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: Visy Packaging Pty Ltd (ABN 13 095 313 723)

Address: Level 11, 2 Southbank Boulevard, Southbank, Victoria, 3006

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

2. Contact person for applicant

Full name: Rohan Wiltshire

Position: General Manager Food Can

Email address: rohan.wiltshire@visy.com.au

Telephone number: (03) 9286 2252

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

The Applicant is an importer of goods that are the subject of a dumping notice issued under s269TG(1) and (2) of the Customs Act 1901.

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

Resealable Can End Closures (referred to a tagger, ring and foil (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

8309.90.00

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.

2017/20 – See attachment A

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

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.

See 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.

The correct or preferable decision was to not publish a dumping duty notice.

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

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

PART D: DECLARATION

The applicant's authorised representative 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: Ross Becroft

Position: Principal

Organisation: Gross & Becroft Lawyers

Date: 24/4/2017

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: Ross Stuart Becroft

Organisation: Gross & Becroft Lawyers

Address: Level 17, 390 St Kilda Road, Melbourne, Victoria, 3004

Email address: ross@grossbecroft.com.au

Telephone number: (03) 9866 5666

Representative's authority to act

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

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: ROHAN WILTSHIRE

Position: GENERAL MANAGER - FOOD

Organisation VISY

Date: 21 / 4 / 17

Attachment A

PUBLIC RECORD

Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

Customs Act 1901 – Part XVB

Resealable can end closures

Exported from Malaysia, the Republic of the Philippines and the Republic of Singapore

Findings in relation to a dumping investigation

Public notice under subsections 269TG(1) and (2) of the Customs Act 1901

Anti-Dumping Notice (ADN) 2017/20

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of resealable can end closures exported to Australia from Malaysia, the Republic of the Philippines (the Philippines) and the Republic of Singapore (Singapore).

The goods:

The goods the subject of the investigation (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.

Further information on the goods:

TRFs are commonly manufactured by the TRF industry in the following nominal sizes (diameters):

- 73mm;
- 99mm;
- 127mm; and
- 153/4mm

The goods may be coated or uncoated and/or embossed or not embossed.

The goods can also be known as RLTs (ring, lid, tagger), RLFs (ring, lid, foil) or Penny Lever ends.

Goods specifically excluded:

Goods specifically excluded from the investigation are TRFs of nominal size:

- 52mm;
- 65mm;

- 189mm; and
- 198mm

The goods are classified to tariff subheading 8309.90.00, statistical code 10, in Schedule 3 to the *Customs Tariff Act 1995* and are subject to no customs duty.
The Commissioner reported his findings and recommendations to me in *Anti-Dumping Commission Report No. 350* (REP 350). REP 350 outlines the investigation carried out and recommends the publication of a dumping duty notice in respect of the goods. I have considered REP 350 and accepted the Commissioner's recommendations and reasons for the recommendations, including all material findings of fact or law on which the Commissioner's recommendations were based, and particulars of the evidence relied on to support the findings. This report is available at www.adcommission.gov.au.

The method used to compare export prices and normal values to determine whether dumping has occurred and to establish the dumping margin was to compare the weighted average of export prices with the weighted average of corresponding normal values over the investigation period pursuant to subsection 269TACB(2)(a) of the *Customs Act 1901* (the Act). The normal values were established under subsections 269TAC(2)(c) and 269TAC(6) of the Act. The export prices were established under subsections 269TAB(1)(a) and 269TAB(3) of the Act.

Particulars of the dumping margins established and an explanation of the methods used to compare export prices and normal values to establish each dumping margin are set out in the following table:

Country	Exporter	Dumping Margin	Method to establish dumping margin
the Philippines	Genpacco Inc.	17.4%	Weighted average export prices were compared with weighted average corresponding normal values over the investigation period in accordance with subsection 269TACB(2)(a) of the *Customs Act 1901*.
	Uncooperative and All other exporters	41.5%	
Malaysia	All exporters	266.3%	
Singapore	All exporters	266.3%	

I, CRAIG LAUNDY, Assistant Minister for Industry, Innovation and Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science,[1] have considered, and accepted, the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 350.

I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those goods and because of that, the establishment of an Australian industry producing like goods has been materially hindered. Therefore under subsection 269TG(1) of the *Customs Act 1901* (the Act), I DECLARE that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

(i) the goods; and

(ii) in accordance with subsections 45(2), 45(3A)(b) and 269TN(2) of the Act, like goods that were exported to Australia for home consumption on or after 6 October 2016, which is when the Commonwealth took securities following the Commissioner's Preliminary Affirmative

[1] On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science. For the purposes of this decision the Minister is the Parliamentary Secretary to the Minister for Industry, Innovation and Science.

Determination published on 5 October 2016 under section 269TD of the Act, but before the publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, the establishment of an Australian industry producing like goods has been or may be materially hindered. Therefore under subsection 269TG(2) of the Act, I DECLARE that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from Malaysia, the Philippines and Singapore.

The considerations relevant to my determination that dumped goods have materially hindered the establishment of an Australian TRF industry are that dumped goods have limited opportunities for Australian manufacturers of like goods to:

- manufacture for an extended period of time;
- achieve continuous and stable production;
- increase operational scale and achieve higher levels of production;
- generate a sustainable operational and financial "break-even" point; and
- implement plans to increase the range of TRFs manufactured.

In making my determination, I have considered whether the establishment of an Australian industry is being hindered by a factor other than the exportation of dumped goods, and I have not attributed hindrance due to other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export prices, non-injurious prices and normal values of the goods (as ascertained in the confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how measures and securities are applied to 'goods on the water' is available in ACDN 2012/34, available at www.adcommission.gov.au.

REP 350 and other documents included in the public record may be examined at the Anti-Dumping Commission office by contacting the case manager on the details provided below. Alternatively, the public record is available at www.adcommission.gov.au.

Enquiries about this notice may be directed to the case manager on telephone number +61 3 8539 2471, fax number +61 3 8539 2499 or email operations2@adcommission.gov.au.

Dated this 20th day of March 2017

CRAIG LAUNDY
Assistant Minister for Industry, Innovation and Science
Parliamentary Secretary to the Minister for Industry, Innovation and Science

ATTACHMENT B

VISY PACKAGING PTY LTD
GROUNDS IN SUPPORT OF AN APPLICATION TO THE ANTI-DUMPING REVIEW PANEL (ADRP) FOR REVIEW OF A DECISION OF THE MINISTER TO PUBLISH A DUMPING DUTY NOTICE

1. INTRODUCTION

1.1. Anti-Dumping Notice (ADN) 2017/20 published on 24 March 2017 announced a decision by the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Assistant Minister) to accept the recommendation of the Anti-Dumping Commission (the Commission) in Final Report 350 and declare that s8 of the *Customs Tariff (Anti-Dumping) Act 1975* applies to resealable can end closures (TRFs) exported to Australian from Malaysia, Singapore and The Philippines (Decision).

1.2. This Application seeks a review by the ADRP of the Decision on the grounds set out in this document.

2. GROUND 1: The Commission and the Assistant Minister erred in concluding that an Australian industry producing TRFs was not already established

2.1. In section 4.4.1 of the Final Report the Commission confirms that it has verified that:

(a) A number of Australian can manufacturers produced TRFs for self-supply before switching to sourcing imported TRFs in recent years; and

(b) VIP did not cease its production of TRFs and VIP continues to produce TRFs in Australia.

2.2. The Commission found that:

"The fact that VIP continued manufacturing an insignificant volume of TRFs solely for self-supply indicates that the industry would become unestablished and was potentially unestablished when Marpac commenced TRF manufacture." [1]

2.3. The Commission further concluded that *'the question of whether prior manufacturing precludes an industry from being unestablished during the investigation period cannot be answered with respect to the activities of a potential retrospective industry and can only be answered with respect to the production activities of both Marpac and VIP, as they*

[1] Final Report Section 4.4.1, page 27

were the only manufacturers of TRFs at lease 12 months prior to and during the investigation period.' [2]

2.4. The Applicant asserts that the Commission erred in the above conclusion in that it has failed to take into account the prior history of the Australian TRF industry. Instead, the Commission has arbitrary examined TRF production in the 12 months prior to the period of the investigation. Clearly, there was an industry that was established and which continues to exist. The Commission has determined that an established industry has become unestablished at a particular point in time. The Applicant asserts this as an erroneous approach both in fact and at law. In the Commission reaching this decision the Applicant points out that the Commission has disregarded or placed little or no emphasis on the submission of the Can Makers Institute of Australia (CMIA) dated 12 December 2016 in which the history of the Australian TRF industry was explained and depicted in a timeline.[3]

2.5. The Commission went on to conclude that the fact that VIP maintained its manufacture of TRFs prior to Marpac commencing production does not preclude a finding that the Australian TRF industry is an unestablished industry.[4] Clearly the Commission has introduced the criterion that Australian TRF production must be substantial and produce a minimum volume of goods in order for an Australian industry to be established.

2.6. The Applicant asserted during the investigation that there is no minimum production volume criteria at law in order for an Australian industry to exist.[5] In support of this proposition the Applicant referred to and relied upon s269T(4) of the *Customs Act 1901 (Cth)* which provides:

> *"For the purposes of this Part, if in relation to goods of a particular kind, there is a person or there are persons who produce like goods in Australia:*
>
> *(a) there is an Australian industry in respect of those like goods; and*
>
> *(b) subject to subsection (4A) the industry consists of that person or those persons."*

This provision makes it clear that there is no minimum production criteria in order for a party to qualify as an Australian industry for the purposes of the anti-dumping provisions contained in Part XVB of the Customs Act.

2.7. The Commission agrees with this position when it states in the Final Report :

> *"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*

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[2] Final Report, Section 4.4.1, page 28

[3] See Public File Document no 60 and further see the Applicant's submission on this issue (public file document no 59) both of which were in response to the Issue Paper published by the Commission on the question of establishment of an industry.

[4] Final Report, Section 4.4.1, page 29

[5] Visy Submission dated 25 October 2016, document no. 35 of Public File

the Australian industry in section 269TG means an industry that has commenced some production or manufacture of like goods.' (underlining added).[6]

2.8. The Commission then further states in the Final Report:

"The Commission is of the view that section 269TG examines the existence of production and not whether that production has been continuous or over a particular time. Therefore, section 269TG supports the publication of a dumping notice with respect to an industry that has performed some production but may not yet be established. In this particular case, the fact that VIP maintained manufacture of TRFs prior to Marpac commencing production does not preclude finding that the Australian TRF industry is an unestablished industry."[7]

2.9. Whilst the Commission's analysis is somewhat unclear, the Commission appears to be making the distinction between an Australian industry and an established Australian industry. That is, that s269TG deals with whether a party is an Australian producer and not whether it is established. The Applicant submits in the strongest possible terms that the Commission has erred in this interpretation and that VIP's continuous albeit modest production qualifies it as constituting or being part of an established industry and that Marpac was part of this industry when it commenced TRF production in January 2014.

2.10. Taking into account the abovementioned errors, the Commission should have reached the decision that the Australian TRF industry was already established (and was not unestablished), and accordingly, the investigation should have proceeded on a much stricter footing with the Commission being required to conduct a conventional dumping investigation and analyse whether any dumping has in fact caused material injury to an Australian industry.

3. GROUND 2: The Commission and the Assistant Minister erred in concluding that Marpac and VIP's activities did not comprise an established industry

3.1. The Commission has erroneously applied the five criteria based on the United States Anti-Dumping decision *53 Foot Dry Containers* from China in order to find that Marpac's present production activities did not render it an established Australian industry.[8]

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[6] Final Report, Section 4.4.1, page 28

[7] Final Report, Section 4.4.1, page 29

[8] Final Report, Section 4.4.2, pages 29-34. Note: this ground is put on the basis that the ADRP does not conclude that the Commission erred in finding that the Australian TRF industry was not already established as asserted by the Applicant in Ground 1.

3.2. The Applicant notes, as it did in its submission dated 25 October 2016[9], that there is no legislative prescription in Australia for determining whether an industry is established and the Commission has seen fit to consider 'available frameworks'.[10]

3.3. The Commission examined five indicators comprising:

1. Length of Production;
2. Continuity and stability of production;
3. Operational scale;
4. Whether a financial 'break even' was reached;
5. Whether the goods are a new product line deriving production benefit from utilisation of existing equipment, employment and expertise used for existing products.

3.4. In examining indicators 1 to 5 the Commission concluded that Marpac did not satisfy the criteria for determining that it constituted an established industry. The Applicant submits that the Commission erred in reaching this conclusion for the reason that current Australian TRF production does, on the facts established by the Commission, satisfy a majority of these indicators.[11] Therefore, the Commission should have found that the current TRF production by Marpac and VIP constituted an established Australian industry. In applying these indicators, the Applicant notes that:

- VIPs production of 73mm, 99mm and 153mm TRFs over many years (as verified by the Commission) should have been taken into account and therefore the Australian Industry has been producing TRFs for a significant period of time;[12]
- The Commission found no evidence that Marpac (or VIP) experienced a material interruption or start stop production. Marpac has produced 73mm TRFs continuously since January 2014. The Commission has given little or no weight to this factor and has instead erroneously relied upon speculation as to what production may occur in the future, which conclusion is largely based upon a decline in production volumes in the last quarter of the investigation period;[13]
- The Commission found that Marpac maintained a quarterly profit on the sale of TRFs in the direct TRF market during the investigation period. Therefore, Marpac exceeded a 'break even' point. Again, the Commission has then merely speculated *'that Marpac is operating between the survival and self-sustainability phases of growth and was susceptible to adverse market changes'*;[14]

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[9] Public File document no. 35

[10] The Applicant addressed this issue in its submission dated 12 December 2016 (public file document no 59).

[11] This also assumes that the Commission has not erred in replying on these somewhat arbitrary factors.

[12] Final Report, Section 4.4.2, pages 29-34

[13] Final Report, Section 4.4.2, pages 30-31

[14] Final Report, Section 4.4.2, page 33

- In dealing with indicator 5, whether the goods are a new product line, the Applicant notes that the Commission has erroneously approached this issue. The criterion concerns the question, is the production activity for which material hindrance is claimed a new product line deriving a product benefit from the utilisation of existing equipment, employment and expertise normally used for existing products? The Commission concluded that as all TRF sizes are within the goods description production activities do not relate to a new product line and this indicates that the Australian TRF industry is not established. The Applicant points out the logic of the Commission is fundamentally flawed and that the absence of a new product line does not *positively* prove that the industry was not established. This criterion could only be used in the opposite sense of demonstrating that an industry was already established. In this regard, the Applicant notes that Marpac purchased assets and equipment from another TRF producer who was supplying the Australian market with TRFs for many years. The Applicant also refers to the fact that Marpac has itself been involved with the packaging industry for several years and, for instance, manufactures other products such as irregular steel cans. Accordingly, the Commission should have considered the fact that Marpac was able to use existing TRF equipment and employment, skill and expertise in Marpac's can making operations when Marpac decided to commence manufacture of TRFs for the direct market.[15] The Commission should have therefore found that Marpac's TRF production did constitute a new product line.

4. GROUND 3: The Commission and the Assistant Minister erred in concluding that dumping has materially hindered the establishment of an Australian TRF industry.

4.1. In section 7 of the Final Report the Commission states that, in the case of dumping causing material hindrance to the establishment of an Australian industry the causation test requires a modified analysis of the condition of the unestablished industry, and whether dumping has affected the development and performance of the industry beyond what would otherwise been expected in the normal course of business for a late entrant in an import dominated market.[16] The Applicant refers to s269TG(1) of the Customs Act, which requires that the Minister must be satisfied that the establishment of an Australian industry producing like goods has been or may be materially hindered. This test therefore requires any finding of hindrance to be material in nature. For the reasons set out below the Applicant submits that the Minister and the Commission have not satisfied this

[15] Final Report, Section 4.4.2, page 34
[16] Final Report, Section 7, page 78

requirement and the establishment of an Australian TRF industry has not been materially hindered because of dumped TRF imports.

4.2. The Commission then, in section 7.1 of the Final Report, concludes that in the absence of dumped TRFs the Australian TRF industry would have:

- at a minimum maintained its supply volumes in the direct market for 73mm TRFs;
- implemented plans to manufacture other TRF sizes, increasing supply volumes in the direct TRF market; and
- had improved opportunity to secure new supply contracts in both the direct and downstream markets.[17]

Further, the Commission found that, the Australian industry in the absence of dumping would have had improved opportunities for:

- manufacturing for an extended period of time;
- continuous and stable production;
- increasing operational scale and higher levels of production;
- generating a sustainable and financial 'break even' point; and
- implementing its plan to increase the range of TRFs manufactured.[18]

4.3. For the reasons stated below the Applicant contends that the Commission has reached its findings on a speculative and non-evidentiary based assessment of how the market for TRFs operates and it has made misconceived and overoptimistic assumptions about Marpac's ability to function and compete within this market. For example, the Commission has assumed that Marpac will be able to compete on price with imported TRFs (despite the presence of undumped imports from India) and that it will be able to satisfy customer requirements and customer order volumes. 'Opportunities' do not equate to the actual ability to achieve specific commercial outcomes. Accordingly, the Commission has failed to apply the necessary rigour to discharge its evidentiary burden in this matter.

4.4. In this regard, the Applicant refers to s269TAE(2A) of the Customs Act (Cth) 1901 which requires the Commission to consider whether hindrance may have been caused by factors other than dumping. This legislative provision refers to factors such as the effect of goods not dumped and the productivity of the Australian industry. It is the Applicant's contention that the Commission has failed to adequately consider these types of factors.

4.5. The Applicant also refers to s269TAE(2AA) of the Customs Act which requires that an inquiry determination *"must be based upon facts and not merely upon allegations, conjecture or remote possibilities".* This provision is reflected in Article in 3.1 of the WTO Anti-Dumping Agreement which provides:

'A determination of injury for the purposes of Article VI of GATT 1994 shall be based upon positive evidence and involve an objective examination of both (a) the volume of

[17] Final Report, Section 7.1, page 48
[18] Final Report, Section 7.1, page 48

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'.

4.6. In the WTO Appellate Body decision of *Mexico Anti-Dumping Duties on Rice*[19] the Appellate Body determined that an investigating authority finding must be based on positive evidence and when based on assumptions, these assumptions must be derived as reasonable inferences from a credible basis of facts and should be sufficiently explained so that their objectivity and credibility can be verified.

4.7. Further, the obligation on the Commission and the Minister to ensure that a proper analysis of factors other than dumping is found in Article 3.5 of the WTO Anti-Dumping Agreement as interpreted in the WTO Appellate Body decision of *US – Hot Rolled Steel*[20] in which it was concluded that an investigating authority such as the Commission must ensure that the injurious effects of factors other than dumping are not attributed to dumped imports and that an authority must separate and distinguish the effects of these other factors from the injurious effects of dumped imports. Without such analysis and separation an authority will be unable to ascribe injury to dumped imports and hence unable to impose anti-dumping duties. This analysis applies equally to claims based upon hindrance as well as a traditional causation of material injury analysis.

4.8. In this case, the Applicant contends that the Commission has erred in failing to consider and place appropriate weight on the following factors:

(a) **(Marpac's limited production)** Marpac produces one size of TRF (73mm) and does not produce larger sizes that represent a much greater share of the <u>value</u> of the TRF market. Hence, the Commission's whole analysis concerning injury only relates to a minority of the Australian TRF market by value. The Commission's conclusion regarding hindrance being caused by dumped 73mm TRFs is based on the finding that 73mm TRFs represent approximately 50 percent of the total TRF market.[21] The Commission has further erroneously concluded that 73mm TRFs are in fact a 'price leader' and therefore all of the Commission's analysis regarding price trends, suppression and undercutting have been extrapolated to the whole TRF market. This is illogical, without foundation and not a correct basis upon which to proceed in the hindrance investigation. The larger TRF sizes represent a much larger percentage of the TRF market and these products are considerably more expensive. The Applicant contends that when it negotiates with a TRF supplier it arrives at pricing for all TRF sizes at the same time as a package and not individually. In fact 73mm TRFs only

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[19] Appellate Body Report, Mexico – Definitive Anti-Dumping Measures on Beef and Rice, WT/DS295/AB/R, [204]

[20] Appellate Body Report, US – Anti-Dumping Measures on Hot-Rolled Steel products from Japan, WT/DS184/AB/R, [223]

[21] Final Report, Section 7.4.4, page 52

represents 16 percent of the total value of the Applicant's TRF purchases and only 29 percent of the total value of TRFs purchased for use in Australia (with the Applicant accounting for 70 percent of the total value of TRFs purchased for use in Australia).[22]

The Applicant also notes that the Commission has determined that Marpac owns presses required to make other TRF sizes and that plans exist to update and purchase more machinery. The Applicant contends that the existence of presses and business plans do not equate to the ability to have a functioning facility that would consistently produce all TRF sizes to the required standard and for Marpac to be a proven and capable supplier, and then in fact for it to win contracts to supply TRFs to major customers. The Commission has not properly considered the commercial realities of TRF production and supply in deciding that Marpac has been hindered by dumped TRF imports. The fact is that Marpac has been hindered by other factors such as its own inability to compete in the marketplace.

(b) **(Price Undercutting Analysis)** One of the most significant indicators of material injury to a domestic industry is the existence of price undercutting by imports entering the Australian market. The Applicant contends that this indicator is equally important in a hindrance analysis. This issue is dealt with in section 7.4.4 of the Final Report. In this regard, we refer to the following statement: *'The Commission observes that prices from Malaysia and Singapore at the beginning of the investigation period are comparable with Marpac's prices and are more expensive than TRFs imported from the Philippines. The Commission notes that Marpac's prices remained stable throughout the investigation period, however, interfactory prices from the Philippines declined'*. In fact, if the Commission's price undercutting data is examined (as per Table 6 of the Final Report) it shows that prices for TRFs sourced from Malaysia and Singapore were more expensive than Marpac's TRF prices (to its one customer) in Q2 and Q3 of 2015. That is, there was no price undercutting. Further, there was no price undercutting in Q1 of 2016 as the Applicant did not source any TRFs from Malaysia and Singapore and only sourced TRFs from India (at comparable prices found not to constitute dumping). The only finding of price undercutting in respect of Malaysia and Singapore was during Q4 of 2015 when the Applicant was transitioning its sourcing of TRFs from Singapore and Malaysia to India and the undercutting analysis is based upon one shipment from Singapore of 73mm TRF ends during October 2015 with a price reduction equating to AU$17,000 (due to declining tinplate prices) and this is in line with prices from India. It is inconceivable that the

[22] The Applicant provided all of its relevant purchasing records to the Commission at its importer visit on 15 July 2016 which records were verified by the Commission.

Commission can find that Marpac has been injured (and hindered) by one month of lower pricing on a single shipment of TRFs. The Commission has disregarded the positive evidence provided by the Applicant which clearly demonstrates the reduction in tinplate prices prior to the alleged period of undercutting, which when allowing for supply lead time, is reflected in the TRF price reductions.[23]

We note that the Commission has a modified injury analysis in that it is required to examine how dumping may have hindered the development of Marpac's business. However, there is no positive evidence that price undercutting has affected Marpac business and the conclusion drawn by the Commission to the contrary is without foundation and purely speculative. It is also noted that the Commission's undercutting analysis is only based on pricing of 73mm TRFs, which completely distorts the data and misrepresents the findings.

(c) **(Declining Tinplate Prices)** The Commission states under Section 5.5 of the Final Report that tinplate prices are the main driver of changes to TRF pricing and that it is a standard contract clause to adjust customer pricing to follow movements in tinplate pricing. This statement by the Commission implies that all TRF suppliers simply pass on any tinplate pricing changes and that it will not have any influence on the dumping or injury analysis in this case. This is not correct. The Applicant and other TRF importers do not have written contracts with TRF exporters and purchase prices are negotiated on a case by case basis and, whilst there is a correlation with tin plate prices, it is not accurate to suggest that purchase prices simply mirror movements in tinplate prices. Larger TRF manufacturers have a much better ability to negotiate prices to ensure that prices fully reflect tinplate pricing movements and smaller TRF manufacturers like Marpac will have a lesser ability to do this. This is a significant reason why Marpac's prices have not declined in the same way imported TRF prices have declined during the period of investigation. The Applicant refers to Figure 10, discussed in section 7.4.1, which shows TRF export prices declining from both Malaysia and Singapore and from the Philippines. This gives the distinct impression that it is due to predatory pricing on the part of TRF exporters. However, the Commission has erred in a number of respects on this issue in that:

(i) the Commission has erroneously relied upon lagged quarterly Cold Rolled Coil (CRC – raw steel prices, not tinplate) rather than tinplate prices as advised by

[23] See Harbor Intelligence Report on Tinplate Prices dated June 2016 provided to the Commission as Confidential Attachment 2 to the Applicant's submission dated 25 October 2016 being Public File document no 35. The graph of the global spot average tinplate export price shows a marked decline in tinplate prices during all of 2015 and in particular a steep decline of approximately 20 percent during March and April of 2015.

the Applicant in its submission dated 25 October 2016.[24] As tinplate is a further value-added product in the steel making process it does not align with tinplate prices;

(ii) in any event, the Commission has failed to take into account independent research data supplied by the Applicant which shows a reduction in tinplate prices from January 2015 to December 2015 of approximately 30 percent, which coincides with the recent decline in export prices;[25]

(iii) the Commission has failed to examine the Applicant's contention that Marpac, either due to operational size or commercial decisions, has not been able to purchase tinplate at competitive prices relative to foreign TRF producers.[26]

(d) **(Customer Requirements)** The Applicant notes the Commission's findings in section 3.5.1 of the Final Report that Marpac's TRFs are sufficiently physically similar to imported TRFs and the findings in sections 3.5 and 5.4.3 of the Final Report that customers do not have any requirements other than the goods being functional and fit for purpose.[27] In this regard, the Applicant contends that the Commission has erred in a number of respects including:

(i) In finding that other than the ring gauge, Marpac's technical specifications were not uniquely outside the median (range of qualities) compared with imported TRF products.[28] The Commission relies heavily on Figure 1, which lists a series of features of TRFs. What the Commission has failed to appreciate is the fact that the four criteria where Marpac are outside the median, namely ring gauge, plug gauge, countersink depth and foil gauge are the most critical aspects of TRF manufacturing in that they are the features of TRFs that cause the most concern for can manufacturers, customers and ultimately end consumers. It is noted for completeness that these four criteria are even more important for larger TRF sizes where the can, with a greater volume, is likely to be opened and closed many times over a longer product life span. The Applicant has emphasised the importance of the technical characteristics of TRFs in its submissions of 24 June 2016, 3 August 2016 and 25 October 2016. In particular, the Applicant has explained the importance of the 'click seal' feature of TRFs. That is, the 'clicking sound' that one can hear when the TRF plug is pressed down to reseal the can. This demonstrates that the can has been properly closed. The Applicant believes the Commission has

[24] Public File Document no. 35 at page 4
[25] Public File Document no. 35 at page 4
[26] Public File Document no. 35 at page 4
[27] Final Report, Section 5.4.3, page 39
[28] Final Report, Section 3.5.1, page 17

erred in discounting the essential requirement of the click seal for cans utilising TRFs.[29] In section 3.5.1 of the Final Report[30] the Commission merely characterises the click seal as an additional design feature to provide confidence to consumers that airtightness has been achieved, but in the Commission's view it is not a pre-requisite for airtightness. Further, the Commission claims Marpac has tooling to achieve a click seal.[31] The Applicant engaged with Marpac prior to the initiation of the dumping complaint and can confirm that Marpac was not able to produce samples with an adequate click seal using its own tooling. Representing that Marpac has tooling does not provide verifiable evidence of Marpac's ability to produce TRFs with a fit for purpose click seal. As the Applicant's TRF volume represents 70 percent of the total value of all TRF consumed in the market, the ADC has clearly understated this as a market requirement.

(ii) The Applicant also vigorously takes issue with the Commission's contention that TRF end users do not have specific demands regarding technical specifications and only are concerned that a complete can unit is functional and fit for purpose.[32] This is a bizarre approach to understanding manufacturing and implies that customers are not interested in achieving a quality product produced to consistent standards. Whilst it is correct that technical standards are more the purview of the manufacturer (rather than the customer) it is precisely this commitment to high manufacturing standards that results in an end product that meets the customers' product requirements. The Applicant's customers do in fact have requirements which include openability, resealability, minimisation of water vapour transmission and various consumer safety requirements.[33]

(iii) In short, the Applicant submits that the Commission has failed to take into account the inability of Marpac to produce TRFs to a high standard and to adequately meet customer requirements[34] and if the Commission had so taken into account these factors then the Commission would have found that

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[29] For example, we refer the ADRP to Customer Specifications provided to the Commission as Confidential Attachment 1 to the Applicant's submission dated 25 October 2016 being Public File document no 35. In particular the reference in the table on page 2 of the customer specifications which provides: 'Penny Lever Plug should be removable with either end of a spoon and when replaced with hand the plug must make an audible "click" sound as it returns back into the lever ring.'

[30] Final Report, page 18

[31] Final Report, page 18

[32] Final Report, Section 5.4.3, page 39

[33] See Customer Specifications provided to the Commission as Confidential Attachment 1 to the Applicant's submission dated 25 October 2016 being Public File document no 35.

[34] See Visy Submission 24 June 2016, Public File Document no. 4

Marpac has not been hindered in developing its business by reason of dumping and that self-mitigating factors have caused Marpac to not develop its business.

(e) **(Cause of lost contracts)** The Commission claims in section 7.6.1 of the Final Report that it has verified that Marpac lost a TRF supply contract in Q4 of 2015 due to its can manufacturing customer losing a supply contract to a competitor utilising a dumped TRF closure.[35] In reaching this conclusion the Commission has failed to take into account the evidence provided by Irwin Packaging and the Applicant that the contract was awarded to Irwin Packaging based upon its superior product offering and its ability to offer improved reliability of supply.[36] The Commission has assumed, merely based on the coincidence of allegedly dumped TRFs being part of the can manufacturing contract, that in fact this was the cause of the can manufacturer to lose the contract in question.

(f) **(Failure to assess effects of non-dumped imports from India)** The Commission recommended in the Statement of Essential Facts that dumping duties be imposed on TRF exports from India and it only terminated the investigation regarding Indian TRF exports in conjunction with issuing its Final Report. Hence, the Applicant believes that the Commission has failed to consider in its injury analysis what the impact of non-dumped exports from India may be. If indicia such as market share all sizes (Final Report Figure 66), market share – 73mm (Final Report Figure 8) and market share at market segment (Final Report Figure 14) are examined it is clear that a significant portion of market share of TRF sales in the Australian market related to undumped imports. The Applicant understands this to refer to TRFs exported from India. The Commission has failed to analyse how Marpac has been hindered by dumping when it has been the subject of vigorous market competition from undumped imports. To put it more succinctly, how can it be concluded that Marpac is suffering injury and its business plans hindered as a result of dumped TRFs from Malaysia and Singapore when it is already competing against undumped imports from India which represents 20-25 times the sales volumes that Marpac is presently generating? In addition, as will be discussed in ground 4 below, export prices for TRFs from Malaysia and Singapore are virtually the same as export prices of TRFs sourced from India. It is therefore reasonable to conclude that Marpac may have been hindered by undumped imports and the Commission has erred in failing to take this into account.

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[35] Final Report, Section 7.6.1, page 56

[36] See Visy Submission 25 October at section 4.3, public file document no. 35 and Irwin Packaging Submission 7 July 2016 Public file document no. 6

5. GROUND 4 – That the Commission has failed to consider prevailing market prices in determining the dumping margin on TRF exports from Malaysia and Singapore

5.1. During the investigation period the Applicant purchased TRFs from two sources, Hindustan Tin Works in India and MC Packaging in Malaysia/Singapore. The Applicant understands that both of these TRF suppliers manufacture TRFs principally for their own can making operations and they do not sell TRFs into a direct TRF market within their respective countries. Accordingly, it is likely that the Commission has based its normal value calculations not on arm's length sales in their home markets, but rather on a cost to make and sell model or a similar model that involves constructed values. The Applicant is aware that both export prices and normal values for both Indian exports and Malaysia/Singapore exports have been determined under s269TAB(3) and s269TAC(6) respectively.

5.2. In the Statement of Essential Facts the Commission's preliminary view was that the dumping margin for India was 48.2 percent and for Malaysia/Singapore it was 131.7 percent. In the Final Report the dumping margin for India was found to be -12.68 percent whereas for Malaysia/Singapore it had increased to 266.3 percent. Whilst the Applicant appreciates that Hindustan Tin Works received certain favourable adjustments such as tax adjustments to arrive at a more accurate dumping assessment, it is inconceivable that Malaysian/Singaporean TRF exports should have a 266.3 percent dumping margin in light of the findings made in the Final Report with respect to exports from India. The Applicant contends this because firstly it purchases from both the Indian and Malaysian/Singaporean markets at almost the same price and on the same terms, and secondly, pricing of the TRFs is heavily influenced by the prevailing market price of tin plate, which is a worldwide commodity principally traded in United States Dollars. The Commission has confirmed in the Statement of Essential Facts at page 21 that 'tinplate costs are the major portion of the cost to manufacture and hence the price of TRFs'.

5.3. The Applicant's position is that the similarity in pricing from TRF suppliers in different export countries is what is reasonably expected of a globally traded product such as TRFs.

5.4. Hence, in the Applicant's view, the Commission has neglected to adequately consider the effect of tin plate pricing and the price similarity in the Applicant's imports which should have resulted in a finding of negative dumping margins in respect of Malaysia/Singapore that are akin to findings made when terminating the investigation in respect of exports from India.

6. CONCLUSION

6.1. The Applicant submits that the Commission and the Assistant Minister have not reached the correct or preferable decision in this matter for the following reasons:

(a) in finding that an Australian industry producing TRFs was not already established;

(b) alternatively, in considering that Marpac and VIP's current production did not constitute an established industry;

(c) in finding that dumping attributed from exports from Malaysia, Singapore and The Philippines has materially hindered the establishment of an Australian TRF industry;

(d) in failing to adequately consider prevailing market prices and tinplate prices in calculating dumping margins for TRFs exports from Malaysia and Singapore.

6.2. The Applicant understands that this investigation 350 represents the first time the Commission has dealt with a claim based upon hindrance (as opposed to actual dumping). A claim based upon hindrance puts interested parties such as the Applicant at a considerable disadvantage because the Commission can rely on a wider range of factors in its assessment of causation and injury. This makes it even more imperative that the Commission fully and properly discharge its evidentiary burden to positively demonstrate that a TRF industry is not already established, and if it is not, that dumping has materially hindered the establishment of an industry. The Applicant contends that, in considering the matters before it, the Commission has placed excessive reliance on Marpac's claims (which do not appear to be based upon sufficient verifiable evidence) and placed too little weight on submissions and supporting evidence provided by the Applicant and other interested parties during the investigation. The overarching situation, which the Commission has failed to take into account in this investigation, is that Marpac has made a decision to manufacture TRFs with an awareness of difficulties that other Australian TRF producers have experienced and in circumstances where it has a high cost of production, low economies of scale and minimal technical capability and is subject to heavy import competition. In the event that the current findings are not overturned it will result in Marpac (and companies with a similar profile in other industries) being able to claim hindrance without there being a high causation standard being applied to prove that hindrance to the establishment of an industry is **material**. In this case the Commission has not made out that requirement of materiality.