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**NON-CONFIDENTIAL**

Ms Jaclyne Fisher  
Panel Member  
Anti-Dumping Review Panel

Dear Ms Fisher,

**Review of Certain Decisions Regarding the Minister's Decision to Impose Anti-Dumping Measures on Steel Pallet Racking exported from China and Malaysia**

I refer to your notice published on 28 June 2019 of the Review Panel's intention to conduct a review of certain decisions made by the Minister in imposing antidumping measures on steel pallet racking exported from China and Malaysia and inviting interested parties to make submissions within 30 days of the date of your notice.

One Stop Pallet Racking Pty Limited obviously is an interested party and an applicant for the review. It makes the submissions set out below.

**1. Like Goods**

Fundamental to this investigation is the concept of "*like goods*", which is defined in Australia's antidumping legislation and in the WTO Anti-Dumping Agreement.

As you would be aware, it is defined in Australia's antidumping legislation as follows:

*"like goods, in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration."* (Underling added)

The starting point is determining what are the so-called "*goods under consideration*". Only once the "*goods under consideration*" has been determined can any assessment of what the "*like goods*" may be.

The term "*goods under consideration*" is not defined in Part XVB of the *Customs Act 1901* but it is used in the definition of "*like goods*" as indicated above.

In this context, the “*goods under consideration*” are the goods that have actually been exported to Australia or may be exported to Australia. This is clear from section 269TB(1) of the *Customs Act 1901*. That section provides:

(1) *Where:*

(a) a consignment of goods:

(i) *has been imported into Australia;*

(ii) *is likely to be imported into Australia; or*

(iii) *may be imported into Australia, being Like goods to goods to which subparagraph (i) or (ii) applies;*

(b) *there is, or may be established, an Australian industry producing like goods; and*

(c) *a person believes that there are, or may be, reasonable grounds for the publication of a dumping duty notice or a countervailing duty notice in respect of the goods in the consignment;*

*that person may, by application in writing lodged with the Commissioner, request that the Minister publish that notice in respect of the goods in the consignment.”*

*(Underlining added)*

It is a factual question. It is not an ambit claim on a range of goods some of which may have been exported to Australia and some that have not been and may not be exported to Australia. It is the goods referred to in paragraph (a) of section 269TB(1) of the *Customs Act 1901*. It defines what the so-called “*goods under consideration*” actually are.

The determination of “*like goods*” then depends upon the consignment of goods referred to in paragraph (a) of section 269TB(1) of the *Customs Act 1901* and what are the “*characteristics*” of the goods in that consignment. Assuming the Australian industry does not produce identical goods to those in that consignment, it is only then can it be determined whether the Australian industry produces goods that have “*characteristics closely resembling*” those in that consignment.

This is the threshold question that needs to be addressed in order to properly inform what are the “*like goods*” produced by an Australian industry. If this issue is not addressed and properly addressed, it is not possible to determine what are “*like goods*” for the purposes of the investigation and calls into question whether the investigation was validly initiated.

Circumvention of the requirements of section 269TB(1) of the *Customs Act 1901* in applications for the imposition of antidumping measures should not be countenanced.

Further, the Anti-Dumping Commission should not encourage such circumvention by providing a pro forma application for the imposition of antidumping measures that does not require information required by that section.

It is simply applying the plain English in section 269TB(1) of the *Customs Act 1901*.

This approach is supported by the Federal Court in *G.M. Holden v Commissioner of the Anti-Dumping Commission* [2014] FCA 708, at paras. 124 to 126 and WTO jurisprudence (i.e. *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WTO Doc WT/DS337/R, adopted 15 January 2008, at [7.16]-[7.75])<sup>1</sup>

### **1.1 Anti-Dumping Commission’s Description of the Goods the Subject of the Investigation**

In its report to the Minister, the Anti-Dumping Commission described the goods the subject of the investigation as follows:

*“Steel pallet racking, or parts thereof, assembled or unassembled, of dimensions that can be adjusted as required (with or without locking tabs and/or slots, and/or bolted or clamped connections), including any of the following - beams, uprights (up to 12m) and brace (with or without nuts and bolts).”*

This reflects the applicant’s description of the goods in its application for the imposition of antidumping measures.

Unfortunately, such a good does not exist.

The “*dimensions*” of a pallet racking system and, importantly, the dimensions of the parts of a pallet racking system (e.g. beams, uprights and bracing, etc.) cannot physically or otherwise be “*adjusted as required*”. The “*dimensions*” are what they are and cannot be adjusted any more than the “*dimensions*” of any other product can be “*adjusted*”.

The shelving of a pallet racking system may be varied upwards or downwards but the horizontal and vertical beams cannot be adjusted. They are physically fixed and, consequently, as is the pallet racking system in this regard.

The description of the goods the subject of the dumping investigation is fundamentally flawed as it purports to describe a good that cannot and does not physically exist.

No doubt this is why additional information was provided by the applicant in its application, as noted by the Anti-Dumping Commission in its report to the Minister. However, such additional information cannot vary the description of the goods in the application. Interestingly, that additional information makes no reference to the “*dimensions*” of the pallet racking systems or components thereof being “*adjustable*”, which clearly is not physically possible.

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<sup>1</sup> Mortimer J in *G.M. Holden v Commissioner of the Anti-Dumping Commission* [2014] FCA 708 at para 124 did state that a characteristic of a good includes the uses for which they were suitable in a commercial and practical sense. The uses to which a good are suitable for is a function of the characteristics of the good itself. It is not a characteristic of the good itself. Any good may be put to variety of uses depending upon its physical characteristics.

Even with the additional information, the description of goods is of goods that physically cannot and do not exist. This seems to have escaped the Anti-Dumping Commission.

Also, the description of goods is not a description of goods the subject of a consignment, including in this case a consignment by One Stop Pallet Racking. It is simply an ambit claim of a range of goods without any reference to a consignment of a pallet racking system as required by section 269TB(1) of the *Customs Act 1901*. It assumes that all pallet racking systems exported to Australia are the same or, at least, fall within the description provided by the applicant, which is not the case, without reference to the consignments exported to Australia or may be exported to Australia and their respective characteristics.

Such non-compliance with statutory requirements in Australia's antidumping legislation and relevant provisions in the WTO Anti-Dumping Agreement again should not be countenanced.

## **1.2 Dematic's Application**

Did Dematic's application for the imposition of antidumping measures comply with section 269TB(1) of the *Customs Act 1901*?

In response to a question in the pro forma application form prepared by the Anti-Dumping Commission, Dematic answered to a requirement in the application to fully describe the goods the subject of its application as being:

*"Steel pallet racking, or parts thereof, assembled or unassembled, of dimensions that can be adjusted as required (with or without locking tabs and/or slots, and/or bolted or clamped connexions), including any of the following - beams, uprights (up to 12m) and brace (with or without nuts and bolts)." (Underlining added)*

Unfortunately, the pro forma application form provided by the Anti-Dumping Commission does not ask the right question. That is, it does not ask for the information required by section 269TB(1) of the *Customs Act 1901*. Namely:

- what is the consignment of goods referred to in the application that complies with the requirements of section 269TB(1) of the *Customs Act 1901*. This is not addressed in the application. This is simply to apply the plain English requirements of section 269TB(1) of the *Customs Act 1901*.

Absent that information it is not possible to make an assessment or determination of whether the Australian industry produces "*like goods*".

Was that information provided in Dematic's application, supported by objective probative evidence. No. The description was simply an ambit speculative claim not based on the requirements of section 269TB(1) of the *Customs Act 1901*.

Further, the "*Additional Supporting Information*" in the applicant's application is inconsistent with the description of the goods the subject of the application. As "*supporting*

*information*", it does not form part of the description of goods the subject of the application and, in any event, is inconsistent with that description. No explanation was provided as to why it was included. In particular, why the description of the goods the subject of the application required inconsistent supporting information.

It provides no explanation as to how "*dimensions*" of a pallet racking system and its components can be physically "*adjusted*". Nor does it relate to any consignment of pallet racking systems exported to Australia, including those imported by One Stop Pallet Racking.

It simply does not comply with relevant statutory requirements.

The application should have been rejected and no determination of whether the Australian industry produced either identical goods to a consignment imported into Australia or may be imported into Australia or had "*characteristics closely resembling*" such consignment or consignments could be determined.

That is, there should have been no determination that the Australian industry produced "*like goods*" given the non-compliance with the requirements of section 269TB(1) of the *Customs Act 1901* in relation to applications for the imposition of antidumping measures.

### **1.3 Consignment of Goods Imported by One Stop Pallet Racking**

One Stop Pallet Racking provided to the Anti-Dumping Commission information and evidence of consignments of pallet racking systems imported by it, including the physical characteristics of those consignments of palleting systems.

Evidence also was provided to the Anti-Dumping Commission by One Stop Pallet Racking, including pictures, as to why the pallet racking systems produced by Dematic were neither identical to those consignments imported by One Stop Pallet Racking nor had characteristics closely resembling those consignments imported by One Stop Pallet Racking.

Please see One Stop Pallet Racking's submissions to the Anti-Dumping Commission, including that of 19 August 2018, on the differences between the characteristics of the pallet racking systems imported by One Stop Pallet Racking and those produced by Dematic.

Clearly Dematic's pallet racking systems are neither identical to nor have characteristics closely resembling those of the pallet racking systems in the consignments imported by One Stop Pallet Racking.

### **1.4 Dematic's determination of like goods**

In its application for the imposition of antidumping measures, Dematic has argued that its product is a like goods on the basis of "*likeness*". That is, physical likeness, functional likeness, commercial likeness and production likeness.

This based on the tests of like goods in the Anti-Dumping Commission's Dumping and Subsidy Manual using "*likeness*". The Anti-Dumping Commission has adopted a similar test in its report to the Minister.

"*Likeness*" is not the test. The test is whether the goods produced by the Australian industry are identical to or have characteristics closely resembling those of the goods the subject of a consignment imported into Australia as indicated earlier above.

The Anti-Dumping Commission in its report to the Minister and the Minister's acceptance of the "*likeness*" test is misguided and does not comply with the relevant statutory requirements for determining whether the Australian industry produces like goods - i.e. are identical to or have characteristics closely resembling the consignment of goods imported into Australia or may be imported into Australia.

One can only speculate on why the Anti-Dumping Commission has adopted a "*likeness*" test in defiance of and circumvention of the clear, plain English words used in the definition of "*like goods*". "*Functional likeness*", "*commercial likeness*", "*production likeness*" are not of themselves characteristics of the goods the subject of a consignment in question.

As indicated above, the Anti-Dumping Commission in its report to the Minister and the Minister's acceptance of the "*likeness*" test is misguided and does not comply with the relevant statutory requirements as to what constitutes "*like goods*". Consequently, any determination of "*like goods*" on this basis was contrary to the relevant statutory provisions and the provisions in the WTO Anti-Dumping Agreement.

## **2. Conclusion**

For the reasons set out above, it is evident that the Anti-Dumping Commission has not applied the correct test in determining what are "*like goods*" and whether the Australian industry actually produces "*like goods*". In other words, in applying a "*likeness test*" the Anti-Dumping Commission in its report to the Minister has not complied with relevant domestic statutory obligations, nor those in the WTO Anti-Dumping Agreement, and arguably misled the Minister.

In particular, it is evident from submissions made by One Stop Pallet Racking that the Australian industry produces steel pallet racking systems that are neither identical with nor having characteristics that closely resemble the consignments of steel pallet racking systems imported by One Stop Pallet Racking.

This is also evident from submissions from other interested parties.

Also, as indicated earlier above, the description of the goods the subject of this investigation do not and are not capable of physically existing because it is not possible for steel pallet racking systems dimensions to be physically adjusted. Consequently, there can be no "*like goods*" to a good that does not exist.

In such circumstances, the preferential decision is that the investigation should have been terminated in relation to imports by One Stop Steel Pallet Racking and that the Minister should revoke any antidumping measures applying to imports of steel pallet racking systems by One Stop Pallet Racking.

If you have any queries please let me know,

Yours faithfully

A handwritten signature in black ink, appearing to read 'Andrew Percival', with a large, stylized initial 'A' at the start.

Andrew Percival

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