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Details of Filing

Document Lodged: Concise Statement
File Number: VID932/2019
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
BLUESCOPE STEEL LIMITED & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 29/08/2019 4:22:01 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Concise statement

FEDERAL COURT OF AUSTRALIA

No. of

DISTRICT REGISTRY: MELBOURNE

DIVISION: GENERAL

COMMERCIAL AND CORPORATIONS NATIONAL PRACTICE AREA (ECONOMIC
REGULATOR, COMPETITION AND ACCESS)

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

BLUESCOPE STEEL LIMITED (ACN 000 011 058)

First Respondent

JASON THOMAS ELLIS

Second Respondent

IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 1 This proceeding concerns cartel conduct engaged in by BlueScope Steel Limited (**BlueScope**) and BlueScope's former General Manager of Sales and Marketing, Mr Jason Ellis (**Ellis**) during the period from September 2013 to approximately June 2014 (**Relevant Period**). It involved attempts by BlueScope and Ellis to induce arrangements or understandings with BlueScope's competitors, to fix and/or raise the level of pricing for flat steel products supplied in Australia.

BlueScope

- 2 During the Relevant Period, BlueScope:
- (a) was a vertically-integrated steel mill and distributor that manufactured steel products, predominantly in Australia and to a lesser extent overseas;
 - (b) was, with limited exceptions, the only manufacturer of flat steel products based in Australia. When steel is manufactured, it can be cast into slabs for further manufacture. Flat steel is essentially the products that are produced from steel slabs such as plate steel and rolled steel, which may or may not be coated. These products are in turn used in a variety of manufacturing and construction applications including producing steel panels and plate, roofing and cladding;
 - (c) was, through its various divisions and subsidiaries, a manufacturer, distributor, wholesaler and retailer of steel products, including flat steel products;
 - (d) derived most of its revenue from manufacturing and distributing steel products in Australia, competing with overseas manufacturers and domestic wholesalers and retailers;

Filed on behalf of (name & role of party)	ACCC (the Applicant)		
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- (e) generally obtained higher profits from sale of its steel in Australia, than overseas;
- (f) held a significant market share in the Australian market in relation to the sale of flat steel products; and
- (g) faced competition in the Australian market for the sale of flat steel products to end customers, including from imported flat steel sold into the Australian market through local Australian entities known as **Import Traders**.

Jason Ellis

- 3 Ellis commenced his career at BlueScope in the mid-1990's. Between March 2004 and January 2008, Ellis was President of BlueScope subsidiaries located in India and China.
- 4 In February 2008, Ellis left BlueScope and became Group General Manager at Commercial Metals Company, an Australian distributor of flat steel products, and a competitor to BlueScope.
- 5 In March 2010, Ellis returned to BlueScope as President of BlueScope, Thailand. Ellis held this role until around the end of August 2013, at which time he returned to Australia as General Manager of Sales & Marketing at BlueScope (**GM**), within the BlueScope Coated and Industrial Products Australia (**BSL CIPA**) division. During the Relevant Period, Ellis was one of the most senior BlueScope employees in Australia, with significant responsibility for the domestic and international sales of BlueScope, including its strategic direction. He had significant power to direct BlueScope's pricing, in particular, through BSL CIPA, where he was responsible for all domestic and international sales from BlueScope's manufacturing sites.

Steel Industry

- 6 During the Relevant Period, BlueScope sold BlueScope steel to **Australian Steel Users** (being those purchasers who have a final use for the product rather than on-supplying it) by a number of means including:
 - (a) direct sales from BlueScope's steel mill, through BSL CIPA to Australian Steel Users;
 - (b) supplying steel through BSL CIPA, to BlueScope's wholly-owned distribution companies, who then on-sold BlueScope products to Australian Steel Users;
 - (c) supplying steel through BSL CIPA, to what were referred to internally at BlueScope (and within the steel industry) as '**Aligned Distributors**', who then on-sold BlueScope product to Australian Steel Users. Aligned Distributors were those distributors who purchased the majority of their steel products from BlueScope; or
 - (d) supplying steel through BSL CIPA to what were referred to internally at BlueScope (and within the steel industry) as '**Non-Aligned Distributors**', who then on-sold BlueScope product to Australian Steel Users. Non-Aligned Distributors were those distributors who purchased the majority of their steel products from sources other than BlueScope.
- 7 BlueScope was accordingly both a supplier, and a competitor (both directly and through BlueScope's wholly-owned subsidiaries) to the Aligned Distributors and Non-Aligned Distributors in relation to the supply of flat steel products to Australian Steel Users.
- 8 **Overseas Steel Mills** are companies based in foreign countries which have the facilities and capability to manufacture steel. During the Relevant Period, BlueScope faced significant competition in the Australian market, from Overseas Steel Mills which

supplied flat steel products into Australia, either directly or via Import Traders or Distributors.

- 9 Typically, the steel supplied to Australia from Overseas Mills was supplied through Import Traders, who imported volumes of steel from Overseas Mills for re-sale to various distributors or Australian Steel Users.

Steel Market as at 2013

- 10 By 2013, due to a worldwide over-supply of steel and lower demand for steel following the global financial crisis, steel prices in Australia were low and BlueScope and other Australian steel distributors were under financial pressure.
- 11 By 2013, many countries, including Australia, became increasingly protectionist in relation to their local steel industries, which led to an increase in anti-dumping applications.

Domestic competitor strategy

- 12 Following his appointment as GM, Ellis devised and, with the assistance of a number of senior BlueScope representatives, implemented a strategy to increase the price of flat steel supplied by BlueScope, as well as that supplied by its competitors, in order to alleviate the consequences of the intense competition arising from the market downturn described above.
- 13 The steps taken by Ellis and other senior BlueScope representatives during the Relevant Period to implement the strategy included:
- (a) speaking to Aligned Distributors to find out what BlueScope should do for them, in order for them to buy more steel from BlueScope;
 - (b) expanding BlueScope's distribution channel by seeking to increase the amount of steel that BlueScope sold to Non-Aligned Distributors such as Vulcan Steel Pty Ltd (**Vulcan Steel**) and Selection Steel Trading Pty. Ltd. (**Selection Steel**);
 - (c) limiting the amount of 'tactical pricing' or discounting offered to distributors to meet the prices of their competitors;
 - (d) amending BlueScope's price list (**BlueScope Price List**) to remove "early order offers" (a discount for ordering well in advance), and replace these offers with a non-conditional Distributor Discount, which along with other rebates, provided approximately a 13-15% margin between the columns referred to in the BlueScope Price List as the 'Net Price' and the 'List Price' (**List Price**);
 - (e) assuring the distributors and competing steel companies approached that BlueScope's wholly-owned distributors would be increasing their prices and/or pricing by reference to the List Price;
 - (f) conveying to distributors that they should agree to price all of their steel products (both BlueScope and imported) at, or by reference to, the List Price. The List Price was also referred to by BlueScope representatives, in both internal and external communications, including to competitors, as the 'Recommended Resale Price';
 - (g) encouraging distributors to agree to increase their prices across all their products, including imported products. An internal BlueScope 'Pricing Summary' was disseminated to distributors which conveyed the increased profits and profit margins distributors stood to make if they purchased:
 - i. BlueScope steel at a certain price and sold it to their customers at the List Price; and
 - ii. imported steel at a certain price and sold it to their customers at the List Price.

International competitor strategy

- 14 By at least February 2014, ELLIS had devised and introduced a strategy known as the **'Carrot and Stick Strategy'** in relation to BlueScope's interactions with Overseas Steel Mills in order to protect and improve BlueScope's position in the Australian steel market by:
- (a) restricting the volume of steel being imported into Australia from those mills; and
 - (b) increasing the price of flat steel products being exported by those mills into Australia.
- 15 There were various 'carrots' and 'sticks' utilised by Ellis, including:
- (a) inviting the Overseas Steel Mills to raise their prices on the basis that they had been pricing well below Australian prices and so could raise their price without losing their sales volume;
 - (b) informing Overseas Steel Mills that BlueScope would be increasing its own prices and publishing these prices so that the Overseas Steel Mills could see the prices they could charge and price accordingly;
 - (c) in at least one instance, offering to provide an Overseas Steel Mill with the BlueScope Price List;
 - (d) threatening that BlueScope would lodge an anti-dumping complaint against the country where the Overseas Steel Mill was located if it did not raise its prices to levels acceptable to BlueScope; and
 - (e) BlueScope offering to buy the steel that the Overseas Steel Mills would otherwise be exporting into Australia in competition with BlueScope.

Attempts to induce cartel agreements

- 16 The cartel conduct involved separate attempts by Ellis and other BlueScope representatives, on behalf of BlueScope, to induce agreements containing a price fixing provision, with:
- (a) Wright Steel (Sales) Pty. Ltd., an Import Trader, during a meeting in Victoria on 12 September 2013;
 - (b) Selection Steel, a Non-Aligned Distributor, in a series of meetings and communications in September 2013;
 - (c) Apex Steel Pty Ltd, a Non-Aligned Distributor, in a series of meetings and communications in September 2013;
 - (d) Southern Steel Group Pty. Limited, an Aligned Distributor, in a series of meetings and communications in September 2013;
 - (e) Vulcan Steel, a Non-Aligned Distributor, in a series of meetings and communications in September 2013;
 - (f) Celhurst Pty. Ltd. (trading as Selwood Steel Trading), a Non-Aligned Distributor, during a meeting in Victoria on 30 October 2013;
 - (g) CMC Steel Distribution Pty Ltd (previously trading as CMC Coil Steels Pty Ltd), an Aligned Distributor, in a series of communications, between September 2013 and around June 2014;
 - (h) Shang Chen Steel Co Ltd, an Overseas Steel Mill during a meeting in Taiwan, on 26 February 2014;

- (i) Yieh Phui Enterprise Co. Ltd, an Overseas Steel Mill during a meeting in Taiwan, on 26 February 2014;
- (j) China Steel Corporation, an Overseas Steel Mill during a meeting in Taiwan, on 26 February 2014; and
- (k) JSW Steel Ltd., an Overseas Steel Mill during a meeting in India, on 6 March 2014.

RELIEF SOUGHT FROM THE COURT

- 17 The Applicant claims claims the relief from the First and Second Respondents set out in the accompanying originating application, namely declarations, disqualification orders, pecuniary penalties and costs.

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

- 18 During the Relevant Period, BlueScope and each of the respective businesses referred to at paragraph 16, were or were likely to be, in competition with each other in relation to the supply of flat steel products in Australia.
- 19 In each of the instances referred to at paragraph 16, BlueScope, through Ellis and other BlueScope representatives, attempted to induce BlueScope's competitor to enter into an arrangement or arrive at an understanding, containing a cartel provision, contrary to section 44ZZRJ of the CCA. In each instance, the cartel provision was one that had the purpose or likely effect of fixing, controlling or maintaining the price for flat steel to be supplied by BlueScope and the respective steel company within the meaning of s 44ZZRD(2)(a) and (c) of the CCA.

ALLEGED HARM SUFFERED

- 20 The conduct involved attempts to induce various steel companies, at all functional levels of the Australian steel market, to enter into arrangements containing provisions which had the purpose of raising the prices of flat steel in the Australian market. Annual sales in the flat steel market in Australia in the Relevant Period were about 2 million tonnes with a value of between approximately \$2.5 and \$2.8 billion. BlueScope had about \$2 billion of these sales, and supplied about 75% of the market. The attempts had the potential to, and were intended to, raise prices and restrain or remove effective price competition and thereby cause large scale, serious and ongoing economic harm in the Australian steel industry to a range of Australian Steel Users.
- 21 By communicating its pricing strategy as part of the attempts, BlueScope gave its competitors a very strong incentive to raise prices as requested and so gained substantial benefit from the increased prospect that the price rises it initiated would be adopted, whether or not the competitors expressly agreed to do so.

CERTIFICATE OF LAWYER

I Glenn Owbridge certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provide a proper basis for each allegation in the concise statement.

Date: 29 August 2019



Glenn Owbridge
AGS Lawyer
Lawyer for the Applicant

for and on behalf of the Australian Government Solicitor

This Concise Statement was prepared by Glenn Owbridge of the Australian Government Solicitor and settled by Ron Gipp of counsel.