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23 October 2012

The Director
Operations 1
International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Our ref: ATH
Matter no: 9553516

By email: itrops1@customs.gov.au

Dear Director

GM Holden Limited
Investigation into alleged dumping of Hot Rolled Coil Steel exported from Japan, the Republic of Korea, Malaysia and Taiwan
Response to Statement of Essential Facts Number 188 and Preliminary Affirmative Determination Number 188

We refer to previous correspondence and confirm that we act on behalf of GM Holden Limited ("**Holden**").

We advise that our client has now instructed us to make the following submission in relation to the SEF and PAD issued by Customs.

Please note that this is the non-confidential version of the submission and that there is no confidential version.

1. Definitions

For the purposes of this submission the following definitions have been adopted.

- (a) "**ACDN**" means Australian Customs Dumping Notice Number 2012/46;
- (b) "**Act**" means the *Customs Act* 1901 (Commonwealth);
- (c) "**AFR Article**" means the article entitled "BlueScope protection slammed" on pages 1 and 6 of the Australian Financial Review of 5 October 2012;
- (d) "**Anti-Dumping Act**" means the *Customs Tariff (Anti-Dumping) Act* 1975;
- (e) "**Application**" means the application by BSL for the imposition of dumping duties on HRCS exported from Japan, Korea, Malaysia and Taiwan;
- (f) "**Australian Industry**" means the Australian Industry identified in the Application;
- (g) "**BSL**" or "**the Applicant**" means BlueScope Steel (AIS) Pty Ltd;
- (h) "**Customs**" means the Australian Customs and Border Protection Service;

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- (i) **"Final Report"** means the Final Report to be made by Customs to the Minister;
- (j) **"GFC"** means the Global Financial Crisis;
- (k) **"GUC"** means Goods Under Consideration as described in the Application;
- (l) **"HRCS"** means Hot Rolled Coil Steel as described in the Application;
- (m) **"Investigation"** means Investigation Number 188 conducted by Customs following the Application;
- (n) **"Korea"** means the Republic of Korea;
- (o) **"Minister"** means the Minister for Home Affairs;
- (p) **"Material Injury Direction"** means the ministerial direction on material injury dated 1 June 2012 published in Australian Customs Dumping Notice No. 2012/24;
- (q) **"PAD"** means Preliminary Affirmative Determination 188, dated 3 October 2012;
- (r) **"SEF"** means Statement of Essential Facts Number 18, dated 3 October 2012;
- (s) **"Submission"** means this submission on behalf of Holden; and
- (t) **"WTO Anti-Dumping Agreement"** means the Agreement on the Implementation of Article IV of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

2. **General Position of Holden**

We are instructed that Holden does not agree with the conclusions of Customs as set out in the SEF, the imposition of securities on imports of GUC as set out in the PAD or the findings as to dumping and material injury as set out in the SEF.

We set out below more specific details of our client's objections.

3. **No material injury to BSL in the automotive industry.**

Before proceeding to address specific issues associated with the SEF, our client wishes to first address the issue of Customs' finding in relation to injury to BSL in the automotive market arising from alleged dumping of HRCS.

For these purposes, Holden has instructed us to make the following submissions:

3.1 ***Position expressed in the SEF***

- (a) Holden notes (and agrees with) the findings of Customs at section 8.7.3 at page 45 of the SEF (which, although numbered as section 8.7.1 has possibly been incorrectly numbered given that there is already an earlier 8.7.1) that BSL has not stated it suffered injury in the automotive sector or provided any evidence to suggest that there

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had been such injury and that HRCS required for the automotive sector requires certain characteristics and specifications that BSL, or indeed one producer alone, cannot supply in its entirety.

As Customs finds (at page 45 of the SEF):

"While BlueScope's sales to this sector have decreased over the injury period, it can also be seen that the volume of cars manufactured in Australia have declined and that this decline has affected all supplies into this market. Consequently, Customs and Border Protection's preliminary view is that BlueScope has not suffered injury in the automotive sector due to dumped imports. What injury BlueScope may have suffered is due to the contraction of the automotive markets."

Holden has instructed us that it agrees with the findings of Customs as above.

- (b) Holden believes that BSL has had ample time to claim or demonstrate injury in the automotive sector in relation to alleged dumping of exports of HRCS but has not made that claim nor provided any evidence to verify such a claim or verify injury and, given it has not done so, then Customs is not in any position to find otherwise than it has found in the SEF.
- (c) Holden is aware that Customs believes that pursuant to section 269TDA(13) of the Act, Customs does not have the authority within the legislation to recommend the termination of the case in respect of individual suppliers to the automotive industry.
- (d) Holden is also aware that the provisions for exemption of specific goods from the application of dumping duties or other measures in the Anti-Dumping Act may not allow the Minister to exempt HRCS for the automotive sector from the application of the proposed measures.

3.2 *Inappropriate to impose dumping duty on HRCS exported for the automotive sector*

Holden is of the firm view that given the findings of Customs it would be inappropriate and contrary to law and policy for Customs to impose (or recommend) measures on exports of HRCS for use in the automotive sector.

For these purposes, Holden is of the view that:

- (a) the WTO Anti-Dumping Agreement only provides for dumping duties to be imposed in circumstances where there is both established dumping and injury. To impose dumping duty in a manner which allows dumping duty to be levied on goods in an industry sector where there is no injury caused by the alleged dumping would be contrary to the WTO Anti-Dumping Agreement. For these purposes, it would also be contrary to the provisions of the Act;

- (b) it would be inequitable for the automotive sector to have to bear dumping duty where no injury to the Australian industry (BSL) has been occasioned by the exports of the allegedly dumped HRCS in that sector. Indeed, in doing so, that would cause significant additional injury to the Australian automotive industry; and
- (c) the imposition of dumping measures will lead to action at the WTO against Australia by Governments of countries of exporters of HRCS to the automotive sector.

3.3 Means to exempt the application of anti-dumping duties on HRCS for the automotive sector

As a result of the comments above, we would strongly recommend that Customs consider alternative means to ensure that no dumping duties (or other securities or other measures) are imposed on HRCS exported for use in the automotive industry.

For these purposes, we would strongly recommend that Customs create a new statistical code for HRCS to be used in the automotive industry within the Customs Dumping Commodities Register and designate that such goods bearing such statistical code would be exempt from dumping duties. That would allow for the importation of such HRCS without the payment of dumping duties or the taking of other securities. Holden understands that Customs may be concerned that there may abuse of this arrangement, especially in circumstances where the HRCS is actually put to uses other than automotive purposes. To address and alleviate these concerns, we would recommend the following:

- (a) Customs is well aware of those exporters and importers and automotive companies involved with the use of HRCS and undertakings should be sought from each of them to use the HRCS only for automotive purposes and to comply with the precise terms of the new statistical code.
- (b) Customs should monitor the use of the new HRCS statistical code including its use by new parties and make enquiry of new parties who use it and those who have previously been using it to ensure that there has been compliance with the terms of the statistical code. Customs would then be in a position to audit and heavily penalise any misuse of the statistical code.
- (c) Customs can use its new anti-circumvention provisions to ensure that there has been no misuse by other means.

3.4 Action by the Minister

In addition to the means set out above, Customs could recommend to the Minister in the Final Report that he not impose dumping duty on exports of HRCS to be used in the automotive sector. That could be a recommendation and a measure which the Minister could invoke (in addition to the adoption of the procedures set out in the preceding paragraph) as the Minister has the ultimate discretion as to how any measures are imposed.

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For these purposes, Holden refers Customs to the comments in the Dumping Policy Statement which refer to the requirement for the Minister to take into account the effect on downstream industry from any proposed measures (section 6). While Holden understands that Customs is still drafting a "Ministerial Direction on Public Interest", the consideration of the adverse effect on downstream industry (i.e the automotive industry) from the measures imposed and proposed by Customs must be taken into account by Customs and the Minister as a matter of Government policy. To this effect, Holden refers Customs and the Minister to comments by Holden, Master Builders Australia, Toyota Australia, the Housing Industry Association and A.D. Coote as to adverse consequences on "downstream" industry in the AFR Article. In Holden's view this would mitigate against measures being recommended or imposed.

4. Earlier submissions

In making this submission in relation to the SEF and the PAD, our client wishes to also refer to (and incorporate) all comments made in its previous correspondence and submissions to Customs in relation to the Investigations.

5. Other comments on the SEF

Without limiting the comments in the preceding paragraphs, Holden is of the view that Customs has also erred as follows in the SEF.

5.1 Section 6.1

- (a) In this section, Customs estimates the size of the Australian market for HRCS to be "between 750,000 and 1,000,000 MT". In the view of Holden, this shows a significant range of the potential Australian market and is entirely too imprecise. Accordingly, Holden believes that any analysis undertaken by Customs without knowing more accurately the size of the Australian market for HRCS is likely to be inaccurate.
- (b) Customs has identified the market is supplied predominately by BSL and the remainder by imports. This appears to be inconsistent with the notion that BSL has suffered injury by way of loss of market share. Indeed, if the measures proposed by Customs are adopted then the sales of imports may be adversely affected which would increase BSL's market share and potentially have the impact of placing BSL in a quasi-monopoly position.
- (c) Customs notes that HRCS is sold into 3 market sectors. This supports the notion that Customs should have undertaken separate market assessments for each of those 3 market sectors. The failure to do so or to otherwise separate the description of the GUC has meant that Customs has denied itself the ability to separately find no injury and impose no measures on imports of HRCS for the automotive sector.

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5.2 Section 6.2

- (a) The graph in section 6.2 purports to indicate sales in the Australian market (MT) of BSL, and sales by various other exporters together with total sales. In the view of Holden the graph is inadequate and unhelpful as:
- (1) it does not indicate total sales over the relevant period; and
 - (2) it does not differentiate between sales from Japan, Korea, Malaysia and Taiwan.
- (b) Holden is of the view that while the graph appears to show that imports from Japan, Korea, Malaysia and Taiwan have increased slightly over the period shown in the graph, the movement in sales by BSL appears to closely correspond with the total sales in the Australian market.

5.3 Section 6.3

Holden reiterates its previous objection that the importers chosen by Customs are all distributors of HRCS and none of them are end-users. Accordingly, even though the largest 8 importers accounted for apparently 90% of HRCS imported from the nominated countries, Holden still believes they do not represent an appropriate or comprehensive sample of users of HRCS and may not have afforded Customs adequate information regarding the market for HRCS and may have delivered an unreliable set of results to Customs.

5.4 Section 6.4

- (a) Again, Customs reiterates that there are 3 main sectors for sales of HRCS. Again, Holden agrees with that conclusion and reiterates that Customs should not have accepted such a broad characterisation of "GUC" which did not differentiate between product for those sectors. That would have allowed for entirely separate market assessments and separate assessments of injury which is especially relevant given conclusions regarding lack of alleged injury to BSL in respect of sales of HRCS to the automotive sector.
- (b) Furthermore, Customs does not appear to have ascertained the relative percentages as between the 3 sectors. Again, this may suggest that Customs' investigation may have been inadequate.

5.5 Section 8.1

Holden notes that Customs has alleged that injury to BSL stems from the reliance by BSL on its "import parity" approach to sales being linked to "dumped" prices for imports. However, Holden believes that this approach almost guarantees that BSL will be found to have suffered injury even where the overseas competitor companies had cause to reduce their prices for reasons other than dumping.

5.6 Section 8.4.1

- (a) According to BSL, "*global demand for steel is weak. This has resulted in exporters looking for markets for their excess capacity*". However, Australia is part of that global demand and while Customs has undertaken an analysis of "micro" basis for each of the separate sectors, Holden is concerned that Customs may not have taken into account the effect on reductions in general demand in the Australian industry.
- (b) The section suggests that BSL has claimed that "*Japan exported to the automotive sector*" while it is clear that Korea has also exported to the automotive sector. Again, this suggests that BSL may have an inaccurate assessment as to the relevant markets and exports of HRCS.

5.7 Section 8.4.2

- (a) Holden concurs with the Australian Steel Association that any assessment of BSL's sales volumes should include sales into the Australian market by BSL's New Zealand subsidiary (New Zealand Steel). As a result, Holden also agrees with Customs' conclusion that this data should also be included for assessment of BSL sales volumes.
- (b) Holden notes that at page 34 of the SEF, the "market share chart" indicates that despite the contraction in the market, BSL maintained a steady market share with a slight increase in 2011/12 at the expense of imports from sources other than those named in the Application. In Holden's view, not only does this show that BSL has not suffered injury as its market share has not declined but that there is the capacity for BSL, in fact, to increase prices rather than continue the alleged price suppression and price depression.
- (c) Holden believes it is relevant that exports from the nominated countries in the Application have only maintained a steady market share. For these purposes, we note that the table showing market shares on page 35 of the SEF does not include actual numbers and in no other way indicates the quantum of market shares as between the relevant parties for the relevant periods.
- (d) While the tables at the bottom of page 35 and page 36 suggest that BSL has suffered a reduction in sales revenue, an increase in costs (in general terms), a decrease in revenue (in terms of unit cost) and a reduction in profits and profitability, Holden believes that this may have arisen for a variety of other reasons which have been referred to by Holden in other submissions. Further, these results may also be the product of BSL's approach in merely adopting an "import parity" approach to sales rather than other approaches to sales which may have delivered different results.
- (e) At the end of the last paragraph in section 8.4.2, Customs has indicated that to assist in identifying if dumping is the cause of injury,

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Customs examines the industry's economic performance over a longer period than the injury period. However, there do not appear to be details of that assessment in the SEF and there appears to be no analysis of effects on demand on all parties relating to the GFC and subsequent slow recovery of markets. This also calls into question Customs' assessment as to the likely continuation of alleged injury.

5.8 Section 8.4.3

In the last paragraph of section 8.4.3 on page 37 of the SEF, Customs has come to the conclusion that the price of all imported HRCS compared to all locally produced HRCS, imports were priced 3% above industry prices. Accordingly, if BSL had, indeed, adopted an "import parity" approach to pricing then Holden would suggest that BSL has unreasonably and in an uneconomic fashion reduced its prices by some margin below that of imported product which may not have been necessary.

5.9 Section 8.7

Please see our comments in the preceding paragraph regarding the findings by Customs in relation to section 8.7 and the consequences for the automotive sector.

5.10 Section 8.10

Holden does not believe that Customs has made a comprehensive assessment of the impact of currency fluctuations on BSL and its market for HRCS. As stated in other places in the Application and in the SEF, BSL establishes its prices based on "import parity". If the Australian dollar appreciates, then the relative prices of imports will necessarily reduce and applying "import parity" BSL is required to reduce its prices as well. This is as a result of the currency fluctuation and not due to any alleged dumping. Holden believes that a proper and comprehensive assessment needed to be undertaken. The apparent failure to do so makes Customs' findings on the potential effect of currency fluctuations on injury for BSL to be inadequate and unreliable.

5.11 Section 8.11

The material in section 8.11 clearly demonstrates that there have been significant increases in raw material costs which were high during the investigation period. Customs seems to have concluded that:

"Whilst BlueScope's costs may have been directly impacted by the higher raw material prices, Customs and Border Protection does not consider that this detracts from the assessment that dumped exports directly impacted on BlueScope's prices and revenue over the investigation period".

However, this conclusion is not apparently supported by any detailed assessment as to the actual effect of higher raw material prices on BlueScope especially in terms of the likely costs to make and sell and effects on revenue and profit and profitability. Holden believes this renders the conclusion

unreliable. The approach also denies Holden the opportunity to question the assessment which is unreasonable.

5.12 Section 8.12

This section addresses Customs' assessment of the effect of decrease in demand and low steel prices globally as the cause of potential injury to BSL. In the view of Holden, the fact that BSL sets prices according to "import parity pricing" and given that there is low demand for steel and low prices for steel globally, that is more likely to have been the cause of any alleged injury to BSL than any alleged dumping. It is the view of Holden that Customs has not adequately undertaken a separate assessment as to the degree of injury likely to have been caused by global decrease in demand for HRCS and decrease in HRCS prices and the effect on BSL compared to any alleged dumping.

5.13 Section 8.13

Holden has previously identified a number of management decisions by BSL and closure of BSL's export business as the cause of significant costs to BSL and potentially having effect on revenues and profitability rather than alleged dumping. At the end of section 8.13 (on page 52) Customs has commented:

"However, when assessed over the course of the investigation period, the effect this has on costs is minimal."

However, Holden is of the view that this is inadequate as Customs has not provided details on which costs are, in fact, minimal or details of how it has undertaken its assessment of these factors. Again, Holden believes this approach to be unreliable as a basis for a conclusion and denies Holden the ability to review the assessment.

5.14 Section 8.14

The last paragraph of this section includes the following conclusion by Customs:

"The number of investigations into HRC shows the propensity for manufacturers of these products to engage in dumping."

Customs appears to rely on this conclusion, in part, in making its conclusions regarding alleged dumping by the exporters identified in the Application. However, in the view of Holden, these comments are illogical, unreliable and deficient for the following reasons

- (a) Customs' commentary does not properly identify those countries in which there have been measures **actually applied** as measures have been imposed against each nominated country and territory as a result of **some** of these investigations (not all).
- (b) Customs' assessment of overseas investigations and measures should have identified countries and exporters and particular measures in detail.

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- (c) Overseas investigations apply different procedures, different exporters and countries of export and should not be treated as supporting dumping findings here.
- (d) The comment in the last paragraph of section 8.14 demonstrates a lack of logic and a flaw in reasoning by Customs. The mere fact that there may have been a number of investigations into HRC in other parts of the world does not reflect that there is a propensity for manufacturers of these products to engage in dumping as a basis to support a finding of dumping in this case. Indeed, on one reading, this comment by Customs may suggest that Customs has pre-judged the position of the exporters the subject of the Investigation and may have demonstrated some bias against those parties.

5.15 Section 8.15

Holden is of the view that Customs has not properly applied the Material Direction. Holden is of the view that Customs has not adequately weighted other factors which may have led to injury when compared to alleged injury caused by alleged dumping. This is referred to in commentary in preceding paragraphs. However, it is worth noting in the view of Holden that BSL's "import parity pricing" approach has led to price suppression, price depression and price undercutting by BSL. Customs then proceeds to state that this benchmark was based on dumped prices during the investigation period. However, as has been stated in many other paragraphs of this submission, the benchmark is also based on a depressed global steel market with depressed prices and depressed demand for steel which could equally be the cause of injury to BSL. There does not appear to be a comprehensive analysis of the effect of the import parity pricing method given global demands and pricing and merely an acceptance of the conclusions and reasoning provided by BSL.

5.16 Section 9.3.1

- (a) In this section, Customs has stated that forward orders for exports from nominated countries have a significant share and influence in the Australian market. However, this appears to be at odds with earlier statements by Customs that BSL has the major share of the Australian market. Further, we note that Customs' assessment is only based on a very short period of alleged injury by BSL. Accordingly, we believe that a conclusion regarding the future effect of alleged dumping and the future existence of alleged dumping is inadequate.
- (b) Holden also believes that Customs has not taken into account that global prices and demand may well increase (indeed, Customs has undertaken no obvious analysis as to likely future trends in demand for steel globally). Should this arise (and this does not appear to have been considered by Customs), then BSL's "import parity" approach could lead to increased prices, revenues and profits for BSL in relation to HRCS.

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5.17 Section 10.6

Holden re-states its previous objection that no details of Customs' assessment of an actual unsuppressed selling price or non-injurious price have been provided to Holden for review.

5.18 Section 12 – Preliminary Affirmative Determination.

Given the view of Holden that there is no alleged dumping and certainly no injury in the automotive sector, Holden believes that Customs has erred in making its Preliminary Affirmative Determination and imposing securities on various exports to the automotive market.

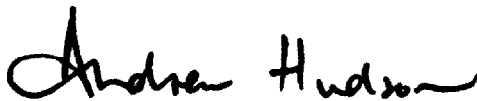
6. Conclusion and recommendations

As a result of the comments in the preceding paragraphs, Holden is of the view that:

- (a) There have been fundamental errors of fact and law in the SEF and the PAD which do not warrant the recommendation of the imposition of Anti-Dumping or other measures on HRCS imported into Australia.
- (b) Customs and the Minister for Home Affairs should adopt measures to ensure that goods exported to Australia for the purposes of use in the automotive industry are excluded from the impact of current securities or any proposed dumping duties in the future.

We look forward to discussing these matters further with you.

Yours faithfully
Hunt & Hunt



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