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Australian Government
**Australian Customs and
Border Protection Service**

CUSTOMS ACT 1901 - PART XVB

TRADE MEASURES BRANCH

REPORT No. 170

**REINVESTIGATION OF CERTAIN FINDINGS
IN REPORT No. 150**

SILICONE EMULSION CONCRETE ADMIXTURES

EXPORTED FROM

THE UNITED STATES OF AMERICA

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1 SUMMARY AND RECOMMENDATIONS

This report provides the results of the reinvestigation by the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs and Border Protection) of certain findings in Trade Measures Report No. 150 (REP 150), which resulted in the imposition of anti-dumping duties on silicone emulsion concrete admixtures (SECA) exported to Australia from the United States of America (USA).

1.1 Recommendation

In respect of SECA exported to Australia from the USA, the delegate of the CEO recommends that the Minister for Home Affairs (Minister) affirm his decision to publish dumping duty notices in respect of SECA exported to Australia from the USA.

1.2 Reasons

Division 9 of Part XVB of the *Customs Act 1901*¹ sets out procedures for review by the Trade Measures Review Officer (TMRO) of certain decisions made by the Minister.

1.2.1 The role of Customs and Border Protection

Where the Minister has accepted a recommendation by the TMRO that a finding or findings should be reinvestigated, the Minister must, in writing, require the CEO of Customs and Border Protection (CEO) to reinvestigate a finding or findings.

The delegate is required to:

- make further investigation of the finding or findings, having regard only to the information and conclusions to which the Review Officer was permitted to have regard;
- within a specified period, to report the result of the further investigation to the Minister affirming the finding or findings;
- set out any new finding or findings and the evidence or other material on which the new finding or findings are based and the reasons for that decision.

1.2.2 The role of the Minister

Division 9 empowers the Minister, after receiving the delegate's reinvestigation report, to:

- affirm the reviewable decision concerned; or
- revoke that decision and substitute a new decision.

Depending on the Minister's decision², the Minister may³:

- publish a dumping duty notice or countervailing duty notice; or
- vary a dumping duty notice or countervailing duty notice; or
- revoke a dumping duty notice or countervailing duty notice and substitute another dumping or countervailing duty notice.

1.2.3 The reviewable decision

In the original investigation, REP 150, the delegate found that dumping of SECA exported to Australia from the USA caused material injury to the Australian industry

¹ A reference to a division, section or subsection in this report is a reference to a provision of the *Customs Act 1901*, unless otherwise specified.

² Under s.269ZZM(1).

³ Under s.269ZZM(3).

producing like goods. The delegate therefore recommended that the Minister publish a dumping duty notice⁴.

The Minister accepted the recommendations contained in REP 150, including the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied on to support those findings. To give effect to these recommendations, a dumping duty notice was published on 13 April 2010 imposing dumping duties on SECA exported to Australia from the USA.

The Minister's decision to publish a dumping duty notice is the reviewable decision.

1.2.4 What must be reinvestigated

On 2 December 2010, the Minister directed the CEO to reinvestigate certain findings⁵ made in REP 150 and to report the results of the reinvestigation by 14 February 2011. The findings in the following areas are to be reinvestigated:

- the impact of the global financial crisis on the price depression analysis;
- the loss of sales volume calculation;
- the loss of market share calculation; and
- the scope of like products.

In the report to the Minister, the Review Officer commented on specific issues in each of these areas. These issues are identified and addressed in the relevant sections of this report.

1.2.5 Reinvestigation findings and conclusions

The delegate has considered all relevant information and conclusions based on relevant information⁶.

The delegate is of the view that the following findings should be affirmed:

- SECA exported from the USA at dumped prices caused the Australian industry to suffer injury in the form of price depression (section 4.1);
- the accuracy of the calculations used to illustrate the loss of sales volume and market (section 5.1); and
- SECA and the fatty-acid based products are not like products (section 6.1).

⁴ Under s.269TG(2).

⁵ Section 269ZX of the *Customs Act 1901* defines findings as “a finding on a material question of fact or on a conclusion based on that fact in relation to reviewable decisions under Subdivision 3 [Review of Ministerial decisions]”.

⁶ Under s.269ZZL(2)(a)(i) the reinvestigation can only have regard to the information and conclusions to which the Review Officer was permitted to have regard. Section 269ZZK(4) states that the Review Officer ‘must only have regard to the relevant information [as defined] and conclusions based on relevant information that are contained in the application for the [Review Officer] review, or in any submissions received from interested parties within 30 days’ of the publication the dumping duty notice. Section 269ZZK(6)(a) defines relevant information as ‘... the information to which the CEO had had regard, or was... required to have regard, when making findings set out in the report... to the Minister in relation to the making of the reviewable decision’. The “conclusions” which the Review Officer could consider were set out in the application for review to the Review Officer and submissions to the review.

2 BACKGROUND

2.1 Original Investigation

2.1.1 The application

On 14 August 2009, following assessment of an application⁷ made by Tech Dry Building Protection Systems Pty Ltd (Tech Dry), an investigation was initiated into the alleged dumping of SECA exported to Australia from the USA. Notification of the commencement of the investigation was published in *The Australian* newspaper⁸. Australian Customs Dumping Notice (ACDN) 2009/27⁹ was issued on the same day.

2.1.2 The goods under consideration

The goods under consideration (the goods) are SECA.

SECA is used for water-repellency and efflorescence control for concrete or similar cementitious products, including concrete block, concrete paving, retaining wall units, concrete roof tiles and pre-cast or pre-stressed concrete.

The goods are classified to tariff subheading 3824.40.00 in Schedule 3 of the Customs Tariff Act 1995. The rate of duty on the goods imported from the USA is free, subject to the goods meeting the Australia-United States Free Trade Agreement (AUSFTA) Rules of Origin requirements.

2.1.3 Preliminary affirmative determination

On 26 November 2009 the delegate made a preliminary affirmative determination that there appeared to be sufficient grounds for the publication of a dumping duty notice in relation to SECA exported from the USA.

2.1.4 Statement of essential facts

On 1 February 2010, Statement of Essential Facts No 150 (SEF 150) was placed on the public record. The report set out the facts on which the delegate proposed to base his recommendations to the Minister.

2.1.5 The Minister's decision

The Minister accepted the recommendations contained in Report No 150 (REP 150) including the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied on to support those findings.

The Minister published a dumping duty notice¹⁰ imposing dumping duties on the goods exported to Australia from the USA from 13 April 2010. Notice of the Minister's decision was published in *The Australian* and the Commonwealth Government Special Notices Gazette No. S166 on 13 April 2010. ACDN 2010/12 was issued on that day.

⁷ Lodged under s.269TB(1).

⁸ Under s.269TC(4).

⁹ All ACDNs are available on the internet at www.customs.gov.au by following the anti-dumping links.

¹⁰ Under s.269TG(2).

2.2 Review of a Ministerial decision by the Review Officer

The Review Officer may review certain decisions by the Minister, including decisions to publish a dumping duty notice¹¹. These reviews are conducted only as a result of an application from relevant interested parties¹².

In making a recommendation to the Minister, the Review Officer is only to have regard to "relevant information"¹³ and any conclusions in applications and submissions to the Review Officer based on the relevant information. The Review Officer must only have regard to the information available to Customs and Border Protection during the course of the original investigation, information contained in REP 150 and applications and submissions to the Review Officer review¹⁴. The information in the application for review and submissions to the review to which the Review Officer may have regard is also limited to conclusions based on the relevant information.

2.2.1 Applications to the Review Officer

Interested parties had until 13 May 2010 to lodge an application for review of the Ministers decision with the Review Officer. The Review Officer received an application for review from BASF Construction Chemicals Australia Pty Ltd (BASF Australia).

2.2.2 Review Officer review process and decision

The Review Officer published a notice¹⁵ in *The Australian* on 26 May 2010, advising that he would conduct a review and inviting interested parties to make submissions to the review by 25 June 2010 (30 days from notification).

The Review Officer only received a supplementary submission from BASF Australia within this time.

The Review Officer recommended that certain findings in REP 150 be reinvestigated. A finding¹⁶ in relation to a reviewable decision means a finding on a material question of fact or on a conclusion based on that fact.

Copies of public applications and submissions to the review are available from the Review Officer. The Review Officer's report is available from the Attorney-General's Department website, www.ag.gov.au.

On 2 December 2010, the Minister accepted the Review Officer's recommendations and directed the CEO to reinvestigate certain findings in REP 150 and to report by 14 February 2010.

On 6 December 2010, a notice¹⁷ was published in *The Australian* newspaper advising the Minister's acceptance of the Review Officer's recommendations and the reinvestigation requirements.

2.3 Reinvestigation by Customs and Border Protection

ACDN 2010/47 was published on 8 December 2010. The ACDN advised that:

- the reinvestigation could only have regard to the information and conclusions to which the Review Officer was permitted to have regard;

¹¹ Under s.269TG(2).

¹² As defined in s.269ZX.

¹³ In accordance with s.269ZZK(6).

¹⁴ In accordance with s.269ZZK(4).

¹⁵ Under s.269ZZI.

¹⁶ As defined under s.269ZX.

¹⁷ Under s.269ZZL(2)(b).

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- no new information or conclusions could be considered in a reinvestigation;
- all relevant information was in the public domain and available to interested parties through the public record of the original investigation or the public record of the review maintained by the Review Officer; and
- the report of the reinvestigation had to be provided to the Minister by 14 February 2011.

2.3.1 The reviewable decision

The reviewable decision is the Minister's decision to publish a dumping duty notice¹⁸.

2.4 The reinvestigation report

The following sections of this report set out:

- The reinvestigation methodology;
- further investigation of the information and conclusions to which the Review Officer was permitted to have regard;
- reinvestigation of the findings central to the original recommendation to the Minister;
- conclusions on whether the original findings should be affirmed or new findings made;
- evidence or other material on which the findings of the reinvestigation are based; and
- the reasons for the recommendation to the Minister in relation to the reviewable decision.

2.5 The Reinvestigation Framework

In conducting a reinvestigation, the delegate must have regard only to information and conclusions to which the TMRO was permitted to have regard¹⁹. That is, relevant information and conclusions based on relevant information.

Relevant information is from the original investigation and includes information such as the original application, submissions to the original investigation, visit reports, SEF 150, submissions to SEF 150 and REP 150.

Conclusions based on relevant information are conclusions based on the relevant information contained in applications to the Review Officer and submissions received by the Review Officer within 30 days of notification of the review.

The findings in REP 150 in the following areas are to be reinvestigated:

- the impact of the global financial crisis on the price depression analysis;
- the loss of sales volume calculation;
- the loss of market share calculation; and
- the scope of like products.

The delegate examined documents from the original investigation (relevant information) and applications and submissions to the Review Officer received within the specified timeframes (conclusions based on relevant information) for the purposes of conducting the reinvestigation.

¹⁸ Under s.269TG(2).

¹⁹ Section 269ZZL(2)(a)(i).

3 BACKGROUND INFORMATION FROM REP 150

The following information is provided as background to the matters under reinvestigation.

The Applicant

The applicant for anti-dumping duties was Tech Dry Building Protection Systems Pty Ltd (Tech Dry).

The goods under consideration

The goods under consideration (the goods) are SECA.

SECA is used for water-repellency and efflorescence control for concrete or similar cementitious products, including concrete block, concrete paving, retaining wall units, concrete roof tiles and pre-cast or pre-stressed concrete.

The Australian industry

Tech Dry is the sole Australian manufacturer of SECA.

Australian Distributor

The majority of Tech Dry's sales are made via an exclusive distribution arrangement with Tech Dry International Pty Ltd (Tech Link).

The Australian market

The admixture market in Australia, including SECA and other types of admixtures is supplied by BASF Australia, Tech Dry, Sika Australia Pty Ltd and Grace Construction Products Pty Ltd.

Exporter and importer

The Australian industry identified one importer of SECA, BASF Australia and one exporter, BASF.

Investigation period

The period 1 July 2008 to 30 June 2009 - used to examine exports from the USA to Australia to determine whether dumping had occurred.

Injury analysis period

The period commencing from 1 July 2005 - used to examine details of the Australian market for injury assessment.

Dumping outcome

Export price²⁰ was determined using prices paid by BASF Australia to BASF. Normal value²¹ was determined using BASF selling prices in the US domestic market.

The weighted average dumping margins for SECA exported by BASF during the investigation period was 110 percent.

²⁰ ascertained under s.269TAB(1)(a)

²¹ determined under s.269TAC(1)

4 IMPACT OF THE GLOBAL FINANCIAL CRISIS ON PRICE DEPRESSION ANALYSIS

4.1 Summary of reinvestigation findings

The delegate recommends the Minister affirms the finding of the original investigation that SECA exported from the USA at dumped prices caused the Australian industry to suffer injury in the form of price depression.

4.2 The original investigation

Section 7.5.2 of REP 150 identified that Tech Dry had suffered injury in the form of price depression.

The original investigation team found that “the investigation did not identify any factor other than competition with the price of the imported goods that would cause Tech Dry to lower its prices”.²²

This finding was based upon the following evidence provided by Tech Dry:

- A copy of correspondence between Tech Dry and a major customer in March 2009 discussing BASF Australia’s price and Tech Dry’s willingness to consider a price adjustment in order to compete with BASF Australia;
- Copies of invoices to another major customer for sales in August, September and October 2009, showing the reduced price agreed to in June 2009;
- Detailed sales listing from Tech Link showing a significantly reduced price to another major customer from June 2009.

It was noted in section 8.4.2.2 of REP 150 that BASF provided a submission in response to SEF 150 stating that it had been approached by end users of their products to reduce their prices in light of the effects of the global financial crisis.

In support of this claim BASF produced a letter it claimed that it received from an end-user of the SECA product. Customs and Border Protection queried the timing and origin of the letter, with BASF confirming that it was unable to recall whether the letter was originally sent to BASF Australia as it did not possess a copy of the original letter. In any case, the original investigation team conceded that “it is reasonable to expect that concrete product manufacturers would have sought to maintain and, if possible, reduce costs following the impact of the global financial crisis.”

The delegate was satisfied, however, that there was sufficient information to demonstrate that reductions to the Australian industry’s selling prices could be attributed to the dumped imports. .

4.3 Issues identified by the Review Officer

The Review Officer raised some specific issues in relation to these findings at paragraph 16 of the TMRO Report. These include:

- It was not clear whether the in-confidence correspondence referred to in 8.4.2.2 of REP 150 is the same as the correspondence listed in 8.4.2.1;
- On the basis that the correspondence is the same “it does not seem that it is of a nature that alone provides strong evidence that the dumped price of SECA imported by BASF Australia caused the price reduction experienced by the Australian industry”;

²² Section 8.4.2.1 of REP 150

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- The statement that “the investigation did not identify any factor other than competition with the price of the imported good that would cause price depression” seems inconsistent with the statement that “it is reasonable to expect concrete product manufacturers would have sought to reduce costs following the GFC”. This inconsistency is not addressed in the reports.
- Supporting evidence relies solely on the correspondence provided by Tech Dry, as the invoices mentioned in the report do not contain any clear statements as to motivation for price reduction. This Correspondence also mentioned that concrete manufacturers wish to cut costs, but does not provide details as to why this arose, or whether it was just a general cost saving technique. The Review Officer was of the view that the correspondence was not sufficient given correspondence produced by BASF Australia states a contrary point of view.

4.4 The reinvestigation

4.4.1 Correspondence provided by Tech Dry

In support of its claim that it was forced to lower its prices to its largest customers as a result of the dumped prices offered by BASF Australia, Tech Dry provided a letter sent to a technical manager of one of their major customers in March 2009, in response to a phone conversation from earlier that day.

Amongst other matters the letter discusses:

- Tech Dry’s view that BASF have targeted the Australian market with a very low price aiming to eliminate Tech Dry from the Australian market.
- Tech Dry’s acknowledgment that, although they believe the pricing by BASF to be unsustainable and unfair, they realise concrete manufacturer would be looking to cut the costs of production and finding a cheaper alternative supply. As such, Tech Dry stated that it would be willing to do “everything we can to keep your business.”
- Tech Dry’s willingness to adjust their price to compete with the price being offered by their competitors to consolidate their position in the market.

Tech Dry also provided a letter sent to one of their major customers in June 2009, which confirmed future orders of SECA Block Emulsion at a significantly reduced price. Tech Dry noted in their application that this price is well below their cost to make and sell the product.

4.4.2 Correspondence provided by BASF Australia

In its response to SEF 150, BASF Australia provided a letter it claimed it received in February 2009 from an end-user of the SECA product, as evidence that the drop in Tech Dry’s prices was due to the decline in the cement and concrete market, caused by the global financial crisis.

It was noted in REP 150 that there was uncertainty whether the end user actually wrote this letter or if it was formulated by BASF to reflect discussions held with the end user concerning price reductions around February 2009. For the purposes of this reinvestigation, it has been assumed that the letter was formulated by the end user.

The contents of the letter include the following statements by the end user of the SECA product:

- Due to the slow growth of the economy, the end user is seeking support in receiving goods in the “most cost effective manner”.
- “Our target is to reduce costs by a minimum of 5%”.

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- “Any increases will necessitate a re-evaluation of the supply relationship”.
- A representative from the company will discuss this shortly, and “in the meantime we will continue to purchase goods and services at the prices currently on file”.

BASF claims that as a result of this request suppliers were forced to grant price reductions on SECA products.

4.4.3 Analysis

Section 269TAE outlines the factors to which the Minister may have regard in determining whether dumped goods have caused material injury to the Australian industry producing like goods. Subsection 269TAE(2A) provides a non-exhaustive list of possible other factors that may have contributed to the injury, that the Minister must consider and ensure are not attributed to the exportation of the dumped goods. This provision reflects the non-attribution language in Article 3.5 of the Anti-Dumping Agreement.

In assessing whether dumped goods have caused material injury, Customs and Border Protection will undertake a line of inquiry aimed at firstly distinguishing all of the known factors that may have contributed to the Australian industry’s injury. Customs and Border Protection then looks to separate the injurious effects of the dumped imports from those other known causal factors.

However it is common for the different causal factors to be inter-connected and produce a combined effect on the domestic industry. In these circumstances, separating the injurious effects of the different causal factors may not be a straight forward exercise.

In REP 150, a number of factors were identified that may have contributed to price depression experienced by Tech-Dry during the investigation period. Firstly, exports of SECA by BASF at dumped prices by a margin of 110%. Secondly, contraction in the cement and concrete market following the global financial crisis which resulted in concrete product manufacturers seeking cost savings from suppliers. And finally, competition from lower priced non-SECA substitutes.

In the case of dumped imports from the USA, the original investigation found that the imported goods significantly undercut Tech Dry’s selling prices. Given the degree of market concentration of the concrete block manufacturers, it is reasonable to expect that the industry would be highly susceptible to price pressures from competitors. Therefore the reinvestigation considers that the level of undercutting established during the investigation period, along with evidence of price reductions by the industry to key customers, is sufficient to establish that exports of SECA at dumped prices caused the Australian industry’s prices to be depressed.

The reinvestigation was able to confirm that the in-confidence correspondence referred to in 8.4.2.2 of REP 150 is the same as the correspondence listed in 8.4.2.1 of the same report. The correspondence provided by Tech Dry does not contain any specific statements as to the reasons why they were requesting a price reduction. It does however contain references to the pricing policies of BASF Australia and their entry into the market in conjunction with Tech Dry’s willingness to adjust their prices to compete with the competitor’s price.

On the other hand the letter provided by BASF appears to be a standard letter sent by one of its customers during the GFC to the suppliers of all its products. There is nothing to indicate that the letter was aimed at suppliers within the market for SECA or admixtures.

Further, the wording of the letter doesn’t mandate any future price decreases, it only indicates that the customer had aimed to reduce costs and would only reconsider their relationship with their supplier in the event of an increase in costs. It is worth noting that

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any effect that this letter had on the supply of SECA products cannot be confirmed, as BASF did not supply any SECA products to the customer during the period, and no further evidence was provided of similar letters being sent to other suppliers of the product during the period to enable a price comparison.

It was acknowledged in section 8.4.2.2 of REP 150 that “it is reasonable to expect that concrete product manufacturers would have sought to maintain and, if possible, reduce costs following the impact of the global financial crisis.” The reinvestigation considers that this conclusion is not inconsistent with a finding that the dumped price of SECA imported by BASF caused the price reduction experienced by the Australian industry, particularly in light of the findings in section 8.7.1 of REP 150 that the global financial crisis placed considerable pressure on the market for concrete, blocks and pavers, whilst the market for SECA during this period actually grew.

As such, it is reasonable to expect that the customer may have wished to reduce costs on all its products due to this pressure, but there is no definitive evidence that the global financial crisis had any direct impact upon the price of SECA within the Australian market. The only direct evidence of a reduction in prices from the customer was in the context of the reduced prices offered by BASF.

Accordingly, although it may be reasonable to assume that the end users wished to reduce the raw material costs of their products, the available evidence suggests that the reduced prices were primarily caused by the allegedly dumped imports of SECA.

The above finding is further supported by the calculation of the unsuppressed selling price (USP) and comparisons with Tech Dry’s equivalent actual selling prices during the investigation period. In estimating a SECA price that Tech Dry could reasonably be expected to achieve in a market unaffected by dumping, the original investigation appeared mindful of these other possible factors causing injury.

The delegate recommended to the Minister at section 11.5.1 of REP 150 that Tech Dry’s selling prices in 2007-08, unadjusted for cost increases that were evident in 2008-09, be used to calculate the USP. The original investigation considered that it was not appropriate to adjust the 2007-08 selling prices due to uncertainty surrounding the impact of competition from non-SECA substitute products.

The reinvestigation also considers that the original investigation appropriately addressed the possible impact of the global financial crisis by basing its estimate of USP on 2007-08 industry selling prices, even though the available data showed that the SECA market in Australia had grown in the following year.

A comparison of the USP and Tech Dry’s actual selling prices during the investigation period shows that the degree to which the dump exports depressed and suppressed industry’s prices was significant.

Therefore, the reinvestigation finds that based on the information gathered in the original investigation, it was reasonable to be satisfied that dumped imports of SECA from the USA had led the Australian industry’s prices being depressed. The reinvestigation affirms the finding of the original investigation that SECA exported from USA at dumped prices caused the Australian industry producing like goods to suffer from price depression.

5 LOSS OF SALES VOLUME AND MARKET SHARE CALCULATION

5.1 Summary of reinvestigation findings

The reinvestigation affirms the accuracy of the calculations used to illustrate the loss of sales volume and market share.

5.2 The original investigation

Section 8.5.1.1 of REP 150 identified that Tech Dry lost sales volume in 2008-09. Tech Dry claimed this was due to the entry of the imported product on the Australian market. In support of this claim Tech Dry stated that the North Queensland Branches of one of its major suppliers changed supplier from Tech Dry to BASF Australia in late 2008.

Confidential Appendix 9 of REP 150 calculated the percentage of lost sales caused by Adbri changing suppliers. The delegate was satisfied that the portion of lost sales was significant in relation to its total sales.

5.3 Issues identified by the TMRO

The Review Officer queried whether the lost sales at the Maroochydhore plant were sales that were lost directly to BASF Australia, and therefore whether they should have been used in the loss of sales and market share calculations in Confidential Appendix 9.

5.4 The reinvestigation

The loss of sales volume and market share calculation includes the three lost sales in North Queensland as being from Adbri (formerly Hanson Building Products) in Cairns, Townsville and Maroochydhore. The distinction between North Queensland and South Queensland sales is relevant, as in Adbri's end-user questionnaire response it noted that whilst their North Queensland plants changed suppliers from Tech Dry's SECA to BASF's Rheopel Plus in February 2008, the South Queensland plants changed from Tech Dry to Grace in 2006, before changing to BASF in November 2008.

Regardless of the geographical classification of the Maroochydhore plant, invoices contained within Confidential Attachment I-1 of the Tech Link Visit Report indicate that the last sales of SECA to Hanson Building Supplies Maroochydhore were made on 22 September 2008. Additionally, internal communication provided between Tech Dry and Tech Link in May 2009 indicate that Adbri Maroochydhore was one of three manufacturers lost to BASF Australia.

It should also be noted that Adbri acquired Hanson Building Products in July 2008. As such it is apparent that the comments made in relation to the lost South Queensland sales to Grace in 2006 do not apply to this branch, as Adbri had no controlling interest in the company at the time.

Therefore the reinvestigation considers that it is reasonable for sales from Maroochydhore to be included in the loss of sales volume and market share calculation in Appendix 9.

6 THE SCOPE OF LIKE GOODS

6.1 Summary of reinvestigation findings

The reinvestigation affirms the finding in the original investigation that SECA and the fatty-acid based products are not like goods.

6.2 The original investigation

The original investigation found at section 3.4.5 of Rep 150:

“SECA and fatty acid-based products are not physically alike, a factor on which Customs and Border Protection usually places the most weight. The production processes are quite different.

SECA was developed as a new, high-performance product that provides better functionality than traditional fatty acid-based products. It is more expensive to produce and is aimed at the high end of the market. For this and the reasons set out above, while there is downward substitutability on price, SECA is considered a distinct product in its own right. SECA and fatty acid-based products are not considered like goods in terms of the legislative definition”

6.3 Issues identified by the Review Officer

The Review Officer raised some specific issues in relation to these findings at paragraph 16 of the TMRO Report:

- REP 150 stated that Customs and Border Protection usually places the greatest weight on physical likeness in determining whether goods are like goods. The Review Officer infers from this statement that Customs and Border Protection determined that SECA and fatty-acid type goods are not like goods on the basis that they are not physically alike.
- The analysis in REP 150 seems to be based primarily upon the outward appearance of the goods rather than physical likeness. The Review Officer noted that the use of visual characteristics in this case seems to be misplaced, as following this any goods that contained the active ingredient and resembled the SECA product would be a like good.
- Customs and Border Protection should place more emphasis on commercial and functional likeness, rather than physical appearance.
- The statement in REP 150 that “the global financial crisis was not an impediment to growth in the market if sold at a price that was competitive with the fatty acid based mixtures” indicates market substitutability between the products.
- Fatty acid based admixtures were directly substituted for Tech Dry’s SECA by at least one user.

6.4 The reinvestigation

6.4.1 Tech Link Visit Report

The exclusive distributor of Tech Dry’s SECA products, Tech Link commented on the differences between SECA and the fatty-acid based products in the Tech Link Visit Report.

The company noted, at section 2.1 of the Visit Report, that fatty acid based products are biodegradable, and as such will break down and wash away over time, as opposed to SECA, which is not biodegradable. Tech-Link also claimed that these fatty acid based products are not as effective in preventing the presence of efflorescence in the finished product.

6.4.2 Tech Dry Visit Report

Tech Dry also commented on the substitutability of the two products at section 3.4 of the Tech Dry Visit Report. It noted that fatty acid based mixtures were designed to react with one ingredient of concrete (cement), whilst SECA is designed to react with the concrete. Additionally the application of SECA requires some precision in relation to dosage rates, which makes it difficult for builders to use on-site. The company noted that this is the reason why SECA is used in the manufacture of concrete blocks, as they are manufactured in a location where the add rates and curing can be controlled.

6.4.3 BASF Visit Report

During our visit to BASF Australia, the company advised that there were other products substitutable for SECA, but was of the view that these would not be like goods to the goods the subject of the investigation.²³

6.4.4 Analysis

In examining the issue of like goods, the reinvestigation notes that the original investigation made a finding that SECA and fatty acid-based products were not physically alike. However REP 150 provides no explanation of the physical characteristics that would support such a finding.

The reinvestigation has examined information provided to the investigation on this issue to establish the physical characteristics of the two products. The key physical attributes of the products are not their outward appearance, but instead their chemical properties and composition. The most obvious and fundamental physical difference is that these other concrete admixtures are fatty acid-based products usually containing calcium stearate dispersion and/or surfactants. These other concrete admixtures also do not contain any silicones which is a key active component of SECA products.

The reinvestigation is of the view that physical characteristics are the most important single factor in determining like goods. Only in rare circumstances would two products be considered like products where they did not possess closely resembling physical characteristics. In light of the clear differences in their chemical properties, the reinvestigation considers that it was reasonable for the original investigation to find that SECA and other concrete admixtures were not like goods.

Despite their obvious physical differences, the original investigation did examine and address other factors relevant to the determination of like goods. This included an assessment that SECA provided better functionality than traditional fatty acid-based products, is more expensive to produce and is aimed at the high end of the market to distinguish between the functional likeness and commercial substitutability of the goods.

The reinvestigation notes the comments made by Tech Dry and Tech Link that there are significant differences in the functionality of the two products when used in relation to coloured blocks, as a result of the different physical properties of the products. This difference in functionality would also indicate the products are not commercially substitutable, particularly in the market for coloured blocks, where the end users looking for longer lasting products would be unlikely to replace SECA with a fatty acid based product due to the long term damage caused to the blocks by efflorescence. As such, the SECA product is generally aimed toward the higher end of the market by end users concerned about the long term damage to the colour of their product.

Additionally, from the comments made by Tech Dry it appears as though SECA is used at an alternate stage of the production process to fatty acid based mixtures, which would

²³ Section 2.2 BASF Australia Visit Report

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also indicate the goods are not commercially substitutable, as they could only be used by users which have the facilities and capabilities to correctly utilise the product, as opposed to the more general use fatty-acid admixture.

Although there may be certain situations where the products compete directly within the Australian market, it is reasonable to consider that the products are not commercial substitutes and have significant differences in functionality

It is, therefore, reasonable to conclude that SECA and the fatty acid based products are not like goods for the purposes of defining the Australian industry.