



Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 52

Resealable Can End Closures exported
from Malaysia, the Republic of the
Philippines and the Republic of Singapore

September 2017

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Abbreviations

Term	Meaning
Act	<i>Customs Act 1901</i>
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
CMIA	Can Makers Institute of Australia Inc.
Commissioner	The Commissioner of the Anti-Dumping Commission
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act, 1975</i>
Genpaco	Genpacco Inc.
Irwin Packaging	Irwin Packaging Pty Ltd
Marpac	Marpac Pty Ltd
MC Packaging	M.C. Packaging Pte Ltd
Minister	Minister for Industry, Innovation and Science
PAD	Preliminary Affirmative Determination
Parliamentary Secretary	The Parliamentary Secretary to the Minister for Industry, Innovation and Science ('the Minister')
CIO Regulation	<i>Customs (International Obligations) Regulation 2015</i>
Reviewable Decision	The decision of the Assistant Minister made on 20 March 2017
SEF	Statement of Essential Facts
TRF	Tagger, ring and foil ends
Visy Packaging	Visy Packaging Pty Ltd
WTO	World Trade Organization

Summary

1. For the reasons set out below, I do not consider that the applications for review establish that the decision of the Assistant Minister for Industry, Innovation and Science (“the Minister”) was not the correct or preferable decision.

Introduction

2. The following parties have applied pursuant to s.269ZZC of the *Customs Act 1901* (“the Act”) for review of a decision of the Minister made on 20 March 2017 to impose dumping duties on the export of resealable can end closures (referred to as tagger, ring and foil (“TRF”) ends or TRFs) from Malaysia, the Republic of the Philippines and the Republic of Singapore (“Reviewable Decision”):
 - Genpacco Inc. (“Genpacco”);
 - Irwin Packaging Pty Ltd (“Irwin Packaging”);
 - Can Makers Institute of Australia Inc. (“CMIA”);
 - Visy Packaging Pty Ltd (“Visy Packaging”); and
 - M.C. Packaging Pte Ltd (“MC Packaging”).
3. The applications for review were accepted and notice of the proposed review as required by s.269ZZI was published on 8 May 2017. As Senior Member of the Review Panel, I directed in writing pursuant to s.269ZYA that the Review Panel for the purpose of this review be constituted by me.

Background to the application

4. On 18 May 2016, the Anti-Dumping Commissioner of the Anti-Dumping Commission (“ADC”) initiated an investigation into the alleged dumping of TRFs from the Republic of India, Malaysia, the Republic of the Philippines and the Republic of Singapore.¹ The investigation was as a result of an application by Marpac Pty Ltd (“Marpac”), a manufacturer of TRFs in Australia. The inquiry period for the investigation was 1 April 2015 to 31 March 2016.
5. A Statement of Essential Facts (“SEF”) and a Preliminary Affirmative Determination (“PAD”) were published by the ADC on 5 October 2016. The ADC subsequently published an Issues Paper on 1 December 2016 which dealt with the composition and status of the Australian TRF industry and allowed interested

¹ ADN No. 2016/54.

parties to make submissions on this issue before the Commissioner made the final report and recommendation to the Minister.

6. The final report to the Minister was made in February 2017 (“the ADC Report”)². The Commissioner recommended to the Minister that the Minister impose anti-dumping measures on TRFs imported from Malaysia, the Republic of the Philippines (“Philippines”) and the Republic of Singapore (“Singapore”). The Commissioner terminated the investigation with respect to the Republic of India (“India”) on 17 February 2017³.
7. The Minister accepted the recommendation and on 20 March 2017 declared that s.8 of the *Customs Tariff (Anti-Dumping) Act* applied to exports of TRFs from Malaysia, the Philippines and Singapore.⁴ Notice of the Minister’s decision was published on 24 March 2017.
8. Apart from CMIA, the applicants are affected by the decision of the Minister as they are either importers or exporters of TRF ends. In the case of CMIA, it claimed in its application it was the industry body representing Australia’s can manufacturers, a trade organization within the meaning of s.269ZX(e)(ii) of the Act. This claim was strongly disputed by Marpac. I note that the ADC allowed CMIA standing in the investigation⁵. As the definition of interested party under s.269T of the Act is similar to the definition of interested party in s.269ZX, I consider it appropriate to rely on the finding of the ADC on this point. Accordingly, all the applicants had standing to seek review of the decision of the Minister.

Conduct of the Review

9. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the review, s.269ZZ(1) requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it were the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

² Final Report No. 350.

³ ADN No. 2017/16

⁴ ADN No. 2017/20.

⁵ Final Report No. 350, section 2.7.1 at page 12.

10. With limited exceptions⁶, in carrying out its function the Review Panel is not to have regard to any information other than to “relevant information” as that expression is defined in s.269ZZK(6). For the purpose of the review, the relevant information is that to which the Commissioner had, or was required to have, regard when making the findings set out in the report to the Minister⁷. In addition to relevant information, the Review Panel may have regard to conclusions based on relevant information that are contained in the application for review and any submissions received under s.269ZZJ⁸.
11. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information and to conclusions reached at the conference based on that relevant information. No conferences were held during this review.
12. Unless otherwise indicated, in conducting this review, I have had regard to the application (including documents submitted with the application or referenced in the application) and the submissions received pursuant to s.269ZZJ, insofar as they contained conclusions based on relevant information. I have had regard to the ADC Report and the SEF, and information relevant to the review which was referenced in the ADC Report and the SEF. This latter information included submissions made to the ADC by interested parties. I have also had regard to Verification Reports where relevant.
13. The ADC provided relevant documents containing confidential information which were part of the material relied upon by the Commissioner in making the recommendations to the Minister. These documents and the correspondence with the ADC concerning them were not made publicly available.
14. Submissions were received within the 30 days required by s.269ZZJ of the Act from Marpac and MC Packaging. A submission was also received from Irwin Packaging and CMIA. However, this submission was received outside the 30 day period specified in s.269ZZJ and hence I did not have regard to it.
15. During the review, I came to the conclusion that the Commissioner should be required to conduct a reinvestigation pursuant to s.269ZZL of the Act.⁹ A report was made by the Commissioner following the reinvestigation on 9 August 2017. I

⁶ The exceptions are in s269ZZK(4A) and s.269ZZHA(2).

⁷ S.269ZZK(6)(a).

⁸ S.269ZZK(4).

⁹ Letter to the ADC dated 3 July 2017.

had regard to that report pursuant to s.269ZZK(4A). A copy of the reinvestigation report is attached to this report.

Grounds for Review

CMIA

16. CMIA relies upon three grounds for the review of the Minister's decision. These are:
- The ADC 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;
 - The ADC 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; and
 - 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.

Genpacco

17. There are two grounds put forward by Genpacco in its application for review. These are:
- The ADC did not accept the revised computed costs of Genpacco that showed more accurately and directly the computed costs; and
 - Genpacco was not producing like product and there was no basis to conclude that it was dumping the goods or that it was pricing the product at a lower value than other similar products.

Irwin Packaging

18. Irwin Packaging has put forward four grounds in its application. These are:
- The ADC erred in concluding that the Australian TRF industry was not established at the time Marpac entered the industry, and incorrectly considered whether the industry was materially hindered in its establishment;

- The ADC erred in concluding that the Australian TRF industry was not established during the investigation period and incorrectly considered whether the industry was materially hindered in its establishment;
- The finding of hindrance is not correct or preferable due to a failure to properly isolate and distinguish a number of critical factors; and
- The finding of hindrance is not correct or preferable due to a lack of evidence demonstrating that dumped goods materially hindered the establishment of the industry.

19. The first three grounds are the similar to those in the application for review by CMIA.

MC Packaging

20. The application for review by MC Packaging relies on two grounds. These are:

- The Commissioner erred in treating MC Packaging as an uncooperative exporter; and
- The Commissioner erred in determining that MC Packaging was dumping.

Visy Packaging

21. The four grounds relied on by Visy Packaging in its application are:

- The ADC and the Minister erred in concluding that an Australian industry producing TRFs was not already established;
- The ADC and the Minister erred in concluding that the activities of Marpac and VIP Packaging Pty Ltd (“VIP”) did not compromise an established industry;
- The ADC and the Minister erred in concluding that dumping has materially hindered the establishment of an Australian TRF industry; and
- The ADC has failed to consider prevailing market prices in determining the dumping margin on TRF exports from Malaysia and Singapore.

22. Again, the first three grounds are similar to those relied upon by CMIA and Irwin Packaging in their applications.

Consideration of Grounds

CMIA

Australian TRF industry already established

23. CMIA's first ground contends that there already existed an Australian TRF industry at the time Marpac entered the industry. CMIA points to the fact that VIP was producing 73mm, 99mm and 153mm TRFs in Australia before Marpac commenced production in early 2014. Further, CMIA submits that TRF production had been undertaken in Australia in various forms for 30 years before the investigation period as well as during the investigation period.
24. CMIA's submission notes that the ADC accepted that the production of TRFs in Australia was undertaken by Marpac and VIP during the investigation period and that the Australian can manufacturing industry had previously manufactured TRFs for captive production of complete can units. The submission then refers to a quote in the ADC Report that while the ADC "considers that even if there was an established Australian TRF industry, the industry had largely ceased when 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 market indicates that the industry became unestablished and was unestablished when Marpac commenced TRF manufacture" (emphasis added by CMIA)¹⁰.
25. In its submission, CMIA argues that the ADC asked the wrong question when it considered whether the prior manufacture of like goods precludes an industry from being established. This is because it is not the case that the Australian industry totally ceased production and then a new entrant subsequently commenced production. Rather there was an established industry which produced like goods for 30 years and continued to exist at the time of Marpac's entry and beyond and 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.

¹⁰ The CMIA submission does not reference the quote but it appears to be referring to a comment in Final Report No 350, section 4.4.1 at page 27.

26. CMIA takes issue with the weight given by the ADC to the level or volume of the existing TRF production at the time of Marpac's entry. This is highlighted, according to CMIA, by the references by the ADC to "largely ceased" and "an insignificant volume". CMIA submits that, as pointed out by the ADC, there is no requirement for a particular level of production for there to be an industry and that the ADC should have concluded that there was a TRF industry producing like goods which had been established for over 30 years and continued to exist at the time of Marpac's entry.
27. I do not agree with the criticism of the ADC's approach in first examining the question of whether the existing production of TRFs by VIP prior to Marpac's entry to the industry precluded a finding that the Australian industry was unestablished. It is looking only at whether such existing production precluded a wider examination of the state of the industry for the purposes of assessing whether the industry was established. As submissions had been made to the ADC to this effect, it was appropriate that the ADC deal with them.
28. I also agree with the conclusion in the ADC Report that "the fact that VIP maintained manufacture of TRFs prior to Marpac commencing production does not preclude a finding that the Australian TRF industry is an unestablished industry"¹¹. An examination of the relevant legislation and in particular s.269T(4), s.269TB(4) and s.269TG(1) of the Act must lead to a conclusion that the existence of an Australian industry producing some like goods does not preclude there being for the purpose of s.269TG(1) an Australian industry producing like goods, the establishment of which has been or may be materially hindered.
29. Having reached the preliminary conclusion that the Australian production of some like goods did not preclude an examination of whether there was an established Australian industry producing TRFs, the ADC looked at whether the Australian TRF industry was an established industry. The ADC did this by considering five indicia. The CMIA submission criticises this approach and argues that the ADC should have sought to answer the question whether the Australian industry prior to Marpac's entry was established. If it was then, CMIA contends, it stands to reason that the industry continued to be established after Marpac's entry and throughout the investigation period.
30. The critical flaw in the ADC's approach according to CMIA was that it focused on Marpac's particular circumstances with no regard to whether the industry was already established prior to Marpac's circumstances. Further the ADC's assessment of the five indicia was not correct as it overlooked VIP's particular circumstances.

¹¹ Final Report No 350, section 4.4.1 at page 29.

31. I do not agree with CMIA's submission that the assessment by the ADC of the Australian industry overlooked VIP's circumstances. Rather, the ADC did consider the circumstances of both VIP and Marpac in its assessment. It did however give more weight to Marpac's circumstances. In the ADC Report it was found that:
- Marpac is the dominant member of the Australian TRF industry with approximately 99 per cent of the Australian production during the investigation period (for all TRF sizes);
 - Marpac supplies both the direct and downstream TRF markets; and
 - compared to the total production of the Australian TRF industry, VIP's insignificant production volumes for the downstream market are immaterial, cannot influence the activity of the Australian TRF industry and are not representative of the Australian industry as a whole.¹²
32. In light of the above, it was reasonable that the ADC did give more weight to Marpac's circumstances when considering the five indicia.

Length of production

33. CMIA's submission on the first of the five indicia is to the effect that as VIP was producing like goods for over 16 years and VIP's production was stable with an established customer base, the TRF industry was a stable and established industry when Marpac entered it. I do not agree that it necessarily follows from those facts that the Australian industry was a stable and established industry before Marpac entered it.
34. The fact that VIP was producing a small amount of like goods at the time of Marpac's entry to the market cannot preclude an examination of the industry as a whole over the investigation period to determine whether its establishment is being materially hindered. As noted above, it was reasonable that the ADC gave more weight to the circumstances of Marpac in its assessment of the industry.

Volume and Stability of Production

35. CMIA refers to the finding by the ADC that VIP's production had been stable before Marpac's commencement of production in 2014. It contends that it was

¹² Final Report, section 4.4.2 at page 31.

illogical to consider the Australian TRF industry stable and established before Marpac's entry but then an unstable and unestablished industry following Marpac's entry.

36. This contention though confuses the difference between the existence of an industry and an industry which is established. The fact that VIP had a stable production of some TRFs does not preclude a finding that the Australian TRF industry was not established.
37. CMIA's submission argues that Marpac's production instability was 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 quality and supply issues. The arguments regarding Marpac's decision to focus on a single TRF size and supply issues are dealt with elsewhere in this report. However, such issues do not detract from the finding by the ADC that the Australian TRF industry was not an established industry during the investigation period.

Operational scale and stable market share

38. The ADC's approach to this issue is criticised by CMIA for being flawed in that it had regard to Marpac's circumstances only which masked the fact that the Australian industry represented by VIP before Marpac's entry was stable and established. While VIP's production may have been stable, as noted above, this does not mean that the Australian TRF industry was established. As also noted above, I do not think that the ADC erred in focusing on Marpac's circumstances when considering whether the Australian TRF industry was established.

Sustainable "break-even" point

39. With respect to the profitability of the TRF industry, the ADC relied only on Marpac's direct market sales of TRFs as the profit accounted for in the downstream market was applied to the complete can unit and not the TRF. VIP did not make direct market sales. CMIA argues that this conclusion overlooked two important considerations.
40. The first was that TRFs represent approximately 35%-45% of the costs of a complete can unit and the profit achieved by VIP on its can sales should have been apportioned. The difficulty I have with this submission is that CMIA's submission does not reference this information to any material which was before the ADC so it is not clear that regard may be had to it under s.269ZZK. Also, I note that the ADC Report states that VIP did not provide sales and costing information so that the ADC was unable to verify how VIP undertakes costing and pricing.

Given this and the small volumes of production by VIP, I consider the approach by the ADC to be appropriate.

41. The second criticism made by CMIA, is that the ADC ignored or overlooked statements by relevant can makers previously members of the can making industry as to the primary reason for those can makers ceasing production. I note that the ADC's response to this claim in the ADC Report was that it considered it to be unverifiable, as it was not known whether previous TRF manufacturers self-supplied TRFs at cost, below cost or above cost, and how market and economic conditions caused a loss of competitive advantage¹³. I also do not consider that the reasons why previous producers of like goods ceased production sometime before the investigation period to be relevant to the consideration of the profitability of the TRF industry during the investigation period.

A new product line

42. The ADC Report considered as part of the five indicia, whether Marpac's plans to manufacture other TRF sizes constituted a new product line. CMIA argues in its submission that the ADC erred in framing the question in the way it did. It contends that the question to be answered is whether the activities of Marpac are truly a new industry or merely a new product line of an already established industry. CMIA further contends that the facts demonstrated that Marpac's activities were simply the commencement of a new product line in an already established industry.
43. I agree with CMIA that the question posed by the ADC on this issue was not the correct question. The issue was not whether Marpac's plans to manufacture other sizes of TRFs constituted a new product line. The question that should have been asked was "Is the production activity for which material hindrance is claimed, a new product line deriving a production benefit from the utilisation of existing equipment, employment and expertise normally used for existing products".
44. However, I do not agree with the rest of the submission by CMIA on this issue. I address this issue further when considering the application of Visy Packaging.

Australian TRF industry during investigation period

45. In the alternative to its argument that the industry was established at the time Marpac commenced TRF production, CMIA contends that the ADC erred in finding

¹³ Final Report no. 350, section 4.4.2 at page 33.

that the Australian industry was not established during the investigation period. In support of this, the submission points to the findings in the ADC Report that Marpac had been supplying TRFs to a can manufacturer and was utilising its manufactured TRFs as a component in its self-produced complete can units.

46. The CMIA submission also relies upon the increase in production by Marpac between the September 2014 quarter and the December 2015 quarter and the increase in sales by Marpac between the March quarter 2014 and the December quarter 2015. There was a substantial increase in such production and sales, although I note that Marpac only commenced production in 2014. More importantly, the material relied upon by CMIA indicates that there was a substantial reduction in sales by Marpac in the first quarter of 2016 and a further substantial decrease projected for sales in the second quarter of 2016.
47. I do not consider that anything in the submission by CMIA on the issue of whether there was an established Australian TRF industry during the investigation period supports the ground that the ADC erred with respect to the findings on this issue.

Finding of Hindrance

48. CMIA contends that the ADC did not properly separate and distinguish the injurious effects of a number of factors which it alleges had a material impact on the Australian industry's performance. These factors were:
 - The impact of non-dumped export prices from India;
 - Marpac's inefficient operation and lack of economies of scale;
 - Marpac's inability to negotiate competitive steel input prices;
 - Marpac's inability to supply TRFs with higher technical specifications;
and
 - Injury to Marpac from lost supply contracts by can filling customers.
49. With respect to the third and fourth factors, I deal with these below when considering the applications by Irwin Packaging and Visy Packaging.

Undumped exports

50. The submission in relation to the imports from India asserts that the ADC overlooked or ignored the impact of these non-dumped imports and points out that

the ADC identified India as being the largest exporting country and holding the largest market share. CMIA's submission also relies on observations by the ADC that:

- there was during the investigation period a shift in imports from Malaysia and Singapore to non-dumped imports from India; and
- can manufacturers had dual suppliers with the primary supplier supplying the higher volume with a lower price.

51. As a result, CMIA argues 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.

52. With respect to the findings relied upon by CMIA, I note that undumped imports did have the biggest share of the market in the second half of the investigation period but that over the whole of the investigation period it was found that undumped imports had 37% of the market¹⁴. I also note that for the specific product manufactured by Marpac during the investigation period, namely the 73mm TRF, the largest market share was not held by undumped imports. Dumped imports were found to have had 53% of the market.¹⁵ Accordingly, I do not consider that the arguments made by CMIA in its submission on this issue are supported by the factual findings made by the ADC.

53. While the ADC Report does not consider the impact of imports from India specifically, it did in its analysis of the cause of the hindrance to the Australian industry, consider the impact of undumped imports. Its finding was that:

- undumped 73mm TRFs supplied to composite can manufacturers held a minority market share over the investigation period;
- importers' dual supply arrangements mean that even if an importer sourced undumped TRFs as its primary supply, Marpac has been hindered from being one of the dual suppliers as importers have a selection of dumped TRFs from which to source secondary supply; and
- Marpac's supply (as a secondary supplier to its composite can manufacturing customer) was directly replaced by dumped TRFs.¹⁶

¹⁴ Final Report No 350, section 5.6 at page 41.

¹⁵ As above at page 43.

¹⁶ Final Report No 350, section 7.6.3 at page 60.

54. I am not satisfied by the submission made by CMIA that the ADC did not properly consider the impact of undumped exports from India when examining the cause of the hindrance being suffered by the Australian TRF industry.

Inefficient operation

55. CMIA submits that given Marpac's inability to produce and supply TRF sizes other than 73mm, it was reasonable to conclude that Marpac did not achieve its forecasted financial performance targets due to its limited manufacturing capabilities and that this had no link to TRF imports or import prices. This submission however disregards the finding by the ADC that Marpac did have plans to move into production of other TRF sizes and that in "the absence of the maintenance of existing supply contracts and hindrance from obtaining new supply contracts for 73mmTRFs, Marpac was unable to implement the staggered production of other TRF sizes as scheduled".¹⁷
56. The ADC considered that dumped TRFs caused a delay in Marpac's plans to manufacture other TRF sizes. Indeed, Marpac's failure to move into the planned production of other sizes could be considered evidence of the material hindrance to the establishment of the Australian TRF industry and not a cause of that hindrance.
57. CMIA's submission also refers to the specification for the TRFs manufactured by Marpac not being designed for steel cans and that rectifying this issue would require a substantial further investment by Marpac. According to CMIA's submission, this highlights that it was the limitations on Marpac's current operational capabilities which contributed to Marpac not achieving its business performance targets.
58. Again, Marpac's inability to further invest in different specifications could be considered evidence of the material hindrance to the establishment of the Australian TRF industry rather than a cause of it. The ADC found that reduced revenue and profitability for the Australian industry prevented revenue growth which otherwise would have been reinvested in the industry for access to the steel can market segment.¹⁸
59. CMIA's submission also contends that Marpac was a high cost operation dependent on a very narrow customer basis. It refers to the undumped imports

¹⁷ As above, section 7.7.2 at page 64.

¹⁸ As above, section 7.8 at page 66.

from India undercutting Marpac's prices by up to 40.4%. However, as noted above, the undumped imports were only significant in the last two quarters of the investigation period and did not have the major market share in the 73mm TRF market. I note that the price undercutting analysis for that market did not show anywhere near the same degree of price undercutting for imports from India.¹⁹

60. The submission by CMIA also argues that as imports of 73mm TRFs from the Philippines undercut Marpac's prices by up to 21.5%, a dumping duty rate of 12.8% on those imports would mean that those imports would continue to undercut Marpac's selling prices. The price undercutting analysis conducted by the ADC in relation to 73mm TRFs does not however support CMIA's submission in this respect. In any event, the submission does not explain why the undercutting by the dumped exports from the Philippines was not materially hindering the establishment of the Australian TRF industry.

Lost supply contracts

61. CMIA's submission on this point notes the finding by the ADC Report that Marpac's TRF production is used as an input in the production and sale of complete can units to the downstream market which includes producers and/or contract fillers. Therefore, it contends, any lost sales of Marpac's finished can business will have a direct and detrimental impact on Marpac's TRF production.
62. CMIA understands that Marpac's finished can sales have been negatively impacted from lost contracts by Marpac's customers servicing the retail market. No reference is made to any material in support of the alleged impact from lost contracts by Marpac in its finished can business. In the absence of any evidence in support of this contention, I am unable to give it any weight. In any event, it does not affect the findings made by the ADC as to the effect that the dumping had on the establishment of Marpac's direct TRF market.
63. For the reasons set out above and also below with respect to the applications of Irwin Packaging and Visy Packaging, I am not persuaded by the arguments put by CMIA in its submission that the decision of the Minister was not the correct or preferable decision.

¹⁹ Confidential Attachment 8 to Final Report No 350.

Genpacco

Revised computed costs

64. Genpacco's application for review submits that the decision of the Minister was not the correct or preferable decision because the ADC did not accept the revised computed costs of Genpacco which it argued would show a more accurate and direct computation of costs for the TRFs it manufactured. To understand this submission, it is necessary to set out the history of the investigation into Genpacco's exports during the dumping investigation.
65. The ADC Report notes that Genpacco was identified as an exporter of TRFs to Australia during the investigation period and was provided with an exporter questionnaire. Genpacco provided its response to the questionnaire²⁰ and the ADC visited Genpacco to verify the information provided in the questionnaire response²¹. The report of this visit notes that the ADC team verified Genpacco's cost to make and sell (CTMS) and that during this process it observed:
- “Genpacco had allocated certain manufacturing overhead costs to TRFs using a different cost allocation methodology relative to the methodology it uses to allocate costs to all other products and the methodology it outlined in its response to the exporter questionnaire. The verification team observed that this alternative cost allocation methodology understated Genpacco's cost of production for TRFs. Genpacco did not provide any evidence to support this alternative cost allocation methodology”.²²
66. Following the verification visit, the ADC team also observed that “for some models and quarters, the costs recorded in the updated CTMS spreadsheet did not match the costs recorded in Genpacco's management reports and supporting worksheets. Therefore, the verification team amended the CTMS spreadsheet relating to some TRF models to reflect the costs recorded in Genpacco's management reports and supporting worksheets”²³. In its comments on the Verification Report, Genpacco disagreed with the amendments to the CTMS but the ADC team found that there was no supporting evidence for these comments.

²⁰ Exporter Questionnaire Document 008 in the EPR 350.

²¹ Verification Report August 2016 Document 031 in EPR 350.

²² As above, section 4.1.1 at page 7.

²³ As above.

67. On 14 November 2016 the ADC received a detailed submission from Genpacco making claims for adjustments to information provided during the verification visit²⁴. Following queries by the ADC, a further submission was made by Genpacco in December 2016.²⁵ Although the further submissions by Genpacco were made out of time, they were still investigated by the ADC. The ADC Report concluded that the submissions by Genpacco were unreliable as:

- The cost to make data (Genpacco's allocation of costs from its management systems) was revised by Genpacco after the ADC verified Genpacco's data and issued its verification report;
- the revised data could not be reconciled with the data verified by the ADC; and
- the ADC was satisfied with the previous data provided by Genpacco, as it verified upwards to Genpacco's management systems and audited financial statements and verified downwards to the purchase of TRF manufacturing inputs.²⁶

68. With its application for review, Genpacco provided a letter of appeal which expanded on the grounds for review set out in the application. I have reviewed the details given for the claimed adjustments. I have also reviewed the analysis conducted by the ADC of the claimed adjustments at the time the ADC team considered the further submissions by Genpacco²⁷. I am satisfied that the approach taken by the ADC to the further claims made by Genpacco was reasonable, that the further claims were properly considered and that the decision not to amend the verified cost data based on the further submissions made by Genpacco was appropriate.

69. My reason for this conclusion is that the cost data used by the ADC in calculating the normal value for Genpacco's exports was based on the information provided by Genpacco in its response to the Exporter's Questionnaire and was verified by the ADC team from the records maintained by Genpacco during the team's visit to Genpacco. The adjustments were claimed by Genpacco after publication of the SEF and by then it was too late to have those claims verified. Without that verification and given the concerns expressed by the ADC team in the analysis

²⁴ Submission by Genpacco dated 10 November 2016 Document 046 EPR 350.

²⁵ Submission by Genpacco dated 19 December 2016 Document 078 EPR 350.

²⁶ Final Report No 350, section 6.2.2 at page 45.

²⁷ Confidential Attachment 4 to Final Report No 350.

made of the claims, to accept the new costing information claimed by Genpacco would mean using unverified and potentially unreliable data.

70. Genpacco also submitted in its application that it was not producing any like product to the TRFs. I understand this to refer to the fact which was established during the dumping investigation that Genpacco did not make sales of TRFs in the domestic Philippines market. The absence of such sales or any sales by any other sellers in the domestic market is why the ADC determined normal value for the exports by Genpacco under s.269TAC(2) of the Act. There is nothing in Genpacco's submission which explains why this was not an appropriate approach.
71. I do not consider that the grounds provided by Genpacco in its application establish that the decision of the Minister was not the correct or preferable decision.

Irwin Packaging

72. As with the CMIA application, the application for review by Irwin Packaging relied on a submission by John Bracic of J Bracic & Associates. This submission was in similar terms to that provided by CMIA with its application as far as the first three grounds of the application. As noted above those three grounds were the same for both CMIA and Irwin Packaging's application. To the extent that the submission is in the same terms, I will not repeat the consideration of those grounds which is set out above with respect to the CMIA application. Irwin Packaging does however provide more information to support the third ground and I deal with this below, before considering the fourth ground in Irwin Packaging's submission.

Finding of Hindrance

Undumped imports

73. In relation to the third ground and the submission regarding the effect of undumped imports from India, Irwin Packaging provided information with respect to certain purchases it made of TRFs from an Indian exporter and from Genpacco. Irwin Packaging's submission notes that the prices from these two sources were the same for corresponding months. The submission also refers to Figure 11 in the SEF which it states shows that the export prices from India and the Philippines were the same for most of the investigation period with non-dumped Indian export prices being substantially lower than Philippine exports for the first quarter of the investigation.

74. The ADC concluded in the SEF that at the beginning of the investigation period Marpac's price for 73mm TRFs was comparable to the prices from India, Malaysia and Singapore²⁸. The information also indicates that the export prices from the Philippines initially were below those from India, Malaysia and Singapore. So, to this extent, the information in the SEF does not support the submission by Irwin Packaging.
75. The information does indicate that the export prices from India and the Philippines were similar over the latter quarters of the investigation period. However, the submission by Irwin Packaging does not take into account the respective market shares of the dumped and undumped 73mm TRFs and the analysis of the reasons for Marpac's loss of sales in the composite can market, as set out in the ADC Report, which was found to be attributable to dumped TRFs²⁹. I do not consider that the further information provided by Irwin Packaging affects my conclusion in relation to this ground.

Technical Specifications

76. Irwin Packaging in its submission provides more details in support of the claim that the lower technical specifications for Marpac's TRFs had a detrimental affect on the ability of Marpac to supply TRFs for use on complete can units. Irwin Packaging states that it prefers to have TRFs with a thicker tinplate gauge than that supplied by Marpac, particularly as it supplies the food industry and quality is important. So, even if Marpac lowered its price, the thinness of the tinplate gauge would cause Irwin Packaging to refuse to purchase it. Irwin Packaging contends that the ADC ignored this evidence.
77. The submission by Irwin Packaging is at odds with findings by the ADC and the submission by Marpac on this issue. Irwin Packaging alleges that Marpac is unable to meet its requirements for TRFs to be manufactured with tinplate thickness in a range of 0.21mm to 0.22mm. On the other hand, the ADC Report states:

“No evidence has been provided by interested parties demonstrating that Marpac's TRFs are of inferior quality and functionality and cannot be used on food cans, and no evidence has been provided that Marpac is incapable

²⁸ Statement of Essential Facts No 350, section 8.3.1 at page 33.

²⁹ Final Report No 350, section 7.6.3 at pages 58,59 and 60.

or unwilling to manufacture TRFs to suit individual can manufacturer specifications".³⁰

78. This would indicate that the ADC did not accept the submission by Irwin Packaging. Certainly, the ADC did consider the claims made as to the inferiority of the Marpac TRFs, including technical specifications as to the tinplate gauge.³¹ The ADC accepted that Marpac could manufacture TRFs with different tinplate gauge specifications. This appears to be based not just on the submission by Marpac but on the information provided by VIP during a meeting in October 2016 that it would take no more than 90 minutes to alter the presses to accommodate a tinplate gauge change.³²
79. Given the above, I do not consider that the material before the ADC supported the contention made by Irwin Packaging that Marpac could not supply TRFs to the specifications it required. In any event, even if Marpac was unable or unwilling to supply TRFs with such specifications this would not affect the findings made by the ADC with respect to the effect dumped TRFs were having on Marpac. I note that the dumped imported TRFs do not need to be the sole cause of the hindrance suffered by the Australian industry.³³

Lack of evidence dumped exports materially hindered establishment of industry

80. As noted above, Irwin Packaging's application had a fourth ground. This ground is that there was a lack of evidence that dumped exports materially hindered the establishment of the Australian industry. With this ground, Irwin Packaging focuses on the loss of a contract by Marpac to supply 73mm TRFs to a can supplier because that supplier lost its contract to supply to an end customer. The identity of the supplier and end customer were not disclosed in the ADC Report. However, the public version of the submission by Irwin Packaging notes that the new contract to supply the end customer was awarded to it.
81. Irwin Packaging contends that the ADC's finding that dumped exports materially hindered Marpac's establishment relied heavily on the loss of this contract. As there was no direct link between Marpac's reduced TRF sales and imported TRFs, Irwin Packaging contends that the ADC sought to establish a causal link by simply

³⁰ As above, section 3.5.2 at page 21.

³¹ As above, sections 3.5.2 and 3.5.3 at pages 20 to 23; section 7.5.4 at page 54.

³² Minutes of Meeting with VIP, Document No 43 EPR 350.

³³ ICI Australia Operations Pty Ltd v Fraser [1992] FCA 128; (1992) 34 FCR 564.

identifying that TRFs imported from the Philippines were a component of the complete can units supplied by Irwin Packaging. This analysis it submits does not meet the minimum requirements of establishing a causal link based on an objective examination and positive evidence.

82. There are two arguments made by Irwin Packaging. The first takes issue with the ADC's finding that price was the sole reason for the end user changing can manufacturer. Irwin Packaging submits that while price was a primary factor, other factors brought to the ADC's attention were also important.
83. Both the ADC Report and Irwin Packaging's submission refer to a meeting held with representatives of the end user. The notes of that meeting include that the end user's "first requirement is that an agreement on canister price is achieved, before further items such as canister testing and other contract or value-add items are negotiated."³⁴ The notes also record advice that Irwin Packaging and the end-user had previously failed to negotiate supply contracts because the price was not low enough.
84. The other factors to which Irwin Packaging refers as important with the decision to change suppliers related to quality, technical specifications and technical assistance. Except for the technical assistance, the other factors were largely discounted by the ADC. With the quality issues, having regard to the ADC's reasons for discounting this and having read the notes of the meeting with one of the end-users for Marpac's complete can units,³⁵ I consider that the ADC's approach was reasonable. With the technical specifications, I note that the end-user did not initially want the specifications offered by Irwin Packaging.
85. Given the evidence from the end-user customer, I consider that price was the overwhelming reason for the decision by the end-user to change can manufacturer. Therefore, I do not consider that the finding by the ADC on the importance of the price to be unsupported by the evidence.
86. The second argument made by Irwin Packaging is that at the time of the tender for the end-user contract, Irwin Packaging was dual sourcing its supply of TRFs from both India and the Philippines and that as the pricing for both imports was similar (as found by the ADC), in doing its internal costings it relied on the prevailing price for imports from both India and the Philippines, adjusted for forecasted movements in global tinplate prices. An initial difficulty I have with this submission is that there

³⁴ Notes of Meeting with end user 16 December 2016 Document 61 EPR 350.

³⁵ Notes of Meeting with end user Document 65 EPR 65.

is no reference to material before the ADC supporting the statements regarding Irwin Packaging's internal costings.

87. The ADC Report found that the competitor can manufacturer used a dumped TRF.³⁶ This finding is supported by information and submissions made by Irwin Packaging during the dumping investigation.³⁷ Indeed, I do not understand Irwin Packaging's submission to the Review Panel to be putting anything to the contrary. Rather, the submission is that even if the price of the dumped TRF had been higher to reflect an undumped price, the tender price would have remained unchanged given the prevailing undumped price.
88. It is speculative to assume what the price of the TRF would have been in the absence of the dumped TRFs. In this respect, I note that the undumped imported TRFs did not have dominant market share in the 73mm TRF market. In the absence of the dumped 73mm TRFs, prices may have been higher. In any event, there was, contrary to the submission by Irwin Packaging, evidence to support the finding by the ADC that dumped TRFs were used in the complete can units offered to the end-user customer and this allowed for the price of the cans to be lower than otherwise.
89. I do not consider that the grounds relied upon by Irwin Packaging are persuasive that the decision of the Minister was not the correct or preferable decision.

MC Packaging

90. MC Packaging is a Singaporean manufacturer and exporter of TRFs to Australia. It was found during the dumping investigation to be an uncooperative exporter. The application for review by MC Packaging was accompanied by a submission by Moulis Legal. Moulis Legal also provided a further submission on behalf of MC Packaging under s.269ZZJ.
91. The first ground of MC Packaging's application is that the Commissioner erred in treating it as an uncooperative exporter. The submission by Moulis Legal contends that the decision to treat MC Packaging as uncooperative was not the correct decision because the Commissioner could not have been satisfied of the requisite matters under s.269T of the Act. In the alternative, the decision was not the preferable decision because the decision should not have been exercised in the way it was.

³⁶ Final Report No 350, section 7.6.1 at page 56.

³⁷ Importer Visit Report for Irwin Packaging Pty Ltd July 2016 (Confidential Version); Submission by Irwin Packaging dated 25 October 2016 (Confidential Version).

92. The submission by Moulis Legal on behalf of MC Packaging sets out the chronology of the dumping investigation for what it describes as:
- The milestones of the investigation;
 - The interactions between MC Packaging and the ADC in the investigation; and
 - The interactions the ADC was having with other interested parties during the investigation.
93. Moulis Legal contends that the facts show that MC Packaging's initial understanding of the requirements of the investigation was incomplete and that it was initially resistant to providing information to the ADC because it had concerns about the confidentiality of its information. The submission also states that MC Packaging had not been involved in such a procedure before and was not fully cognisant of the usual way these investigations are conducted.
94. I agree that the material does indicate that MC Packaging was reluctant to provide information which was confidential. However, I do not consider that the other conclusions can necessarily be reached from the material. I note that Marpac contends in its submission that MC Packaging was familiar with the anti-dumping procedures. I do not know if this is the case or if this is relevant information within the meaning of s269ZZK. In any event, I do not consider it is necessary to know whether or not MC Packaging was familiar with such procedures.
95. As the submission by Moulis Legal notes, the Exporter Questionnaire provided to MC Packaging included detailed instructions. The questionnaire had five pages of explanation of the process and what was required from MC Packaging if it wished to cooperate with the investigation. In particular, it advised:
- That if MC Packaging did not respond, did not provide all of the information sought, did not provide information within a reasonable time period, or did not allow the ADC to verify the information, the ADC may deem it uncooperative;
 - That all information provided to the ADC in confidence would be treated accordingly and gave advice on how to provide confidential and public versions of the response;
 - The ADC would seek to verify the information provided by MC Packaging;

- The purpose of a verification visit was to verify the information submitted in response to the questionnaire. It was not meant to be a chance for the exporter to provide new or additional information; and
- The ADC expected the response to the questionnaire to be complete and accurate.

96. As also noted in the Moulis Legal submission, after the questionnaire was provided to MC Packaging the following exchanges took place:

- On 3 June 2016 MC Packaging replied to the ADC by email, advising that it was under consideration and that MC Packaging would reply by 10 June 2016;
- On 15 June 2016:
 1. the ADC emailed MC Packaging to advise that verification visits were being scheduled, and that the ADC had not heard back from MC Packaging and asked whether it would be participating in the investigation;
 2. MC Packaging responded to the ADC to advise that it was not able to provide detailed cost breakdowns as requested by the ADC, but gave a percentage breakdown of costs to manufacture and sell. MC Packaging said it could show the tinfoil and foil prices when the ADC visited Singapore; and
 3. The ADC replied by listing out all the information required and suggesting visit dates. MC Packaging email's in response stated that it did not agree to fill out the spreadsheets as requested by the ADC, but would share major component costs on the visit to Singapore.
- On 17 June 2016 the ADC emailed MC Packaging to remind it that the questionnaire had detailed instructions for its completion and that the ADC would review MC Packaging's response to decide whether its information was suitable for the investigation. MC Packaging emailed the ADC to say that it would provide the suggested breakdown as long as the information was kept confidential and requested an extension to 30 July;
- On 20 June 2016 the ADC emailed MC Packaging to advise that it would get back to it regarding the extension request and that it had limited flexibility with visit dates;

- On 22 June 2016 the ADC emailed MC Packaging again and advised that it would get back to MC Packaging regarding the extension request. The ADC inquired as to the location of MC Packaging's facilities;
 - On 24 June 2016 the ADC emailed MC Packaging to advise that it had granted it an extension of time to 11 July 2016 and again asked where MC Packaging's facilities were located;
 - On 29 June 2016 the ADC unsuccessfully attempted to get in touch with MC Packaging by telephone, and then emailed MC Packaging to ask it to get in touch with the ADC to discuss its participation in the investigation. That day there was a telephone discussion between the ADC team and MC Packaging, following which the ADC emailed MC Packaging confirming the ADC's proposal to visit MC Packaging on 27 July 2016, asking about what was produced in Malaysia and Singapore and advising of information required in MC Packaging's questionnaire response; and
 - On 29 June 2016 MC Packaging emailed the ADC to say that MC Packaging would not share all the necessary information on the spreadsheet, but that it would fill out the information that it was able to release and asking for confidentiality.
97. On 11 July 2016 MC Packaging provided spreadsheets to the ADC in response to the questionnaire. Not only did MC Packaging not include a completed G2-Production spreadsheet, as acknowledged in the Moulis Legal submission, but it failed to provide answers to almost all of the questionnaire. This was not just the provision of a response with some deficiencies which could be addressed quickly, but a substantial failure to respond to the questionnaire and to provide information which could be used to calculate dumping margins and subsequently verified.
98. MC Packaging was on notice from the information provided with the questionnaire and in the subsequent correspondence with the ADC, that failure to provide the requested information by the required time could result in it being declared uncooperative. In providing the response it did, it took that risk.
99. Moulis Legal submit that for the Commissioner to decide that MC Packaging was uncooperative in accordance with s.269T, the Commissioner had to be satisfied:
- That MC Packaging did not give the Commissioner information the Commissioner considered to be relevant to the investigation within a period the Commissioner considered to be reasonable; or
 - That MC Packaging significantly impeded the investigation.

100. The submission further contends that for the first condition to be satisfied the Commissioner has to have formed the opinion that the information that MC Packaging gave was irrelevant to the investigation. The argument appears to be that as MC Packaging gave the ADC some information which was relevant to the investigation, then the first condition under s269T could not be met. In other words it is not the sufficiency of the information which has been provided which is the test.
101. I do not agree with this interpretation of s.269T. It would mean no matter how inadequate the response by the exporter, provided some relevant information was provided, the exporter could not be considered uncooperative.
102. Such an interpretation seems to me to be against the clear intent of the legislation. The definition of “uncooperative exporter” was introduced into the legislation with amendments to s.269T made by the Customs Amendment (Anti-Dumping Improvements) Act (No 3) 2012, apparently in response to the issues identified in *Guardian Industries Corp Ltd v Attorney-General of Australia* [2013] FCA 780 with regard to the then exporter definitions and sampling. The Explanatory Memorandum to the amending bill:
- refers to the changes strengthening the provisions that deal with non-cooperation in relation to dumping investigations;
 - states that the amendments will prevent possible manipulation of the level of cooperation; and
 - refers to the definition applying where the exporter has not cooperated within the process of the investigation.³⁸
103. The result of being declared an uncooperative exporter is that the export price and normal value is worked out under s269TAB(3) and s.269TAC(6) respectively³⁹. Those subsections provide that where “the Minister is satisfied that sufficient information has not been furnished” then the export price or normal value can be determined by the Minister having regard to all relevant information. This seems at odds with the interpretation of “uncooperative exporter” for which the submission by Moulis Legal contends.

³⁸ Explanatory Memorandum to the Customs Amendment (Anti-Dumping Improvements) Act (No 3) 2012 at pages 7,8 and 27.

³⁹ Section 269TACAB(1)(d) and (e) .

104. It is necessary to consider the decision to treat an exporter as uncooperative in the broader context of the dumping investigation. The questionnaire is provided by the ADC to an exporter to obtain the information necessary for the ADC to determine the export price, normal value and dumping margin for the exports. Such information has to be verified and is necessary for the consideration of whether or not to make a PAD and to possibly take securities in respect of any interim dumping duty that may be payable. That consideration takes place from day 60 of the initiation of the investigation.
105. There are time constraints imposed by the legislation on the time the ADC can take in completing the dumping investigation. While the Minister can extend the time for the key steps such as the SEF and the final report to the Minister under s269TEA, the legislation evinces a clear intention that the investigation be concluded in a timely fashion. The ability of the ADC to treat an exporter as uncooperative allows the investigation to proceed and not to be unduly impeded by an exporter's failure to cooperate.
106. To give the definition of uncooperative exporter the meaning for which Moulis Legal argues, would be contrary to the purpose and object of the legislation and contrary to s.15AA of the *Acts Interpretation Act 1901*. It would allow an exporter to manipulate the investigation process and hamper the ability of the ADC to consider the necessity of a PAD and to complete the investigation in a timely way.
107. The submission by Moulis Legal contends that while the response by MC Packaging was deficient it still provided relevant information that covered critical areas of the ADC's investigation as it applied to MC Packaging. However, the response also was highly deficient and did not provide certain information which was critical to the investigation.
108. The submission also points out that MC Packaging recognised the need for verification of its information and discussed with the ADC how this could be achieved. The information to be verified is, however, that which is provided to the ADC with the response to the questionnaire.
109. Moulis Legal's submission argues that MC Packaging should have been given a deficiency notice and the opportunity to address those matters. It also points out that others were given that opportunity. The ADC gave reasons for the decision not to allow further time for MC Packaging to provide a supplementary response. These reasons were:
- The nature and scope of MC Packaging's deficiencies were extensive. In particular, no response was provided for almost all of the questions in the Exporter Questionnaire as detailed in Attachment A (to the letter);

- Having provided MC Packaging with an extension of time to complete the Questionnaire, the information that was provided was not complete, relevant and accurate and as such was not capable of verification. The cumulative effect of the deficiencies was that the ADC was unable to reliably determine an individual dumping margin for MC Packaging on the information it had provided; and
- Allowing MC Packaging further time to provide a supplementary response would significantly impede the timely and efficient conduct of the investigation. In this regard, it was noted that allowing for an additional supplementary response may affect the ability to consider and make a PAD by day 60 of the investigation (18 July 2016).

110. I consider that the reasons given by the ADC for not allowing further time for MC Packaging to provide a supplementary response were reasonable. It was the scale of the deficiency and the failure to provide critical information which was determinative and also differentiated its response from that of other exporters who, as Moulis Legal note, were given time to address deficiencies.

111. The Moulis Legal submission also complains that it was less than 24 hours between the 11 July deadline and the ADC's decision that MC Packaging was an uncooperative exporter. The submission argues that the treatment of MC Packaging was unjustified and extremely harsh both absolutely and relatively to the treatment of other participating exporters.

112. This argument though does not take the matter further. It does not matter how long the ADC took once the deadline had passed to make a decision to treat the exporter as uncooperative. The issue is whether or not there was a failure to provide relevant information by the deadline and whether in all the circumstances at that time, the exporter should be allowed further time to provide more information. I have dealt with that issue above.

113. In so far as the treatment of MC Packaging is argued to have been different to that of other exporters, this in itself is not a basis for the decision with respect to MC Packaging not being the correct or preferable decision. In any event, it was the difference in scale in the deficiencies that seems to have persuaded the ADC. I note that although other exporters were allowed to provide further information, that information was not necessarily relied upon if it could not be verified. In this respect, MC Packaging was not treated differently.

114. The submission by Moulis Legal refers to decisions of WTO Panels on the rights of interested parties to defend their interests. I do not consider that these cases take the matter further. MC Packaging was given the right and opportunity to participate in the investigation. It could have provided the requisite information within the

extended time period allowed. It was advised by the ADC as to the information required and the importance of providing a complete response to the questionnaire and of the consequences of non-compliance. Even though it was declared uncooperative it was still given the opportunity to review initial findings and to make submissions.

115. In any event, it is the Australian anti-dumping legislation which governs the investigation and the ADC was also obliged to comply with the relevant Ministerial Direction.⁴⁰ I note that no submission was made that this either did not apply or that the ADC had not complied with it.

116. Given my view that MC Packaging has not established the first ground in its application namely that the ADC erred in treating it as an uncooperative exporter, I do not intend to consider the second ground put by MC Packaging as it only becomes relevant if the first ground succeeded.

Visy Packaging

117. The three grounds relied upon by Visy Packaging are similar to those put forward in the applications of CMIA and Irwin Packaging. The arguments in support of those grounds are also very similar. For this reason, I only address below those arguments made by Visy Packaging which are additional or different to those put forward by CMIA and Irwin Packaging. This includes the argument made by all three applicants regarding Marpac's alleged inability to negotiate competitive steel input prices.

Australian Industry already established

118. In its submission, Visy Packaging argues that the ADC erred in failing to take into account the prior history of the Australian TRF industry. I do not agree with this submission. The ADC looked at the investigation period and examined details of the Australian market from 1 April 2012 for the purpose of analysing hindrance to the establishment of an Australian industry. This seems appropriate.

119. The report to the Minister is based on an examination of exports to Australia during the investigation period. Accordingly, the ADC was required to consider whether or not such exports were materially hindering the establishment of the Australia industry. In this context, it is not relevant whether or not there existed an established Australian industry at some time in the past.

⁴⁰ Customs (Extension of Time and Non-cooperation) Directions 2015.

120. The second argument made by Visy Packaging is that the ADC erred in its interpretation of the legislation in making a distinction between an Australian industry and an established Australian industry. This argument cannot possibly be correct. If it was it would not be possible for an Australian industry to ever make an application for anti-dumping measures on the basis that its establishment was being hindered by dumped exports.
121. An Australian industry is defined in s.269T(4) and only requires that there be a person producing like goods. The production of some goods, however insignificant in number, cannot be interpreted as meaning the same as an established industry. I note that s. 269TB(4) requires an application for a dumping duty notice (including one on the basis of material hindrance to the establishment of an Australian industry) to be supported by the Australian industry. This makes it clear that the proper construction of the legislation is that there is a distinction between an Australian industry for the purpose of s.269T(4) and an industry which is established.

Australian TRF industry during investigation period

122. The submission by Visy Packaging contends that the ADC erred in its application of the five criteria it applied in determining that there was not an established industry. This is because, on the facts established by the ADC, Australian TRF production satisfied a majority of these indicators. Visy Packaging relies on three points to support this contention.
123. The first is that VIP's production of different sizes of TRFs over many years should have been taken into account and therefore the Australian industry had been producing TRFs for a significant period. The ADC did take into account the production by VIP and accepted it was manufacturing TRFs before 2013.⁴¹ It was also appropriate though that the ADC take into account the relatively short period of time that Marpac had been producing TRFs, particularly given the insignificant production by VIP.
124. The second point made by Visy Packaging was that the ADC found no evidence that Marpac or VIP experienced a material interruption or start stop production. Visy Packaging contends that the ADC gave little or no weight to this and instead speculated as to what production may occur in the future. The second indicator used by the ADC was volume and stability of production. The existence of interruptions or start stop production only went to the second part of this indicator.

⁴¹ Final Report No 350, section 4.4.2 at page 30.

With respect to volumes, the ADC found that production volumes for the industry were modest.

125. The ADC did, in its analysis of Marpac's production, consider the significant decline in supply of TRFs to the direct market in the last quarter of the investigation period. Given that Marpac's supply of TRFs to the direct market was a significant part of Marpac's business, its susceptibility to changes in demand in this market affected its entire business. The ADC report goes on to conclude that this susceptibility "increases the risk of future declining volumes or discontinuing direct market TRF supply in the immediate future"⁴². Accordingly, the ADC concluded that Marpac did not have secure and anticipated production.
126. I do not consider that the above analysis and conclusion amounts to speculation about the future. Rather it is analysing Marpac's business during the investigation period and its susceptibility to changes in demand in the direct market part of its business as evidenced by the decline in the last quarter of the investigation period. This then has an effect on Marpac's entire TRF business.
127. The third point made by Visy Packaging is that Marpac maintained a quarterly profit on the sale of TRFs in the direct market during the investigation period and therefore it exceeded a "break even" point. Despite this, Visy Packaging, submits that the ADC merely speculated that Marpac was operating between the survival and self-sustainability phases of growth and was susceptible to adverse market changes.
128. The ADC found that at the beginning of the investigation period Marpac was operating between the survival and self-sustainability phases of growth. The reasons for this were:
- Marpac's modest operations;
 - commensurate modest production volumes; and
 - reliance on a single TRF customer in the direct market.
129. By the time of the ADC Report, the ADC found that Marpac was operating in the survival phase because it had been forced to further reduce expenses to maintain profitability with declining demand. The ADC also found that further expense reductions would risk Marpac's ability to continue to manufacture TRFs for the

⁴² Final Report No 350 at page 31.

direct market.⁴³ Given the above and for the further reasons set out in the ADC Report, I consider that the finding with respect to this indicator was reasonable.

130. The final point made by Visy Packaging was with respect to the indicator described in the ADC Report as “A new product line?”. The Visy Packaging submission describes this issue as whether or not the goods are a new product line and contends that this indicator 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 and expertise normally used for existing products.
131. Visy Packaging's submission notes that the ADC 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 was not established. This it contends is flawed logic as the absence of a new product line does not positively prove that the industry was not established but can only be used to demonstrate that an industry was already established.
132. I agree with the submission on this last point. The absence of a new product line does not positively prove that the industry was established. The question the ADC posed in the ADC Report was whether Marpac's plans to manufacture other TRF sizes constituted a new product line of the goods currently manufactured by the Australian TRF industry. It found that it did not. I am not sure why the ADC considered the other TRF sizes rather than asking whether or not the production activity for which material hindrance was claimed was a new product line. It appears to me that material hindrance was claimed with respect to the 73mm TRFs as well as the other sizes.
133. Visy Packaging argues that Marpac's TRF production did constitute a new product line. However, the reasons given for this include assertions of fact which are not referenced to material before the ADC and hence may not be relevant information. Marpac may have purchased assets and equipment from another TRF manufacturer. It would have had to acquire the equipment from somewhere. It was involved with the packaging industry as Visy Packaging notes. However, I do not consider that this establishes that Marpac was able to use existing TRF equipment and employment, skill and expertise from its can making operations for the manufacture of TRFs such that this production activity was simply a new product line.

⁴³ As above, section 4.4.2 at page 33.

Finding of Hindrance

134. The submission by Visy Packaging refers to the obligation on the ADC to consider whether hindrance may have been caused by factors other than dumping and that an injury determination must be based on facts and not merely upon allegations, conjecture or remote possibilities. It contends that the ADC erred in failing to consider and place appropriate weight on certain factors.

Limited Production

135. The first is Marpac's limited production. This refers to the fact that Marpac produced one size of TRF. Visy Packaging submits that the ADC's conclusion regarding hindrance was based on the finding that 73mm TRFs represent approximately 50 percent of the total market. It asserts that the larger TRF sizes represent a much larger percentage of the market with 73mm TRFs representing only 29 percent of the total value of TRFs purchased for use in Australia. This assertion appears to be based on Visy Packaging's purchases of 73mm and the further assertion that Visy Packaging's purchases account for 70 percent of the total value of TRFs purchased in Australia.

136. It is difficult to reconcile the assertions made by Visy Packaging with the findings of the ADC. Those findings are based on the analysis set out in the confidential attachments. As Visy Packaging has not referenced the assertions to material before the ADC (except to refer to the fact that its purchasing records were provided to and verified by the ADC), it is not clear to me what reliance can be placed on such assertions.

137. However, I am not sure that it matters. The claim made is that the ADC has not properly considered the commercial realities of TRF production and supply in deciding that Marpac has been hindered by dumped imports and that Marpac has been hindered by other factors such as its own inability to compete in the market place. The factual assertions made by Visy Packaging do not support this.

138. The ADC did consider the possibility that it was other factors including Marpac's non-production of other sizes of TRFs. I have dealt with this claim in response to the submission made by CMIA.

Price Undercutting

139. The submission by Visy Packaging criticises the findings of price undercutting by the ADC. It argues that as the prices for TRFs sourced from Malaysia and Singapore were more expensive than Marpac's TRF prices in the second and third

quarters of 2015, there was no price undercutting. This ignores the evidence of price undercutting by the dumped exports from the Philippines for all of the investigation period.

140. There was also significant price undercutting by exports from Malaysia and Singapore in the fourth quarter of 2015. Visy Packaging asserts that this was when it was transitioning its sourcing of TRFs from Singapore and Malaysia to India and that the undercutting is based on one shipment. It argues that it is inconceivable that the ADC could find that Marpac had been hindered by one month of lower pricing on a single shipment.
141. This is not of course what the ADC found. As stated in the ADC Report, the ADC considered the cumulative effect of dumped imports from Malaysia, Singapore and the Philippines pursuant to s.269TAE(2C). The price undercutting to which Visy Packaging refers was only part of the price undercutting analysis.
142. Visy Packaging also argues that the price undercutting analysis was only based on the pricing of 73mm TRFs and distorts the data and misrepresents the findings. I do not consider that there is a basis for the criticism of the ADC's analysis. During the investigation period, Marpac was producing and supplying 73mm TRFs so it was appropriate to analyse the price undercutting for this product.

Tinplate Prices

143. As with the CMIA and Irwin Packaging submissions, Visy Packaging contends that the ADC failed to examine the contention that Marpac had not been able to purchase tinplate at competitive prices relative to foreign producers. Visy Packaging also contends that the ADC erred in that it erroneously relied upon lagged quarterly Cold Rolled Coil (CRC) prices rather than tinplate prices. According to Visy Packaging, as tinplate is a further value-added product in the steel making process it does not align with tinplate prices.
144. There was consideration of this issue in the SEF and a finding that the ADC was "satisfied that Marpac's tinplate purchases follow the same trend as the corresponding lagged quarterly cold rolled steel (CRC) prices. Marpac's tinplate purchases are not a cause of injury"⁴⁴ In a submission in response to the SEF, Visy Packaging referred to this finding and asserted that the ADC had erred in relying on the CRC prices because the CRC prices are not aligned to tinplate prices⁴⁵. Visy provided material with its submission in support of its assertion.

⁴⁴ Statement of Essential Facts No. 350 section 8.10.4.

⁴⁵ Document 35 in EPR 350 at page 4.

145. While the ADC Report refers to the effect tinplate prices can have on TRF prices it did not address the allegation that higher prices for Marpac's tinplate purchases were the cause of the material hindrance suffered by it. The ADC Report also did not address the submission by Visy packaging concerning the reliability of CRC prices.

146. For these reasons, I required the ADC to reinvestigate the finding that dumped TRFs ends exported from Malaysia, the Philippines and Singapore had materially hindered the establishment of the Australian industry producing TRFs. The re-investigation was specifically only to address the submission made to the ADC during the dumping investigation that it was the inability of the Australian industry to negotiate competitive steel input prices which caused the material hindrance.

147. The ADC conducted a reinvestigation and the Commissioner reported on that investigation⁴⁶ (the Reinvestigation Report). The findings by the Commissioner as a result of the reinvestigation were:

- CRC prices are reliable as an indicator of future tinplate price trends;
- CRC prices are utilised by members of the Australian can manufacturing and TRF industries to make future business decisions regarding tinplate prices and TRF prices from suppliers;
- Marpac's tinplate prices correlate with CRC price movements, indicating that Marpac pay market price for tinplate;
- Marpac's tinplate prices are competitive, relative to overseas TRF manufacturers; and
- the price of tinplate paid by Marpac did not cause the material hindrance to the establishment of an Australian TRF industry.

148. Having reviewed the Reinvestigation Report and the reasons for the findings made by the Commissioner as a result of the reinvestigation, I am satisfied that the submission made by Visy Packaging has been addressed and that the finding with respect to tinplate prices was properly based.

Customer Requirements

⁴⁶ Reinvestigation Report No 431 dated 9 August 2017.

149. Visy Packaging takes issue with the findings in the ADC Report that customers do not have requirements other than goods being functional and fit for purpose and that the ADC erred in a number of respects. The submission by Visy Packaging makes similar arguments to those made by CMIA and Irwin Packaging which I have already dealt with above.
150. One issue raised by Visy Packaging is what is described as the “click seal” feature of TRFs. This is described by Visy Packaging as being 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. Visy Packaging submits that the ADC erred in discounting the essential requirement of the click seal for cans utilising TRFs.
151. Visy Packaging alleges that it engaged with Marpac prior to the initiation of the dumping complaint and that Marpac was not able to produce samples with an adequate click seal using its own tooling. The only reference to material before the ADC to support this contention is to the submission made by Visy Packaging dated 25 October 2016⁴⁷. I have reviewed the submission and the confidential attachments. There is a reference to the “click” sound being a requirement for one of Visy Packaging’s customers.
152. In its submission to the Review Panel, Marpac contends that it can produce the special feature and that the ADC team was provided with samples and shown tooling that had been purchased to produce this feature during the verification visit. This is confirmed by a statement in the ADC Report that the ADC team verified at its visit to Marpac that Marpac has the tooling available to manufacture TRFs with the “click seal” if a customer requires it.⁴⁸
153. I am not convinced by the submission by Visy Packaging that a failure by Marpac to meet customer requirements was the cause of the hindrance identified by the ADC.

Lost Contracts/undumped imports

154. The submission made by Visy Packaging with respect to the cause of Marpac losing a TRF contract and the competition from undumped exports does not raise anything beyond what has already been submitted on behalf of CMIA and Irwin Packaging. I have dealt with these issues above when addressing those submissions.

⁴⁷ Document No 35 in EPR 350.

⁴⁸ Final Report No 350 at page 18.

TRF exports from Malaysia and Singapore

155. Visy Packaging submits that the ADC has neglected to adequately consider the effect of tinplate pricing and the price similarity in the imports by Visy Packaging from India and Malaysia/Singapore. Such a consideration should, Visy Packaging contends, have resulted in a finding of a negative dumping margin for Malaysian/Singapore exports akin to the findings made when terminating the investigation in respect of exports from India.
156. The basis for this submission is first that Visy Packaging imported TRFs from both India and Malaysia/Singapore during the investigation period. These imports were at almost the same price and on the same terms. The second point made is that the pricing of TRFs is heavily influenced by the prevailing market price of tin plate which is a worldwide commodity principally traded in United States dollars. In support of this latter point, Visy Packaging also refers to the finding by the ADC in the SEF that tinplate costs are the major proportion of the cost to manufacture and hence the price of TRFs.
157. As a result of the above, Visy Packaging submits that it is inconceivable that Malaysian/Singaporean TRF exports should have a 266.3% dumping margin in light of the findings made with respect to the exports from India. The ADC found the dumping margin for exports from India to be -12.68%.⁴⁹
158. Visy Packaging does not reference material before the ADC to support the factual contention regarding the similarity of pricing for exports from India and Malaysia/Singapore. However it does not matter. The submission by Visy Packaging on this point does not take into account the basis upon which the dumping margin for exporters from Malaysia and Singapore was determined.
159. Exporters from Malaysia and Singapore were determined to be uncooperative exporters. Accordingly, the export price for such exporters was determined having regard to all relevant information under subsection 269TAB(3) in accordance with subsection 269TACAB(1). The ADC used the same weighted average export price for uncooperative and all other exporters from the Philippines.⁵⁰
160. Similarly, the normal value for the exporters was determined pursuant to s.269TAC(6) in accordance with subsection 269TACAB(1). The ADC Report

⁴⁹ Termination Report 350 for Hindustan Tin Works, section 3.3.3 at page 8.

⁵⁰ Final Report 350, section 6.3.1 at page 46.

states that the ADC used the best manufacturer-level information available, which was the highest weighted average quarterly normal value calculated for each TRF size manufactured by Genpacco.⁵¹

161. The submissions made by Visy Packaging do not establish that the decision of the Minister was not the correct or preferable decision.

Recommendations/Conclusion

162. I do not consider that the Applicants have established that the decision of the Minister was not the correct or the preferable decision.

163. Pursuant to s.269ZZK of the Act, I recommend that the Minister affirm the reviewable decision.



Joan Fitzhenry
Senior Member
Anti-Dumping Review Panel
8 September 2017

⁵¹ As above, section 6.3.2 at page 47.