MinterEllison LAWYERS

PUBLIC RECORD

SUBMISSION ON BEHALF OF ONESTEEL AUSTRALIAN TUBE MILLS TO THE ANTI-DUMPING REVIEW PANEL CONCERNING A REVIEW OF A MINISTERIAL DECISION TO PUBLISH DUMPING DUTY NOTICES APPLYING TO ZINC COATED (GALVANISED) STEEL EXPORTED FROM TAIWAN

Introduction

1. OneSteel Australian Tube Mills Pty Ltd (**ATM**) is an interested party directly concerned with the importation into Australia of Zinc Coated (**Galvanised**) Steel from Taiwan, a person who uses the goods the subject of the reviewable decision in the production or manufacture of other goods in Australia and an applicant in this matter.

2. We refer to the original statement **(Statement)** by ATM contained in Appendix A to an Application of 4 September 2013 to the Review Panel in relation to the above matter. The purpose of this submission, made pursuant to s 269ZZJ of the *Customs Act 1901 (Cth)* (**Act**), is to elaborate briefly on certain matters raised in our client's statement and to identify more precisely the terms of an exclusion from a substituted dumping duty notice of Galvanised HRC Steel.

Incorrect Application of 'Threat of Injury' provisions

3. Faced with a situation in which, at the time of its final report to the Minister on 30 April 2013, there had never been any been any commercial production by the applicant of Galvanised HRC substrate, the Anti-Dumping Commission (ADC) failed to recognise that Part XVB does not include any provision for a dumping notice to be published in relation to goods that an applicant claims it may produce in the future but has not produced in the past.

4. The only circumstances in which the Act allows for the possibility of the publication of a dumping duty notice in respect of goods that were not being produced in Australia by the applicant at the time of the application for a dumping duty notice are:

(a) at the time of that application an Australian industry ... *may be established* (s 269TB); and

(b) between that time and the time of any publication of a dumping duty notice under s 269TG(2) an Australian industry has commenced ... *producing like goods*[1].

5. At the time of the application the applicant made no claim in relation to any intended establishment of facilities for the production of Galvanised HRC substrate and at the time of the publication of the dumping duty notice the Commission, by recommending to the Minister that he publish a notice exempting out client's imports from dumping duty[2], accepted that there was no production of such goods in Australia, a recommendation that was not opposed by the applicant.

6. The grounds for that recommendation exclude any logical or legal possibility that there was a threat of injury to the applicant in terms of Part XVB of the Act. The work-around adopted by the Commission to circumvent that problem appears two paragraphs later in Report 190 when the Commission observes that the applicant claims that a trial product was ... *currently being produced.* Based on that claim the Commission concludes, unlawfully, that ...*there is a foreseeable and imminent threat of injury to BlueScope.* This work-around adopted by the Commission is clearly unjustified because it is incontrovertible that at the time of Report 190 the 'trial plans', to use Bluescope terminology, had not been completed and the product that the applicant claimed was "currently being produced" had not been supplied to, or used by, anyone in commercial quatities. In those circumstances there are no grounds on which a finding that an Australian industry has commenced ... *producing like goods* can be justified. To conclude otherwise would be to remove any substantive meaning from two of the key concepts in the Act, namely "industry" and "produced".

7. Throughout the investigation, ATM had consistently alerted the Commission (and Customs) to the fact that the applicant's claims of future production capability were, at best, aspirational and provided no grounds for the rigorous conclusions required by law in relation to such matters as injury and revocation of tariff concession orders. ATM further warned that failure to proceed according to law on those issues would inevitably result in inequitable outcomes and difficult challenges for its operations and so it has proved as a series of the applicant's plans for production of Galvanised HRC substrate continue to

[1] Section 269TG(2)(b)
[2] Report 190, p.44

unravel at the expense of stability and predictability in ATM's supply lines and its reputation for reliability with downstream customers. This perfect storm confronting ATM as a result of the applicant's unrealised predictions and the Commission's acceptance of those predictions is further compounded by the applicant's very recent announcement that it had reached agreement to acquire a direct competitor of ATM.

8. The attempt by the Commission to apply 'threat of injury' provisions of the Act is manifestly contrary to the nature and purpose of those provisions. All relevant provisions of the WTO Agreement on the Implementation of Article VI of GATT 1994 (***Anti-Dumping Agreement***)[3] and Part XVB of the Act[4] clearly demonstrate that a threat of injury must relate to an industry that has produced or is producing the goods in question. It has no application to circumstances in which such an industry has not been established at the time that the Minister is considering whether or not to issue a dumping duty notice.

Dumping Duty Notice

9. Paragraph 5 of ATM's statement requested that the Review Panel recommend to the Minister that he revoke the reviewable decision and substitute a new specified decision in the form of a new dumping duty notice that does not apply to our client's importations of Galvanised HRC Steel. We submit that the goods to which the new notice applies should be described as follows:

> *flat rolled products of iron and non-alloy steel,* ***excluding products not further worked than hot rolled or skin passed****, of a width less than 600mm and, equal to or greater than 600mm, plated or coated with zinc.*

10. We further submit that in accordance with the observations of Nicholas J in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 a complementary notice be published under s 269TL of the Act identifying the goods excluded from the proposed new dumping duty notice as being goods to which the Minister has decided that s 8 of the *Customs Tariff (Anti-Dumping) Act 1975* does not apply.

[3] Article 3.7
[4] eg. Sections 269T(2) and (4), 269(TAE)

Ascertained Export Price (AEP) - Currency

9. We refer to our clients earlier observations and submission at paragraphs 45 – 47 of the Statement and, to illustrate the impact of denominating the AEP in US dollars, we attach a confidential spreadsheet based on a recent importation by ATM that demonstrates the severe adverse impact impacts on an importer during a period of AUD depreciation. We stress again, however, that the reverse applies during an appreciating phase producing the paradoxical outcome that an Australian manufacturer of goods subject to a dumping notice will not only suffer the usual erosion of its competitive position due to a strengthening AUD but also the additional disadvantage of a reduction in the effectiveness of anti-dumping measures.

10. Clearly, we submit, the Minister should revert to the more traditional practice of ascertaining export price in Australian dollars if, despite ATM's other submissions, the trade measures remain in place.

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