IP's requirements for the TRFs be manufactured with tinplate thickness ranging from 0.21mm to 0.22mm.

e) Injury to Marpac from lost supply contracts by can filling customers;

As the Commission's REP 350 explains, Marpac's TRF production is also used as an input into the production and sale of complete can units to the downstream market which includes food producers and/or contract fillers. Therefore, any lost sales of its finished can business will have a direct and detrimental impact on Marpac's TRF production, in the form of reduced production volume, reduced capacity utilisation and increased marginal costs.

This is a pertinent issue which again appears to have been overlooked by the Commission in isolating and distinguishing the effects of other factors on Marpac's ability to achieve its forecasted financial performance targets. IP understands that Marpac's finished can sales have been negatively impacted from lost contracts by Marpac's customers servicing the retail market. The potential lost contracts are expected to have had a direct impact on reducing Marpac's sales of finished cans, which would naturally have a flow on effect to Marpac's manufacture of TRF, in the form of lower production volumes, higher unit costs, and a further deterioration in its cost and price competitiveness.

Conclusion

As demonstrated above, each of the outlined other factors have significantly contributed to preventing Marpac from attaining its projected or forecasted financial performance levels. When the detrimental impacts of these factors are considered individually and cumulated, it demonstrates that irrespective of dumping, Marpac would have continued to be uncompetitive and both dumped and non-dumped imports would have continued to undercut Marpac's corresponding prices, resulting in continued lost sales and/or reduced profit margins.

The relevance of the disparity between non-dumped import prices and industry's selling prices are suitably addressed by the Productivity Commission Inquiry Report No. 48[13], which provided that anti-dumping measures would automatically not be imposed where one of five criteria was met. The Productivity Commission's report[14] highlights three specific circumstances:

> *'where measures would not be effective in removing injury being experienced by the applicant industry, and hence where the ensuing costs for others in the community would be needlessly incurred:*
>
> - *The imposition of measures equivalent to the assessed dumping margin (or the benefit from a countervailable subsidy) would result in an import price still well below local suppliers' costs to make and sell.*
> - *'Like goods' could be readily obtained from an un-dumped source at a comparable price, meaning that the imposition of measures would simply lead to substitution into un-dumped imports with little or no benefit for competing local suppliers.*
> - *Dumped or subsidised imports may be a contributing factor to the material injury being experienced by a local industry, but are not the major cause*

IP considers that all three of the circumstances highlighted by the Productivity Commission are applicable in the case of TRF imports from Malaysia, Singapore and the Philippines. It is reasonable to conclude that non-dumped Indian import prices which were undercutting Marpac's prices by up 40%, are substantially below Marpac's cost to make and sell.

As highlighted earlier, the Commission also found a significant shift in import volumes between dumped and non-dumped investigated countries, and evidence demonstrated that non-dumped Indian imports were identically prices in corresponding periods to dumped imports. The Commission's analysis also showed that non-dumped imports from India

[13] Productivity Commission Inquiry Report No. 48 – 18 December 2009; (http://www.pc.gov.au/inquiries/completed/antidumping/report/anti-dumping.pdf)

[14] Ibid. pages 72-73.

accounted for the largest share of the Australian TRF market during the investigation period. Given the significant share of non-dumped and alternative import sources and the high degree of import substitution due to can manufacturer's dual-source purchasing policy, it is reasonable to conclude that factors other than dumping are the primary and predominant causes hindering Marpac's ability to achieve its forecasted financial performance targets. This includes the largest share of imports being found to be non-dumped, and Marpac's operational inefficiencies in producing and selling TRFs required by the local market.

Ground 4: The finding of hindrance is not correct or preferable due to a lack of evidence demonstrating that dumped exports materially hindered the establishment of the industry.

The Commission's finding that dumped exports materially hindered Marpac's establishment relies heavily on the loss of a supply contract by Marpac's sole can manufacturing customer of 73mm TRFs, [redacted]. It is important to emphasise that Marpac did not lose the contract to supply TRFs. Instead, [redacted] lost the contract to supply complete can units to the food processer, [redacted], which included TRFs supplied by Marpac as a component of the complete can. The [redacted] contract was subsequently awarded to IP for the supply of complete can units.

Given that there is no direct link between Marpac's reduced TRF sales and imported TRFs, the Commission has sought to establish an indirect causal link by simply identifying that TRFs imported from the Philippines were a component of the complete can units supplied by IP. In IP's view, this undeveloped and unsophisticated analysis does not meet the minimum requirements of establishing a causal link on the basis of an objective examination and on positive evidence.

IP also does not consider that the Commission has fulfilled the requirements to firstly '*examine all 'known factors', 'other than dumped imports', which are causing injury to the domestic industry 'at the same time' as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not 'attributed to the dumped imports*'[15]. The Commission's only attempt at addressing other known factors in REP 350 was to state:

> *The Commission's analysis in SEF 350 determined that whilst there may have been factors other than price which could have contributed to the food producer switching can suppliers, given the intense competition in the downstream market, price would have been the determining factor.*

For example, the Commission considered comments by the food producer[16], [redacted], and understood that price was '*the sole reason for switching can manufacturer*'. However, a review of the Commission's notes from its meeting with [redacted] does not confirm that price was the sole reason. Instead, it highlights that whilst price of the complete cans was a primary factor in its decision to award the contract to IP, other factors brought to the Commission's attention were also important.

[15] Appellate Body Report, *US — Hot-Rolled Steel*, para. 222

[16] EPR 350, Record no. 061.

These include:

- improved productivity due to a significant reduction in spoilage rates using IP's complete cans when compared to previous spoilage rates experienced with [redacted] complete cans;
- the provision of engineering and technical assistance with its production line which allowed [redacted] to delay the need to undertake an intended upgrade to its production line;
- improved quality through the use of thicker tinplate specification of 21mm-22mm. The file note confirms that [redacted] '*are satisfied with [Redacted:can supplier]'s material specifications and now consider this to be a very important consideration for selecting suppliers. If the Customer were to re-engage with [Redacted:incumbent supplier], the material specifications would be the first point of negotiation.*';
- historical quality issues with Marpac products with [redacted] confirming that it '*trialled Marpac canisters approximately five years ago. The Customer stated there were problems with rust and deformed TRFs. Because of this, the Customer stated that if Marpac was the only supplier available, the Customer would arrange alternate packaging types for products currently using TRF closure canisters.*'

The above issues were clearly relevant to [redacted] decision to switch supply of its complete cans to IP, notwithstanding that price may have been a primary initial factor. It also highlights that the Commission dismissed these other known factors without any real attempt to ensure that they were not attributed to the subject imports from the Philippines.

On the particular issue of price being the primary factor in the awarding of the [redacted] contract to IP, the Commission have also overlooked another critical known factor which would weaken the link with the subject imports from the Philippines and cause the Commission to doubt the materiality.

At the time of submitting its tender offer for the [redacted] contract, IP was dual sourcing TRFs from India and the Philippines. As shown at ground 2(a) of this application, the TRFs prices purchased from India were identical to those from the Philippines. Therefore, when preparing its internal costings and [redacted] tender offer for the supply of complete cans, IP relied on the prevailing price of imported TRFs from India and the Philippines, and adjusted for forecasted movements in global tinplate prices.

Therefore, it is not reasonable for the Commission to automatically link IP's price offer for complete can units to imports from the Philippines. The IP price offer is equally linked to import prices from India which have been found to be non-dumped and non-injurious during the investigation period. That is, even if the import prices from the Philippines had been 17% higher to reflect a non-dumped price, IP's price offer to [redacted] would have remained unchanged given the prevailing non-dumped import prices from India.

In these circumstances, the Commission's findings represented in Figure 13 of REP 350[17], would continue to exist. That is:

- *the new price for a can with a dumped 73mm TRF undercuts the incumbent's price;*
- *the can body of the new supplier is more expensive than the incumbent's; and*

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- *the TRF input cost from a dumped TRF on the new can is cheaper than the input cost of a Marpac TRF on the same can body type.*

This confirms that IP's successful price offer was not linked to import prices from the Philippines. Instead, its price offer was associated with generally prevailing import prices which included the non-dumped and non-injurious Indian import prices.