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11 May 2017

Mr M Kenna
Assistant Director
Anti-Dumping Commission
Operations 5
Level 7, Industry House
10 Binara Street
Canberra
Australian Capital Territory 2601

By email

Dear Sir

Waterdos Instruments Australasia Alleged dumping of cooling tower water treatment controllers

As you know, we represent Waterdos Instruments Australasia (“Waterdos”) in this matter.

We are writing to convey our client’s deep concerns regarding the “material injury” allegations and findings made by the Anti-Dumping Commission (“the ADC”) – preliminary though those findings are – in relation to the allegations of the Australian industry in this matter, as are contained in Australian Dumping Notice 2017/54 (“the PAD”).

At the outset, we wish to emphasise that it is critical to the proper administration of Australia’s anti-dumping system that injury allegations be fully and objectively scrutinised. Dumping without material injury is not actionable. Waterdos is not privy to the margin calculations that are said to have supported the PAD, but is aware that the exporter is presently interrogating those calculations, and that they may be erroneous by reason of a lack of understanding on the exporter’s part as to the data requirements of cases such as this.

Any material injury determination is subject to the strict requirements prescribed under the *Customs Act 1901* (“the Act”). Once a proper understanding is gained as to the relevance or otherwise of the history of the Australian water controller systems industry, the presently buoyant condition of the Australian industry (“Aquarius” or “the Applicant”), the nature of the product, and how the market operates, it should become clear that the injury claimed by the Applicant is illusory, or not material, and that any suggestion that it has been caused by imported water controllers can neither be supported nor proven.

In particular, Waterdos addresses the following matters:

- A Injury has incorrectly been attributed to the subject imports.....2**
- B The Australian industry does not appear to have suffered material injury4**
- C The PAD fails to consider the largest source of water controllers in the Australian market ...6**
- D The price undercutting analysis is misconceived and ultimately incorrect.....7**

NON - CONFIDENTIAL

A Injury has incorrectly been attributed to the subject imports

The injury findings in the PAD are based upon the following conclusions:

The Australian industry's pricing levels in the investigation period were, on average, significantly below those achieved before competition with imports from the USA commenced...

and:

In the investigation period, Aquarius' selling prices for cooling tower water treatment controllers were significantly lower than those achieved when imports from the USA were not present in the market.

These conclusions are based on a seven year injury analysis period, from 2009/10 to 2015/16. This is highly unusual, in that the majority of investigations such as this only adopt a five year injury analysis. In this case, this long term injury analysis period is said to have been adopted as a result of the "significant increase in import volumes from the USA in 2010".

We are very seriously concerned to find that the conclusions drawn by the PAD appear to accept the unsupported allegation of the Australian industry ("Aquarius") that dumping has occurred since 2009/10.¹ Ultimately, the PAD is erroneous, because it is based on the following allegations and conjecture:

- the allegation, unsupported by evidence, that all water controllers exported from the United States between 2009/10 and 2015/16 were dumped;
- the allegation, unsupported by evidence, that all differences in the Applicant's performance between 2009/10 and 2015/16 was the result of exports of water controllers from the United States in that period; and
- the conjecture, unsupported by evidence, that 2009/10 is representative of Aquarius' performance without dumped imports.

There are a number of legal errors in this, as we now outline.

- 1 Section 269TAE(2AA) of the Act specifically requires that an injury determination be *based on facts and not merely on allegations, conjecture or remote possibilities*. As discussed above, insofar as the injury finding relies on assumptions of dumping outside the period of investigation it is based on assertions and conjecture.
- 2 Secondly, the PAD misunderstands the purpose of the injury analysis. As noted by Section 269T(2AD):

(2AD) The fact that an investigation period is specified to start at a particular time does not imply that the Minister may not examine periods before that time for the purpose of determining whether material injury has been caused to an Australian industry or to an industry of a third country.

The investigation period in this case is 1 July 2015 to 30 June 2016. According to Section 269T(2AD) the only relevance of the years prior to this is to determine whether material injury

¹ Application page 32.

has been suffered in the investigation period of 1 July 2015 to 30 June 2016. In other words, as per the Consideration Report, the purpose of the injury analysis period is to:

...identify and examine trends in the Australian market, which in turn assists the Commission in its examination of whether material injury has been caused by dumping over the investigation period.²

The PAD has not “identified and examined trends”, it has merely fastened upon a single year in which Aquarius performed better than it did in the seven years that then followed. This does nothing to identify what impact the subject imports – being those made during the period of investigation – had on Aquarius in the period of 1 July 2015 to 30 June 2016. Even if it were permissible to take such an approach, there is no evidence as to whether 2009/10 was a “standard” year that actually represented Aquarius’s performance prior to facing additional competition in the Australian market, or whether it was some historical apex in Aquarius’ performance – an “age of Aquarius” if you will.³ As such, the conjecture that Aquarius would still perform at those same levels absent the alleged dumping lacks intellectual rigour and logic and, most importantly, is not based on facts as required by Section 269TAE(2AA).

This approach to the question of injury completely ignores occurrences in the Australian market between 2009/10 and 2015/16 that have had a negative effect on Aquarius’ business. For example in 2011/12 Ecolab and Nalco merged.⁴ This impacted the Australian industry’s sales because until that point Ecolab was Aquarius’ largest customer, representing approximately 25% of its overall sales. So far as Waterdos is aware the merged Nalco/Ecolab sources water controllers from either **[CONFIDENTIAL INFORMATION DELETED – importer]** or from related entities. Waterdos understands that 2012/13 represented the lowest point in Aquarius’ sales over the long injury analysis period, some 19% below its previous year sales.⁵ It is completely illogical to assume this fall in sales volume was the result of imports from the United States.

- 3 Finally, the PAD simply does not comply with Section 269T(2AE) of the Act, which provides:

...subsection (2AD) does not permit any determination under this Part that dumping has occurred by reference to goods exported to Australia before the start of the investigation period

By simply finding that Aquarius has performed worse in 2015/16 than it did in 2009/10, the PAD has assumed that that the change in performance between these two periods is due to dumped imports. The Act prevents the determination, whether based on evidence or assumption, that dumping has occurred outside the period of investigation. If dumping cannot be found to have occurred outside of this period, then dumping cannot be found to have caused injury outside this period either. If exports had the massive effect that

² Page 2.

³ Indeed, it is Waterdos’ recollection that in the late 2000s, the market was overheated, as a result of State government initiatives to offer incentives for the purchase of efficient water technologies, such as newer cooling water treatment controllers that had better water saving technology. See for example page 30 of the Sydney Water *Best Practice Guidelines* of 2007 (accessible here https://www.sydneywater.com.au/web/groups/publicwebcontent/documents/document/zgrf/mdu0/~edisp/dd_054580.pdf) which highlights the NSW Green Business Program among other water efficiency programs. Other State governments had similar programs at that time. Water efficiency was a hot topic at the time because of the drought. When the drought ended in 2010 (coincident with Aquarius’ drop in sales) these programs were discontinued. This would have had a significant impact on the Australian market and Aquarius’s sales volume.

⁴ See: <http://www.nalco.com/news-and-events/5385.htm> and <http://www.nalco.com/news-and-events/5524.htm>

⁵ According to the analysis below.

Aquarius attributes to them in 2009/10, then it was open to Aquarius to apply for an investigation at that time, in order to have those allegations properly tested in accordance with law. Having not done so, neither it nor the Commission can now say as a matter of fact that dumping had occurred, or even that exports had the effect that Aquarius retrospectively attributes to them.

In summary, any injury determination needs to be based on fact. It can only relate to the period of investigation. The purpose of the injury analysis period is not to establish a narrative of the impact of imports on the Australian industry over that period, because such imports cannot be found to be dumped. Rather, it is to establish the trends in the Australian market and the Australian industry's performance, in order to determine how imports during the period of investigation may have impacted the industry.

For the reasons outlined above, we submit that the PAD's reliance on facts and circumstances that took place before the period of investigation for dumping purposes as part of its causation analysis is critically flawed.

B The Australian industry does not appear to have suffered material injury

The PAD found that the Australian industry had suffered material injury in the form of loss of sales volume, price suppression and depression, profits foregone, reduced assets, reduced revenue, reduced capacity utilisation and reduced employment.

We will address each of these in turn, in light of the legal principles discussed in part A of this submission:

- 1 **Loss of sales volume** - this finding is not articulated and is not plain on the evidence included in the PAD or in any other document on the public record. Indeed, according to the PAD the Australian industry's sales volumes "*increased from 2012/13 to 2015/16*". That is to say, in the period of investigation, when the Australian industry is supposed to have suffered "material injury" as a result of dumping, it actually increased its sales volume over the years prior.

Indeed, it is only in 2009/10 that the Australian industry's sales volume was better than it was in the POI. But this form of comparison is essentially meaningless given the six year period between 2009/10 and the period of investigation. The fact that the Australian industry sold more units in one isolated year over half a decade ago than it did in the POI is not evidence that dumping has caused a loss of sales volume in the period of investigation. Even if imports from the USA had caused that initial loss of sales volume (a conclusion that has not been evidenced, as is not open to the Commission to make), that would not be relevant to whether injury had been suffered in 2015/16.

2010/11⁶	2011/12	2012/13	2013/14	2014/15	2015/16
100	100	81	86	96	113

⁶ This is based on the information included in the Applicants' "indexed table of sales quantities" at page 25 of the Application, using the 2010/11 figure as the base for the index. Another way to look at the index, is to take a straight average of all years and compare it to the POI. According to this method the average yearly sales over the injury analysis period (not including the POI) was 62.33, compared to sales of 67 in the POI. Again, the Aquarius' sales are above the injury analysis trend. On this basis there can be no finding they are suffering a loss of sales volume.

Ultimately, the trend in the period of investigation was very positive for the Australian industry. Indeed, its sales in the period of investigation far exceed sales made in at any point in the previous five years:

It is equally apparent from the PAD that Aquarius has increased its market share between 2012/13 and the period of investigation, whereas the market share of US imports has decreased. Accordingly, Waterdos submits that there is no evidence that the Australian industry has suffered injury in the form of lost sales volume as a result of imports in the period of investigation, whether from the United States or anywhere else for that matter.

- 2 **Price depression and price suppression** - the price depression/suppression analysis is based upon a comparison of the CTMS and revenue for two Aquarius products – Model CT11330 and Model CO11330. Waterdos notes that the narrative is somewhat confused. The PAD indicates that for Model CT1130 the price has fallen for each year in the injury analysis period other than 2014/15. However the graph supplementing that narrative appears to show a slight increase in the period of investigation of 2015/16 over 2014/15. Similarly, the price of Model CO1130 was higher in the period of investigation than it was in the previous year.

Of note is the fact that both Model CO11330 and CT11330 appear to have had wider margins in the period of investigation than they did at any other time during the injury analysis period. The fact of these increasing margins suggests that no price suppression or depression was suffered by the Australian industry in the period of investigation.

Finally, with regard to the price trend observed over the analysis period, it is apparent that both models have been available in the market over the seven years of the injury analysis period. It is also apparent that Aquarius has updated its offerings over this time. It is Waterdos' experience that these products have a life-cycle, similar to that which accompanies the introduction of a smart phone and the superimposition of later smart phone models. When the product is new to the market it can achieve premium prices, but that ability decreases over time. When the next generation model is introduced to the market, the older generation model cannot be sold for the same price at which it was initially introduced to the market. The introduction of newer, more advanced models – as were introduced by Aquarius in 2015/16 – will therefore unfavourably impact the price achievable for the older models. Our client suspects that this is the reason why the prices are lower in the period of investigation than they were at the start of the injury analysis period. This has nothing to do with import competition.

- 3 **Profits foregone** - the PAD considers that the Applicant's profit improved in the period of investigation of 2015/16. It is therefore *better* than it was in 2014/15. Yet, the PAD concludes that:

It appears that the loss of sales volumes combined with price depression and suppression has caused Aquarius' profits to be lower than would have been the case had these effects not been present.

As discussed, in the POI the Applicant's prices and margins were better than they had been in previous years, as was its sales volumes. The finding that Aquarius' profits would have been higher is merely conjecture which cannot form the basis for a material injury finding.

- 4 **Reduced assets** - there is not sufficient information in the PAD to understand when this reduction in assets was said to have occurred.
- 5 **Reduced revenue** - the PAD indicates that in the period of investigation the Applicant's revenue rose. Accordingly the alleged dumping has not caused a reduction in revenue.

- 6 **Reduced capacity utilisation** - there is not sufficient information in the PAD to understand whether this reduction in capacity utilisation actually occurred, and when.
- 7 **Reduced employment** - reductions in employment occurred between 2009/10 and 2012/13. In the period off investigation of 2015/16 the Applicant actually added an additional staff member. The finding that the alleged dumping caused this form of injury is incongruous in light of these facts.

Accordingly, Waterdos submits that the finding that the Australian industry has suffered injury is erroneous. A proper consideration of the trends in the injury analysis period actually shows that Aquarius' performance in 2015/16, when dumping is supposed to have occurred, was much better than it was in previous years.

C The PAD fails to consider the largest source of water controllers in the Australian market

The Act requires the Commission to consider whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of the goods to which the application relates. To the extent that any injury is caused by another factor besides the exportation of the goods subject to the investigation it must not be attributed to the exportation of those goods.

The PAD noticeably lacks any analysis of the impact of exports from a country or countries that are not the subject of the investigation. According to the PAD, such imports accounted for almost 50% of the market in the period of investigation of 2015/16. As such they are very clearly a significant component of the Australian market, more so than imports from the USA. Any failure to consider the impact of these imports would be a critical flaw in the Commissioner's consideration of the matters under investigation. It is likely that the failure is due to the Australian industry's failure to fully illustrate the Australian market in its application, and the preliminary and possibly hurried nature of the PAD. Nonetheless, given the significance of the PAD on Waterdos' business, it is concerned by the Commission's decision to impose securities in the circumstances. It should not be possible for the Commission to come to the conclusion that there "*appears to be sufficient grounds*" for the publication of a Section 269TG(2) notice if the requisite non-attribution analysis has not been undertaken, regardless of its preliminary basis.

From the PAD it is clear that these other imports occupy a very significant part of the Australian market for water controllers. It is also clear that every year since 2012/13 these non-subject imports have increased their market share. This is a trend these imports have in common with the market share of the Australian industry. The implication of this should be obvious – since 2012/13 up until the period of investigation, imports from the US are the only form of water controllers that have been *losing* market share. How is this indicative that imports from the US have caused the volume injury complained of in these circumstances?

In addition to holding the significant portion of the Australian market, Waterdos understands that these third country imports are the lowest priced in the Australian market, and therefore would be the major cause of any price injury that might be found to have occurred.

[CONFIDENTIAL INFORMATION DELETED – price comparisons in the Australian market]

On this evidence, third country imports, which reflect the largest source of imports, are the lowest priced in Australia. To the extent that the Australian industry is considered to have suffered any injury (noting that Waterdos considers that this cannot be established on the presently available information), such injury would have been caused by third country exports.

D The price undercutting analysis is misconceived and ultimately incorrect

As discussed above, Waterdos believes that the finding that the Australian industry has suffered material injury in any form, including price suppression and depression, is incorrect. It is apparent that during the period of investigation prices were higher than they had been in previous years, and that Waterdos achieved the biggest margin it had over the entire seven year injury analysis period. Accordingly, no price injury has been suffered by the Australian industry.

In addition to this point, Waterdos has significant concerns regarding the alleged undercutting that the PAD finds to have occurred. Our client strongly denies that it has been involved in price undercutting in any form. There are two aspects to this proposition.

- 1 **There is no direct contestability of sales of "cooling tower water treatment controllers" as imported** – the point here is that the Applicant, and Waterdos, and the other market participants here in Australia, do not sell *cooling tower water treatment controllers* in competition with each other. As per the Waterdos verification report, controllers are incorporated by Waterdos into *cooling tower water treatment systems* before being sold to Waterdos' customers.⁷ The injury analysis in the PAD appears to relate to these "systems", rather than to the goods under consideration.

These systems include significant additional components, provided by the Applicant or the importer concerned, and are sold with significantly different qualities and conditionalities appurtenant to them. Waterdos considers that the controller itself accounts for approximately [CONFIDENTIAL INFORMATION DELETED – number] of the cost of this kind of system (although this will vary depending on the complexity of the system), with other components, which may be sourced from other countries, and the various services, reputations, and relationships of the Australian assembler of the system also being a significant intangible element of any successful sale. Given the complexity of these products, and the different marketing and contractual conditions likely to be offered by the market players, it is simply not possible to assess whether it was the cost of the controller that was responsible for the successful sale by the system assembler, or whether other factors were the relevant drivers.

Indeed, it is to be noted that a water controller is only a small part of the water monitoring and treatment system of which it is a part, and that the criticality of such systems for the operational integrity of buildings is so important that the cost of a controller embedded in the system itself is likely to be an infinitesimal consideration for an installer or end user. In Waterdos' opinion, it is simply not possible to "blame" the cost of a water controller for the purchasing decision made with respect to cooling tower water treatment systems and their installation.

- 2 **Factually, Waterdos does not believe that there has been any relevant undercutting** - without detracting from the above, Waterdos is of the opinion that there must be some flaws in the product-matching adopted by the Commission in undertaking its undercutting analysis.

Given the complexity of these items, correct product matching is critically necessary for any price undercutting analysis. Differences between the items can have a significant impact on the price. Waterdos considers that the model the Commission may have used for its price undercutting analysis is [CONFIDENTIAL INFORMATION DELETED – model], based on the explanation that the model "*represented a significant proportion of the sales of Waterdos*". If this is the case, then Waterdos considers that the correct model for comparison is the Aquarius CT11330.

The comparison of these two products is as follows:

⁷ Page 9.

Producer	Model	Description
Waterdos	[CONFIDENTIAL INFORMATION DELETED – model]	This controller package has conductivity, temperature and flow sensors, three peristaltic dose pumps, one 15mm solenoid valve, a 20mm manifold with four injection points, position for the sensors, isolation valves and is mounted on a 15mm PVC backboard, supplied in a shipping box with packing, manuals etc. It trades between [CONFIDENTIAL INFORMATION DELETED – price] ⁸
Aquarius	CT11330	This controller package has conductivity, temperature and flow sensors, three peristaltic dose pumps, one 15mm solenoid valve, a 20mm manifold with four injection points, position for the sensors, isolation valves and is mounted on a 15mm PVC backboard, supplied in a shipping box with packing, manuals etc. Waterdos understands that it trades for between [CONFIDENTIAL INFORMATION DELETED – price estimate]

These prices can be contrasted with third country sales made by [CONFIDENTIAL INFORMATION DELETED – importer] for its product with the same features:

[CONFIDENTIAL INFORMATION DELETED – price details]

Again, all water treatment systems are not alike – they are not all “cookie-cutter” products. The types of systems on offer differ significantly, so an incorrect comparison may lead to a false finding of undercutting. For example, [CONFIDENTIAL INFORMATION DELETED – model] is similar to the [CONFIDENTIAL INFORMATION DELETED – model] mentioned above, but does not include a flow sensor. As a result Waterdos sells it for between \$[CONFIDENTIAL INFORMATION DELETED – price]. If this was compared to the Australian industry’s CT11330 then it would lead to an incorrect undercutting finding, because of the differences in the components included in each product.

Nonetheless, Waterdos considers that it has not undercut Aquarius’ prices, but that third country sales may have. Again, this is not to detract from our client’s concern that a price undercutting analysis with respect to products which are not the goods under consideration, and which are sold with tangible and intangible differences to the goods under consideration, which does not take into account those differences, is not a proper analysis for causation purposes.

Our client would also like to emphasise that a portion of its sales took the form of “kits”. These include some of the major components of a water treatment system, which the customer can then assemble with additional parts from other sources. By their nature, these kits can be sold for less than a complete water treatment system, as Waterdos does not incur the same labour costs nor does it need to provide backing boards, pipe brackets, labelling, testing and packaging materials. All of which is to say these kits cannot and should not be compared to a completed unit because such a comparison may again lead to an erroneous undercutting finding.

We reiterate - even if to do so is to labour the point - that the exercise the Commission must undertake is to determine whether the goods under consideration caused material injury to the Australian industry. As per Waterdos’ verification report, the items it sells are cooling tower treatment systems. These systems combine particular kinds of water controllers imported from the USA (along

⁸ As per the sales report that Waterdos has provided to the Commission.

with accessories) with a range of other items to produce cooling tower treatment systems. Even if the undercutting analysis was correct, it is not apparent how the Commission has ascertained (or how it could ascertain) that any undercutting was caused by the alleged dumping of the water controllers, and not to factors relating to the cooling tower treatment systems in which the goods under consideration are incorporated, and to the assembly, sales and service skills of the Applicant on the one hand and of the Australian importers on the other. Indeed, it would seem that the entire analysis does nothing to inform the question of whether the allegedly dumped imports – being the controllers – had any effect on like goods produced by the Australian industry, whether by way of undercutting or otherwise.

In summary, we submit that the undercutting finding in the PAD is by no means robust enough to establish the proposition to which it must be directed, and that on the evidence provided in this submission it cannot be correct. We submit that there is no positive evidence that the price injury alleged to have been suffered by the Australian industry has been caused by imports of water controllers from the USA.

In summary, we respectfully submit that the only appropriate factual findings open to the Commission are that:

- (a) the Australian industry has not suffered material injury;
- (b) imports from the USA, whether or not dumped, have not caused material injury to the Australian industry;
- (c) if the Australian industry was found to have suffered injury, such injury is likely the result of imports from countries other than the USA; and
- (d) the price undercutting analysis is not appropriate for the exercise required by the Act and that in any case Waterdos has not undercut Aquarius' prices.

Accordingly, Waterdos respectfully submits that this investigation be terminated as soon as possible.

Yours sincerely


Alistair Bridges
Associate