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7 June 2017

Mr M Kenna
Assistant Director
Anti-Dumping Commission
Operations 5
Level 7, Industry House
10 Binara Street
Canberra
Australian Capital Territory 2600

By email

Dear Sir

Waterdos Instruments Australasia Comments regarding Statement of Essential Facts

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

Waterdos has reviewed Statement of Essential Facts 377 (“the SEF”). At the outset Waterdos is heartened to see that the SEF has adopted some positions that accord with the submissions made by us on behalf of Waterdos in our letter of 11 May 2017. In particular, Waterdos notes that the SEF significantly narrows the supposed forms of injury that Aquarius Technology Pty Ltd (“Aquarius”) has suffered, from those found in the Preliminary Affirmative Determination (“PAD”). These are positive steps, particularly given that the SEF did not take that letter into consideration.

Once the Commission has reviewed and considered Waterdos’ previous letter in detail, we are confident that the conclusion will be that there is simply no basis to impose anti-dumping duties in relation to exports from the USA. Those exports have not caused any injury to Aquarius.

The injury analysis is of singular and critical importance to the investigation. Whether dumping has caused, or is causing, material injury to the Australian industry producing like goods is a jurisdictional fact that predicates any decision to impose dumping measures under Section 269TG(2) of the *Customs Act 1901* (“the Act”). It must be based on facts, and not merely on conjecture, allegations or remote possibility. Therefore, it is necessary that the injury analysis be appropriately calibrated to determine whether, factually, injury has been caused or is being caused to the Australian industry producing like goods.

In light of the critical nature of this consideration, Waterdos is compelled to provide this further submission with regard to the question of injury and the findings in the SEF. Specifically, this submission addresses the following issues:

- Aquarius has not suffered from price injury nor profit injury;
- Waterdos has not undercut Aquarius prices; and
- the question of what constitutes the Australian industry producing like goods.

These are discussed in detail below.

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A Aquarius has not suffered price injury nor profit injury

The SEF continues with the PAD's finding that imports of controllers from the USA have caused price and profit injury to the Australian industry. This form of injury is the only form of injury that is said to be caused by the alleged dumping.¹ Again, we note that this SEF finding was made without the benefit of the submissions provided on behalf of Waterdos in our letter of 11 May 2017.

As will be clear from that submission, Waterdos strongly disagrees with these findings. Aquarius's performance in the period of investigation ("the POI") was significantly better than it has been in the years prior. The assumption that Aquarius could have performed better is only conjecture. In addition to the critique Waterdos made of the price injury finding in its earlier submission, Waterdos now makes the following observations:

- 1 As already discussed in the earlier submission, there is no direct contestability with regard to sales of cooling water treatment controllers as imported (a.k.a "the goods under consideration"). The systems upon which the price injury analysis has been undertaken include additional components. What the sales of these systems tells the Commission regarding the operation of the Australian industry producing "like goods" – being the cooling tower water treatment controllers – is unclear and open to interpretation. These systems are subject to completely different cost and pricing considerations than are the goods under consideration. They include components from countries other than the United States, including Australia.² Therefore the nexus between any price effects observed in relation to these systems, and the impact on the Australian industry producing like goods to the goods under consideration, is weak at best. Moreover, this form of analysis does not go to answering the fundamental question before the Commission, which is whether, as a matter of fact, the Australian industry producing like goods has been caused or has even suffered material injury.
- 2 The price suppression/depression analysis has been undertaken on the basis of only two models – CT11330 and CO11330. This cannot establish price suppression/depression for the Australian industry producing like goods. At most, all such an analysis would be capable of achieving is to identify the price effects for those two models. The extrapolation of trends relating to two models to the Australian industry in general cannot lead to a factual finding that the "Australian industry producing like goods" has been injured. While such an exercise may be expedient, it fails to meet the requirements of Section 269TAE(2AA). What is required by law is an analysis of all the sales of the Australian industry during the POI.³

The "window" of information that the SEF provides regarding price movements of all like goods sold by the Australian industry is Figure 5, which details Aquarius profit and profitability trends over the injury analysis period. According to that diagram, Aquarius' profit

¹ Page 8 of the SEF.

² Indeed, it is entirely unclear whether these systems are considered, for the purposes of the SEF, to be "like goods" to the goods under consideration. An analysis at that level has not been undertaken. For the purpose of this submission, Waterdos shall refer to these systems as "like goods", however the fundamental question as to whether they are like goods still needs to be answered.

³ This is even more necessary in circumstances where that industry has confirmed that its new models have cannibalised sales of its old models, as per the Application, which states:

However, Aquarius notes that these sales of the new Ultima models have taken sales volume from their equivalent CT1 and CO1 models, meaning that total sales volumes in FY2014/15 and FY 2015/16 though slightly higher than previous years, did not increase substantially.

As Waterdos mentioned in its earlier submission, the introduction of these new models would clearly lead to a discounting of the price on the old models. Simply put, focussing on a specific band of models does not allow for a consideration of these trends, and will result in an impermissible attribution of injury to imports.

and profitability in the POI both improved over the previous year.⁴ In fact, discounting the anomalous 2012/13 results, the POI shows the second highest profit over the injury analysis period and the highest profitability over that same period. The POI is the period within which the Commission's dumping, injury and causal effect analyses must be confined. If dumping has occurred, these clearly above-trend profit and profitability figures suggest that Aquarius has not suffered material injury by reason of it.

The SEF seems to discount the POI profit and profitability results on the basis that Aquarius' Ultima products were introduced in 2015/16.⁵ Firstly, this appears to be inaccurate, in that the Application for this investigation indicates that sales of the Ultima and Ultima 3G commenced in 2014/15.⁶ Secondly, there is no dispute that the Ultima products are included in what are considered to be "like goods". Therefore, their performance is not only relevant to whether Aquarius suffered injury or not, that performance *must* be included in that consideration to gain a fact-based appreciation of the performance of the Australian industry producing like goods.

The overall trend for Aquarius' sales of like goods was one of improved profit and unprecedented profitability. The possible causes of this are either that prices of the like goods (not just select categories of the like goods) have increased, or the CTMS of those goods have decreased, or some combination of these two factors. In either case, there can be no finding of price suppression or depression because:

- (a) if this is due to the fact that prices of the like goods have increased on average, then there is clearly no price suppression or depression;⁷ or
- (b) if this is due to a decrease in the CTMS of the like goods on average, then Aquarius had no reason to increase price, because its prices were already getting a higher profit margin.

Indeed the fact that prices did not decrease in those circumstances indicates that prices are not suppressed or depressed, as Aquarius was not compelled to match any decrease in its CTMS with a decrease in price.

Accordingly, there is no evidence that Aquarius prices were suppressed or depressed. The evidence before the Commission appears to actively disprove this allegation.

- 3 The price suppression/depression analysis as it is currently presented in the SEF is contradictory. At page 36 it is described as follows:

As discussed in Section 7 of this report, the Commission obtained annual CTMS and selling price information for two of Aquarius' highest volume models. The information shows that, for the CT11330 model, Aquarius' unit CTMS rose by 2 per cent from 2014/15 to 2015/16. Aquarius' weighted average selling price for the CT11330 model declined by 3 per cent over the same period.

The CTMS per unit of model CO11330 rose by 3.5 per cent between 2014/15 and 2015/16 while weighted average selling prices per unit remained stable.

⁴ We understand "profit" to refer to "amounts earned" and "profitability" to the ratio of profit to sales revenue, as per the instructions included at question A-8 of the Application.

⁵ SEF page 31.

⁶ Application, page 40.

⁷ If one views that data at pages 33 - 36 of the Application, it is clear each of the broad model categories had an increase in price between the 2014/15 and the POI: CT1 1%, CT0 1%, C01W 15%, Ultima 17% and Ultima 3G 93%.

The main discrepancy occurs in relation to CT11330 – essentially the description of the price trends is at odds with the graphical presentation of those trends, as per Figure 3 in the SEF. Figure 3 shows prices have increased slightly in 2015/16 over 2014/15, rather than having declined by 3%.

With regard to CO11330, Figure 4 also shows that prices have increased in 2015/16 over 2014/15. In fact based on that figure, the only time prices had been higher was 2010/11, at which point they were equal to the then unit CTMS. The price in the POI is therefore the highest profitable price over the injury analysis period. Again, this does not indicate price suppression or depression (nor do stable prices).

Ultimately, these are small points. Either Figure 3 is wrong, or the analysis extracted above is wrong. If it is the latter, then there is no evidence of price suppression/depression for CT11330. If it is the former, the analysis is not evidence of material injury to the Australian industry producing like goods, it only indicates the price trend for one model of the like goods, which is not sufficient for the purposes of Section 269TG(2) or Section 269TAE(2A) of the Act.

The SEF found that the material injury suffered by Aquarius was in the form of price and profit injury. As per the above, these findings are incorrect. The Commission must terminate this investigation at the soonest possible instance.

B Waterdos has not undercut Aquarius' prices

Waterdos is gravely concerned regarding the undercutting analysis in the PAD, and the continued reliance of that analysis in the SEF, as discussed in its earlier submission. Waterdos does not actively seek to undercut Aquarius' prices and would consider any finding to the contrary to be factually flawed. Waterdos does not accept that there has been any form of price undercutting. The finding that there has been is counter to Waterdos' experience and understanding of the Australian market.

Given this, Waterdos would like to make the following additional comments in relation to the price undercutting analysis:

- 1 There has been no positively evidenced finding that the goods under consideration from the United States have undercut the price of Australian like goods. All that has been compared is the price of systems which include these goods. The SEF attempts to skirt this fact by noting that:

...as the imported controller represents a significant proportion of the value of such models, the analysis is relevant to whether the dumped imports have caused, or are causing, injury to the Australian industry.⁸

Waterdos would query whether water controllers are a "significant proportion" of the value of these systems. In Waterdos' opinion, controllers would account for approximately **[CONFIDENTIAL TEXT DELETED – number]**% of the value of the system, although this will vary depending on the complexity of the system itself, and may be as low as **[CONFIDENTIAL TEXT DELETED – number]**% in some circumstances. The price of each system would be dependent to a significant degree on factors beyond the price of the controller, therefore the price undercutting analysis is of little evidentiary value for determining the effect of the goods under consideration on the sales of like goods made by Aquarius.

⁸ SEF page 36.

- 2 As a second point, Waterdos notes that its sales to Integra represent **[CONFIDENTIAL TEXT DELETED – number]**% of its sales over the period of investigation. Waterdos also noted the comments of Integra, as reported in the SEF as follows:

Integra advised that, while price was one important factor, a range of factors influenced its decision on which cooling tower water treatment controller to purchase. It stated that business relationships, after sales service and support were important considerations.

Integra stated that it had no confidence in the ability of the Australian industry to provide support and after sales service for its controllers. While Integra is a large market participant, the Commission notes that other water treatment service companies have a longstanding relationship with the Australian industry.⁹

Waterdos understand that **[CONFIDENTIAL TEXT DELETED – market intelligence]**. Accordingly, for a price undercutting analysis to have any relevance to the question of whether imports from the USA have caused Aquarius injury, **[CONFIDENTIAL TEXT DELETED – market intelligence]** for the purpose of any price undercutting analysis. By its own statement, this customer has no confidence in Aquarius, for reasons other than price. Accordingly, any price undercutting analysis undertaken on these sales will lead the Commission to incorrect conclusions.

- 3 Waterdos considers that the finding that price undercutting has occurred is a result of an incorrect comparison of models. Such a mistake is easily understandable, as these are complex products. Waterdos believes that the models used for the undercutting analysis in the SEF must be CT11330 and/or CO11330. The reason for this is one of logic – these are the models that the SEF has determined have suffered from price injury, so in order to show that price injury has occurred as a direct result of dumping, the undercutting analysis must also have been undertaken on these models. Without this linkage between supposed injury and alleged dumping, the SEF would be basing its causation finding on mere conjecture. Such an outcome would be counter to the requirements of Section 269TAE(2AA) of the Act. With regard to these models, Waterdos makes the following observations:

- (a) As per Waterdos' previous submission, the correct model match for CT11330 is **[CONFIDENTIAL TEXT DELETED – model]**. The average price of **[CONFIDENTIAL TEXT DELETED – model]** is **[CONFIDENTIAL TEXT DELETED – price]**. Waterdos understands that the usual price for CT11330 is **[CONFIDENTIAL TEXT DELETED – price]**. In other words, Aquarius undercuts Waterdos by at least **[CONFIDENTIAL TEXT DELETED – number]**%.
- (b) With regard to C011330 Waterdos submits the correct model for comparison would be **[CONFIDENTIAL TEXT DELETED – model]**. The average price for **[CONFIDENTIAL TEXT DELETED – model]** was **[CONFIDENTIAL TEXT DELETED – price]**, whereas Waterdos understands the price for C011330 is **[CONFIDENTIAL TEXT DELETED – price]**. Again, Aquarius undercuts Waterdos by **[CONFIDENTIAL TEXT DELETED – number]**%.

C What constitutes the Australian industry producing like goods?

Waterdos has reviewed the information on the public record a number of times, but has yet to divine a clear reason as to why Aquarius is considered to be the Australian industry producing like goods for the purposes of this investigation. More puzzlingly, it is not clear why, if Aquarius has achieved such status, Waterdos would also not be considered to be part of the Australian industry producing like goods.

⁹ SEF page 38.

The Aquarius Visit Report operates on the basis that the like goods produced by Aquarius are “*partly produced in Australia*” and, as such, fall within Section 269T(2) of the Act. The same report also applies Section 269T(3), which states that:

For the purposes of subsection (2), goods shall not be taken to have been partly manufactured in Australia unless at least one substantial process in the manufacture of the goods was carried out in Australia.

In this regard, the Aquarius Visit Report concludes:

...that Aquarius carried out, in Australia, at least one substantial process in the manufacture of the goods. In coming to this conclusion, we have considered:

- *Aquarius’ role in the design of the controller components;*
- *the process undertaken by Aquarius (as described in Confidential Attachments 1 and 2) to assemble the components sourced from various suppliers, and in particular:*
 - *the time taken to construct a controller ready for sale; and*
 - *the skills and experience required to assemble the controllers.*

We consider the process undertaken by Aquarius is more than simple assembly, packaging or labelling.¹⁰

First of all, Waterdos questions whether “*design*” is a “*process of manufacture*”. Design seems to fall outside of what is commonly understood to be the meaning of “*manufacture*”, which is “*the making of articles esp. in a factory*”.¹¹ Additionally, such a broad reading of the requirements of Section 269T(3) would lead to havoc in the application of the anti-dumping system. If it were to be adopted, any product that is designed in Australia and fully manufactured overseas could be considered to be “*produced in Australia*” for the purposes of anti-dumping investigations. Such an outcome is illogical and unsustainable.

In terms of “*processes*” all that remains of the Commission’s reasoning are the “*time taken to construct a controller ready for sale*” and “*the skills and experience required to assemble the controllers*”. Both of these factors are equally attributable to the processes undertaken by Waterdos with respect to water controllers, and likely to the other importers. Therefore, both Waterdos and the other importers must also form part of the Australian industry.

The anti-dumping mechanism cannot be used by one member of the Australian industry to stifle competition amongst the members of the Australian industry. It is not a tool for picking winners and losers amongst legitimate Australian entities that compete against one another. Sustaining an investigation in these circumstances amounts to an abuse of process. Accordingly, this investigation must be discontinued at the soonest possible convenience.

In summary:

- Aquarius has not suffered material injury;
- Waterdos has not undercut Aquarius prices; and

¹⁰ *Cooling tower water treatment controllers – Australian Industry Visit Report Aquarius Technologies Pty Ltd, page 12.*

¹¹ *Australian Concise Oxford Dictionary, fifth edition.*

- there is no legal distinction between Aquarius, Waterdos and other importers in the sense of their qualification as members of the Australian industry.

Accordingly, we submit that this investigation must be discontinued or terminated.

Yours sincerely

A handwritten signature in black ink, appearing to read "Alistair Bridges". The signature is written in a cursive style with a large, sweeping initial "A" and a long horizontal line extending from the end of the name.

Alistair Bridges
Associate