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25 November 2015

The Director
Operations 2
Anti-Dumping Commission
55 Collins Street
Melbourne
Victoria 3000

By email

Dear Director

[CONFIDENTIAL TEXT DELETED – name of client]
Anti-circumvention inquiry concerning hollow structural sections
Comments on Statement of Essential Facts No 291

We are the lawyers for **[CONFIDENTIAL TEXT DELETED – name of client]**. **[CONFIDENTIAL TEXT DELETED – name of client]** is an importer of hollow structural sections from China.

In Statement of Essential Facts No 291 ("SEF 291") the Anti-Dumping Commission ("the Commission") notifies interested parties of the facts and circumstances arising from its inquiry into the alleged circumvention of anti-dumping measures applicable to *"certain electric resistance welded pipe and tube made of carbon steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes"*. SEF 291 also advises of the Commission's opinions in relation to those facts and to the application of the law to those facts. Lastly, SEF 291 outlines the recommendations that the Commission proposes to give to the Parliamentary Secretary[1] in its final report of the inquiry, both in terms of the alteration of the notices presently in place, and in relation to the proposed date of effect of those alterations.

The pipe and tube to which the notices apply is more often referred to as hollow structural sections, or "HSS", made from carbon steel. The pipe and tube to which the claim that a "circumvention activity" has occurred is non-carbon HSS. Non-carbon HSS is also referred to as "alloy" HSS or, as a subset of alloy HSS, as "boron-added" HSS.

Our client's concerns about SEF 291 pertain to the following matters:

- the finding that the legal definition of the "slight modification" circumvention activity can be applied to the alloy HSS; and
- the exercise of any discretion available to the Minister concerning the date of effect of any alterations to the notices.

Our client maintains that there has been no "slight modification" according to the applicable legal test. Further, our client submits that the exercise of the discretion to backdate the alteration of the notices to 11 May 2015 would be an ill-considered and unfair exercise of the discretion. If the Commission does not accept our client's position that the "slight modification" circumvention activity

[1] References to the Parliamentary Secretary are and should be taken to also be references to the Minister.

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has not taken place, we nonetheless sincerely request the Commission to reconsider and reverse its proposal that the notices be altered with effect from 11 May 2015. Instead. Our client requests the Commission to recommend to the Parliamentary Secretary that the alterations should not be backdated.

A The circumvention activity of "slight modification" has not occurred

Sub-regulations 48(1) and (2) of the *Customs (International Obligations) Regulation 2015* provide as follows:

> *(1) For subsection 269ZDBB(6) of the Act, the circumstance set out in subsection (2) of this section is prescribed.*
>
> *Slight modification of goods exported to Australia*
>
> *(2) The circumstance is that all of the following apply:*
>
> *(a) goods (the* ***circumvention goods*** *) are exported to Australia from a foreign country in respect of which the notice applies;*
>
> *(b) before that export, the circumvention goods are slightly modified;*
>
> *(c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;*
>
> *(d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;*
>
> *(e) section 8 or 10 of the Customs Tariff (Anti-Dumping) Act 1975 , as the case requires, does not apply to the export of the circumvention goods to Australia.*

The chapeau to Sub-regulation 48(2) states that all of the circumstances listed in the Sub-regulation must apply, in order for the circumvention activity to have occurred for the purposes of the primary legislation, being Section 269ZDBB of the *Customs Act 1901* ("the Act").

We paraphrase and comment upon the requirements of the Sub-regulation in the context of this inquiry as follows:

1 First, as has been determined by the Commission, alloy HSS has been exported to Australia. This is the requirement of Sub-regulation 48(2)(a). These are the "circumvention goods" to which the analysis that is spelt out in Sub-regulation 48(2) is to be applied.[2]

2 Secondly, according to Sub-regulation 48(2)(b), the alloy HSS must have been slightly modified before that export. Here the Commission has a difficulty – was the alloy HSS slightly modified before it was exported? Obviously, the answer to this question must be "no". The circumvention goods are alloy HSS. As soon as the goods became alloy HSS they were not slightly modified. As soon as they became alloy HSS they were exported to Australia, or at least before they were exported nothing else was done to them by way of modification that could be said to attract this requirement of Sub-regulation 48(2).

[2] In paragraph 6 below we address the position that would apply if the Commission was of the view that the non-alloy HSS goods – in other words, the goods subject to the notice – are the "circumvention goods" for the purposes of Sub-regulation 48(2)(a).

3 Thirdly, the use or purpose of the circumvention goods must be the same before, and after, they are so slightly modified. It has already been established, in relation to the requirement of Sub-regulation 48(2)(b), that the circumvention goods were not slightly modified. On that view this requirement – that of Sub-regulation 48(2)(c) - cannot be met, because no act of slight modification allows us to compare the circumvention goods before and after their modification. However, what if the slight modification was considered to be the manufacture of alloy HSS from alloy hot-rolled coil ("HRC")? Ignoring for one moment that this formulation of the Sub-regulation does not fit with the descriptions used in the other requirements of the Sub-regulation, we can see that the purpose of the "goods" before their modification was the manufacture of other steel products, such as HSS, and that after their modification the purpose of the goods, being HSS, was for fabrication into structures. On this basis the use or purpose of the goods before and after their modification was not the same.

4 Fourthly, the Commission is asked by Sub-regulation 48(2)(d) to assess what would have been the case had the alloy HSS not been so slightly modified and whether, if it had not been modified, whether it would have been subject to the notice. As we have already said, the alloy HSS was not slightly modified. Alloy HSS was manufactured from alloy HRC.

5 Fifthly, the anti-dumping measures in the form of the existing notice must not apply to the export of the alloy HSS. It is axiomatic that the notice, which is in respect of non-alloy HSS ("carbon" HSS), does not apply to alloy HSS. So here we can accept that this requirement is met, as well as the first requirement. However all of the requirements of Sub-regulation 48(2) must be met, and on our analysis the second, third and fourth are not.

6 In footnote 2 we noted that we would return to the proposition that the circumvention goods referred to in Sub-regulation 48(2)(a) could be the non-alloy HSS goods – in other words, the goods already subject to the notice. The fifth requirement of the Sub-regulation – that the circumvention goods not already be the subject of the notices – precludes this proposition.

Accordingly, we submit on behalf of our client that the slight modification circumvention activity has not occurred and that any finding based on a contrary conclusion would be wrong and unsafe.

B The effect of the alterations should not be backdated

Amendments to Australia's anti-dumping legislation to introduce "circumvention activities" as "actionable" activities – in the sense that the proof of one or other of those activities could adversely affect the rights of a party involved in them – became law on 11 June 2013. On and from that date the Parliamentary Secretary was empowered, following investigation and report from the Commission, to find that a circumvention activity had occurred and to take action in respect of it. The circumvention activity constituted by "slight modification" is an exception to this. It came into effect on 1 April 2015. The first set of circumvention activities were enacted by way of amendments to the Act, and the "slight modification" circumvention activity became law by way of regulation.

The power to take action that was bestowed on the Parliamentary Secretary was to make a declaration to alter the notice, and as part of that declaration to impose dumping measures under the altered notice with effect on a day specified in the declaration. To that end Sub-section 269ZDBH(1) provides as follows:

> *(1) After considering the report of the Commissioner and any other information that the Minister considers relevant, the Minister must declare, by notice published in accordance with subsection (9), that for the purposes of this Act and the Dumping Duty Act:*
>
> *(a) the original notice is to remain unaltered; or*

> *(b) the alterations specified in the declaration are taken to have been made to the original notice, with effect on and after a day specified in the declaration.*

A limitation was placed on the retrospective effect of such an altered notice, to the effect that the back-dating could not be before the Commission's notice of initiation of the inquiry.

On behalf of our client we make the following submissions by way of strong objection to the proposal to back-date the altered notices to the date of initiation of this inquiry. The key points of our submissions are these:

- Backdating of an alteration should be considered to be an exceptional use of the discretion in that it adversely affects the interests of a party at a time before a "liability" for behaviour has been determined.
- It follows that a decision to backdate an alteration to the maximum degree is the most severe exercise of the discretion, to be exercised in exceptional circumstances.
- Determining whether and how the discretion should be exercised requires a consideration of a multitude of facts, circumstances, interests and policies.
- In our respectful opinion, the circumstances of this "slight modification" circumvention activity, in this case and at this time, do not at all justify a decision to backdate the alteration in a way which most severely affects the interests of importers such as our client.[3]

1 The exercise of the discretion must take into account different factors in relation to the different circumvention activities. The exercise of any discretion, when it relates to different legal conditions, and different facts and circumstances, must itself be variable. The selection of the maximum period of backdating, as is proposed in this case, is the most extreme exercise of the discretion that can be contemplated. In that context it is worthwhile to consider how the discretion should be guided, and to look at the circumstances for the exercise of the discretion.

In relation to the former, the debate leading up to the enactment of the anti-circumvention laws focused on the alleged "unlawfulness" of behaviour by exporters and importers in evading dumping duties that might otherwise be payable, and on practices that although not unlawful might be frowned upon in some way or other, in the sense that the overall objective of the dumping duties were not being met. An assessment of behaviour that is "right" and "wrong" and of the moral conditions attaching to such behaviour is very difficult to make in circumstances where the "practice " of dumping is not itself illegal or unlawful in the first place. However it seems to us that the discretion to backdate duties itself needs to have some compass by which to guide it, however difficult it might be to describe that compass.

We would also submit that the discretion is not all "one way". It is true that the objective of dumping duties is to protect an industry against prices that, in a previous period, were deemed to be too low and to have caused material injury to that industry thereby. At the same time, the Federal Court has made it clear that the protection of Australian industry is not the only objective of Australia's anti-dumping laws, and that a balance must be struck. As per Nicholas J in the *Panasia* case:

> *Further, I do not agree with [the Australian industry] that the purpose of Part XVB of the Act is "to protect Australian industry". The purpose of Part XVB is far more complicated. It is apparent from the scheme of Part XVB that the legislature has*

[3] Our submissions in this regard are not intended to detract from our client's position as explained in A above.

> *sought to strike a balance, as the relevant international agreements no doubt seek to do, between various interests including not only those of Australian industries but also other WTO members and their own domestic industries, Australian consumers (in the broadest sense of that word) who may have an interest in acquiring imported goods at the lowest available prices and Australian exporters that supply their goods to other countries that are also members of the WTO.*[4]

Part of that balance, it seems to us, is that the lawful conduct of commerce should not be interfered with simply because an Australian industry does not like the practice from the perspective of its own self-interest. There are wider considerations that must be taken into account. The rights of other Australians – not only those of the Australian industry – are equally important.

The power to backdate the alteration of a notice exists within that landscape of law and policy. It permits, in its most severe application, the backdating of an alteration to a time at which the behaviour concerned had not yet been demonstrated to have occurred or to have been "punishable". We use that word advisedly, but even if "punish" is not the correct expression to use it is at least true to say that by reason of backdating an alteration to a notice in that way a person's interests are adversely affected to a greater degree than would be the case if the notice was not backdated. The ordinary case or "default position" would seem to us to be that the alteration of a notice should only have effect from the time at which the decision that found that there a circumvention practice had occurred is actually made, and not before. In our view there needs to be a justification for backdating, being a justification which is aligned to the policies and other considerations that were relevant to the enactment of the laws and to the place that the anti-dumping system holds in national policy (as explained by Nicholas J in the extract we have quoted from the *Panasia* case) and that do not depart from accepted precepts of administrative fairness and reasonableness.

2 In that context the first comment we would make is to acknowledge that a justification is offered in SEF 291 for the proposal to adopt the most extreme form of backdating allowable (namely, to the date of initiation of the inquiry). That justification is stated as follows:

> *To ensure any alteration to the original notice provides an effective remedy to the injurious effects caused by circumvention behaviour, it is necessary to alter the original notices in such a way that the changes are applied both retrospectively and prospectively.*
>
> *The Commission proposes to recommend that the original notices be altered so as to have effect from the date of initiation of this inquiry, 11 May 2015.*

This justification appears to have been arrived at without considering any other factors which are relevant to the exercise of the discretion.[5] With respect, it is blinkered and one-sided. The question we would like to pose, in order to test whether this justification is sufficient to support the intended recommendation, is whether the Commission has given full enough consideration to the range of factors that ought to be taken into account before "penalising" or "punishing" parties who, at the time of the backdating, were going about their lawful business.

3 We draw the Commission's attention to the fact that there are a number of circumvention activities that are described in the relevant provisions of the Act. Those activities can be

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[4] *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870, at para 148:

[5] We note that although this justification is stated we see no factual analysis in SEF 291 which would support it.

ranked from those which could be considered to result in the outright evasion of dumping duties otherwise payable, to those that are fully legal at the time they occur and are defensible as being normal commercial behaviour (whether or not the legislature has decided to refer to all of the activities, somewhat pejoratively, as "circumvention activities").

In that ranking we would think it to be unarguable that arrangements between exporters whereby one exporter's products are exported by another exporter with a lower dumping duty rate are entirely evasionary and indefensible. For example, we assume that such a practice would involve material misrepresentations being made in entry documentation about the corporate origin of the goods. Transhipping goods originally manufactured in and exported from a country that is subject to dumping duties, and claiming on importation into Australia that they are exports of the transhipment country that is not subject to dumping duties, could also validly be considered to be a sharp practice that should not be tolerated. In cases where these activities are proven, the Parliamentary Secretary might properly consider herself to be fully justified in applying backdating to the maximum extent.

4 The other types of circumvention activities do not fall into the same category of severity as the two we have already mentioned. Thus, the choice of an exporter to assemble goods in a third country, or even in Australia, from parts of the goods that were originally exported and found to have been dumped from the country subject to the notice, would be less clearly a circumvention activity that the Parliamentary Secretary would seek to treat with the maximum harshness. Questions as to what is a significant proportion of the parts from the country originally subject to the notice would only be answerable in the course of an inquiry to establish whether the circumvention activity had occurred. The complexity of the assembly may also affect the exercise of the discretion to backdate, in that the anti-dumping system has a heavy focus, of course, on prices and costs. Such prices and costs can be expected to be substantially different in the case of such a radical reorientation of an exporter's manufacturing activities.

5 In making these comments we wish to stress that we are not challenging or seeking to ignore the anti-circumvention laws themselves. The exercise we are here undertaking is to evaluate *the exercise of the discretion to backdate the date of effect of an altered notice*. We do not doubt that the legislature has labelled each of the six circumvention activities purposefully and under the same umbrella, and that proof of one or other of them will have the consequence of allowing the relevant notice to be altered. Our focus is on the exercise of the discretion to backdate, which is a decision that will adversely affect interested parties to a greater degree than a decision only to impose duties from the time that the Parliamentary Secretary has made her final decision. This discretion must be exercised in a way which has regard to the policy factors we have mentioned, and which is administratively reasonable and fair. The power is not untrammelled and we would suggest that it cannot be exercised on every occasion in the most extreme way simply because of a concern about injury to the Australian industry. That would be an all too unsophisticated appreciation of the power and its implications for those who will potentially be affected by its exercise.

6 We move on now to the circumvention activity referred to as the avoidance of the intended effect of the duty. This, it seems to us, is also an activity which would inherently have a lesser requirement for backdating than others. Competition policy promotes competition in markets, except where it is "predatory". Thus backdating any alteration to a notice to have effect at a time before the final decision has been made would seem to us to be needlessly discriminatory against importers and extremely unreasonable, except perhaps where there is strong evidence that an exporter and/or importer's prices are not market driven.

7 Moving now to the circumvention activity referred to as slight modification, we make these comments:

(a) Unlike the circumvention activities having to do with transhipment and arrangements with exporters, slightly modified goods have not at any time been goods subject to the original notices. On this basis alone we can see that the slight modification of goods is not an unlawful or evasionary practice at any time from the time it occurs until the Parliamentary Secretary properly concludes that it has occurred. Transhipment and arrangements with exporters relate to the very goods that are subject to the original notices, and for that reason a heavier-handed exercise of the discretion could be expected in respect of them.

(b) Consistent with the comments in (a) above, nothing that any importer has done in relation to the importation of alloy HSS has been illegal. For its part our client has properly entered the goods, and properly cleared them after having paid the duties that apply to them. There is no facility for an importer to pay duties such as dumping duties to a Collector if those duties are not legally payable, and it is unfair to expect an importer to conduct its business by charging higher prices which include a contingency for an uncertain event – backdating of an alteration to a notice- that may or may not occur in the future.

(c) The scope of the goods against which dumping duties were originally imposed was defined by the Australian industry itself. Our recollection is that this was done very clearly and very deliberately by OneSteel. A decision by importers to purchase goods that are not subject to the notices, and to sell them alongside the goods that are subject to the duties, is competitive conduct that was not challenged by the Australian industry. It may be that the Australian industry made an error in how it described the goods in its original application, however the sins of that error should not now be visited on the importers themselves. Certainly, as indicated by the legislature, the circumvention activity of slight modification can lead to the alteration of notices to encompass them, and to the imposition of the same duties on them as are imposed on the goods already subject to the notices. However the backdating of the alteration to a time before it had been decided that the goods were slightly modified is a different matter and, in our view, is not administratively fair. To the contrary, it is heavy-handed. As we have already emphasised, backdating the alteration of notices to the maximum extent should be reserved for those cases where the circumstances are at their most offensive in a legal or policy sense. Slight modification is not illegal and neither our client nor any other importers of alloy HSS have evaded the payment of dumping duties. They simply made commercial decisions to import goods that were not subject to the notices.

(d) We also note that the law and administrative precedent in this area is entirely new. Future importers will be much better informed as to what the Commission considers a "slight modification" to be. Indeed we have already expressed our view that there is no slight modification as prescribed by law in this case. This is only the first or second (in parallel) "slight modification" inquiry that the Commission has conducted. Setting down opinions in the form of SEF 190 and the final Report, which of course has not even been published yet, will allow interested parties to have a much better understanding of what is considered to be a slight modification and what is not. Punishing importers who have not had the benefit of that education and that precedent by not only imposing duties on them but also backdating those duties would be, with respect, quite mercenary and unfairly punitive. It is not only the self-interest of the Australian industry that is important here, and it is unfair for the Commission to be swayed only by the lobby groups who have demonised the exporter/importer business community in their clamour for ever-greater levels of protection. Altering the notices and backdating them over the very long (the

maximum) period allowed under the Act is not a fair and balanced exercise of the discretion.

(e) Another factor that the Commission is asked to take into account in the particular circumstances of this case is that the "slight modification" law only came into force on 1 April 2015. The proposal to backdate would take the alteration of the notices back to 11 May 2015. Importers such as our client had supply networks for alloy HSS in place at that time, with forward orders in place and with understandings about anticipated future volume offtakes also in place with its suppliers. At all relevant times those networks and commercial arrangements have been fully legitimate. It is simply not possible to cut off these networks or dishonour future supply arrangements over short periods of time, and our client cannot go back in time to change them.

(f) Moreover, the Commission's assessment of whether goods were slightly modified and exported to Australia is referable to the period 1 July 2010 to 31 March 2015. At no time during this period was the "slight modification" circumvention activity a part of the law of Australia or known to our client. It was not law and simply did not exist. Thus, the Commission has based its findings on facts and circumstances that were in existence at a time that the laws proscribing them were not. We submit that the exercise of the discretion to backdate should take into account the fact that the slight modification was not known to be a practice that was exposed to such action at any time during which it was taking place.[6]

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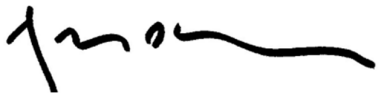
Please do not hesitate to contact the writer should you require any clarification of our client's submissions.

Yours sincerely



Daniel Moulis
Principal Partner

[6] We make this submission without detracting from the proposition that it may not be lawful for the Parliamentary Secretary to arrive at prejudicial findings against our client in respect of commercial practices that were not known to have the potential to attract an outcome that would be commercially prejudicial to them.