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12 April 2012

Our ref 139/15955/80127632

Dear Mr Turner

**Submission in response to International Trade Remedies Issues Paper 2012/181
Aluminium Road Wheels from the People's Republic of China
Ford Australia**

We act for Ford Motor Company of Australia Limited (Ford).

We refer to the Australian Customs and Border Protection Service's (Customs) investigation into alleged dumping and government subsidization of aluminium wheels exported from the People's Republic of China. This submission is made in response to International Trade Remedies Issues Paper 2012/181 (Issues Paper).

Executive Summary

Ford considers that:

1. Customs have not given adequate consideration to those facts which are contrary to the preliminary finding that Original Equipment Market (OEM) and After Market (AM) Aluminium Road Wheels (ARW) are not like goods.
2. There has been a failure to address in any meaningful way submissions from the interested parties in relation to the criteria specified in the Dumping Manual regarding the question of whether goods are like.
3. The Issues Paper makes no attempt to address Customs' reasoning in its findings in Report No 41 on Pineapples Juice Concentrate from Thailand and Pineapple Fruit from Indonesia and Thailand (Report 41), in particular, that the commercial interchangeability of two products is a significant issue in making a determination that OEM and AM ARW are not like goods. This is significant. In Report No 41, Customs found that two separate markets of goods were not commercially competitive, and only marginally substitutable. In this case in contrast, there is complete separation: goods sold in the OEM market are not commercially competitive with those sold in the AM and there is no marginal substitutability.
4. The lack of commercial interchangeability provides objective evidence reflecting underlying essential characteristic differences in the physical and functional characteristic of an OEM ARW when compared to an AM ARW.

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5. To say that, at some point after a car is produced, an ARW can be fitted instead of an OEM wheel does not establish the functional equivalence of the two products.
6. No weight can be given to the claims in respect of dealer-supplied ARW as indicating interchangeability and that the fitment of an AM to a Ford vehicle after production does not affect the warranty of the vehicle in case of damage.
7. Likewise, the reference to Tickford ARW also is irrelevant given that the situation referred to occurred in 2002 whereas what is being considered here is the *present* distinction between OEM and AM ARW. Further, and critically, the ARW produced by a related company of Arrowcrest for fitment to Tickford-branded Ford vehicles were tested to (and met) all of Ford's requirements for wheels and were therefore OEM ARWs not AM ARW as alleged by Arrowcrest.

Background

The past practice of Customs - as reflected in previous Issues Papers on like goods in other dumping investigations¹ - has been simply to request submissions in response to an Issues Paper. In this instance, Customs has departed from its past practice and has gone further and stated its preliminary view on the issue of like goods. No reason has been given for this departure.

It is Ford's submission that doing so has effectively pre-empted the purpose of seeking submissions to address the question of whether goods in this case are in fact like goods.

In addition, in Ford's view, the approach adopted is not appropriate. Customs has indicated that it has formed a preliminary view without providing any detailed analysis of the facts as presented. Nor has Customs indicated what weight it has attached to the various submissions it has received or measured those submissions against the individual criteria referred to in the Dumping Manual. Further, Customs having cited an extract from Report No 41, does not distinguish the approach in that case with that set out in Ford's submission or say why it is not appropriate. Indeed, Customs' analysis relating to Report No 41 is contained in just three sentences.

Given the critical nature of the finding on like goods in this and other cases, and because this will be the last opportunity for Ford as well as other interested parties to respond effectively to this question, this summary (and its brevity) is not satisfactory. Ford notes that the Federal Court in Siam Polyethylene Co Ltd v Minister of State for Home Affairs 2009 FCA 837 at par 96 stated that:

"Where a decision-maker must consider matters prescribed by law, generally, he or she cannot jettison or ignore some of those factors or give them cursory consideration only in order to put them to one side: *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 244 [52] per Gleeson CJ, Heydon and Crennan JJ; *Telstra* 107 ALD at 502 [107]. As Gummow and Hayne JJ, in concurring observed (*East Australian Pipeline* 233 CLR at 256 [102]):

¹ See Issues Paper on Investigation of alleged dumping of preserved mushrooms exported from Australia from the Peoples Republic of China (Paper No. 51), Issues Paper no 50 in relation to Sodium Metabisulfite from China, Issues Paper No 28, Ammonium Nitrate Exported from Russia and Issues Paper No 144, Certain Hollow Structural Sections from China and Malaysia

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"It was not enough for the ACCC to say in its final determination that it had considered those matters in the sense of having looked at but discarded them."

Given that the purpose of the Issues Paper is to conclude this question, and given the lack of proper consideration of the facts and analysis of the facts, Ford considers that if Customs' current findings were to be maintained in the final decision, that would constitute an error of law.

Ford has previously made a submission in the course of this investigation which addressed the question of like goods but the Issues Paper does not include any reference to Ford's previous submission which also included the submission made by Ford in the EC case.

Ford notes that the Issues Paper states that interested parties must attach relevant evidence to support the views expressed in their submission. In its previous submission, Ford provided detailed evidence supporting its position. Customs has also visited Ford since that submission was made. In responding to the Issues Paper, in these circumstances, it is not necessary for Ford to provide any new evidence.

In this regard, Ford also highlights that some of the matters raised by Arrowcrest are generalised assertions without any relevant supporting evidence and should therefore be disregarded. Examples of such matters include the claim that the essential characteristics of ARW for the OEM and AM are the same, that in the AM price is determinative issue in the same way that competition for OEM contracts is price motivated and that the design of ARW by motor vehicle manufacturer is specifically about the outer appearance, with the task of producing a safe and reliable ARW left to the ARW manufacturer.

Ford's position, as set out in its previous submission, is that ARW supplied to OEM as compared to ARWs supplied to AM cannot be considered to be "like goods".

Customs' preliminary view on this issue is set out at page 10 of the Issues Paper, namely:

"It is Customs and Border Protection's preliminary view that the difference between OEM and AM ARWs relates to the different channels of distribution. The manufacture and sale of OEM wheels involves the car industry in the process of developing and designing the wheel whereas the development and design of AM wheels is principally controlled by the wheel manufacturer. OEM and AM wheels share similar physical and technical characteristics and are interchangeable. There is also evidence that AM ARWs are being placed on new passenger motor vehicles by motor vehicle dealers before customers take delivery without affecting the new car warranty.

It is Customs and Border Protection's preliminary view that the Australian ARW market will be treated as a single market i.e. OEM and AM wheels will not be treated as two separate goods.

It is also Customs and Border Protection's preliminary view that OEM and AM are separate segments of the Australian ARW market which will be analysed separately in injury/causation analysis."

Ford notes that even though Customs has stated that the market is to be treated as one single market, it will segment it for the purpose of the injury/causation analysis. That is, Customs' own analysis is that the market is in fact segmented.

It is Ford's submission that the market is not a single market producing like goods for two separate distribution channels, but is rather two separate and distinct markets, where goods sold into each market do not directly compete with each other, and where *at best* the goods are marginally substitutable.

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In this regard, Ford highlights that in Report No 41 Customs' position was that marginal substitutability of goods did not mean that goods should not be treated as two separate goods. Ford submits that the approach taken in Report 41 is the correct one and that a similar approach should be taken in this matter.

At the heart of this matter is the fact that there is no real substitutability of goods sold into the OEM market and the AM market. The fact that a particular manufacturer is able to produce goods for both markets does not mean that the products are like goods even though the products may appear to be superficially similar.

Criteria Used by Customs

In the Issues Paper, Customs identified 5 matters to be considered in determining if goods are like goods, in particular, whether the goods in question closely resemble each other.

The criteria used are as follows

1. Physical likeness;
2. Commercial likeness;
3. Functional likeness;
4. Production likeness; and
5. Other considerations e.g. marketing.

Ford's further submissions on these matters are set out below.

Physical likeness

In its previous submission, Ford highlighted that there were quality, physical and chemical differences between the ARW used on its production vehicles and AM ARW.

Ford repeats its previous submission, in particular the points made under the following headings:

- Design and Testing process;
- Characteristics of the final product;
- Quality;
- Physical and chemical differences;
- Cost of manufacturing; and
- Lack of interchangeability.

It is not proposed to reproduce the contents of the submission here, but rather instead consideration is given to those matters which in Ford's view are not adequately dealt with at page 6 to 8 of the Issues Paper.

In its submissions, Ford pointed out that to ensure the quality of OEM wheels it requires a number of specifications be met and testing undertaken, including Ford engineering specifications, such as Ford's

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Global Wheel Functional specifications, Design Failure Mode Effects analysis, vehicle structural durability, lab durability, ride, handling, steering, noise, vibration harshness evaluations, corrosion resistance testing, paint and finish testing, appearance sign off testing, critical characteristics and capacity verification, and a number of scheme development standards applicable to wheel and tyre durability etc.

Indeed, as part of Ford's Design Verification process there are over 60 different tests with 80 acceptance criteria. It is a requirement of Ford that every one of these tests must be passed.

Particular reference was made in the submission to the Engineering Specification for Aluminium Alloy (A356-T⁶) modified cast wheel (ESA-M2A123-A) regarding chemical composition, mechanical properties, heat treatment and microstructure.

In the Issues Paper it is stated that Arrowcrest maintains that it manufactures its wheels for the AM with identical plant, process and quality controls of OEM manufacturers.

The submission from Arrowcrest dated 21 February 2012 (which responds to Ford's submission) states that:

- It might not engage directly with Ford engineers, but that extensive testing and modifications are required to ensure that all AM ARW meet all the likely target vehicle applications.
- That when AM ARW are developed there are three primary tests conducted to validate the product, cornering, fatigue, radial fatigue and impact and that these are the same as the primary tests that Ford and other manufacturers conduct when developing ARW.
- That Arrowcrest OEM and AM ARW meet and exceed the Ford specifications.
- Arrowcrest products (regardless of AM and OEM) meet each of the requirements listed by Ford, including paint quality and Arrowcrest OEM and AM are produced using the same equipment, process and materials.

The statement made by Arrowcrest that its products meet and exceed the specifications/requirements of Ford is tantamount to saying that they are in fact identical in all material respects, and that AM ARWs could be supplied to the OEM market without undertaking further testing.

This statement is made without any evidentiary support and is clearly contradicted by the fact that no car manufacturer buys AM ARW for use in production vehicles.

Further, this claim is inconsistent with Arrowcrest's earlier statement that extensive testing and modifications to AM ARW are required to ensure that these products meet all likely target vehicle applications. In Ford's view it is significant that Arrowcrest refers to *primary* tests, and not to Ford's detailed requirements referred to above.

In circumstances where Arrowcrest has not provided any evidence to support its assertion that it meets all of the Ford specification requirements, this statement has no probative weight and should be disregarded by Customs as a basis for stating that OEM and AM ARW are like goods.

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Commercial likeness

Ford in its submission made it clear that because of the distinctive technical and physical characteristics, AM and OEM wheels are not interchangeable and that these represent separate markets.

It is notable that the other interested parties who made submissions, including Holden (which Arrowcrest supplies as an OEM manufacturer) all support the clear distinction between ARW supplied to the OEM market and those supplied to the AM as not being like goods.

The mere fact that Arrowcrest supplies car manufacturers with OEM ARW does not in and of itself imply that OEM and AM ARW are like goods. Ford notes that at this point in time there is no Visit Report or submission from Toyota. However, Ford expects that Toyota would also follow Ford's approach and would not put AM wheels on its production vehicles.

One reason for this is that OEM production should be considered as part of the car manufacturing operations which have been outsourced to third parties.² This is why the selection process and quality standards are so high for OEM parts. This is borne out by the fact that vehicle manufacturers will never use an AM ARW for their production vehicles due to the OEM unique design criteria for wheel for specific models.

The AM market is more concerned about price and style, whereas the OEM market is concerned with quality and technical specifications, with price being a secondary consideration. Although in its Application Arrowcrest states under heading "Commercial Likeness" that the goods compete on price which is an influencing factor,³ at page 18 of the Application the Applicant states that

Whilst ARWs sold in the aftermarket segment of the market are essentially designed by the ARW manufacturers, at times in collaboration with their Customers, in the aftermarket segment price is the determining factor in the consumers purchasing decision.

Ford agrees that price is the determinative issue in the AM, but it is not the determinative issue in the OEM market. Therefore it is not correct to say that ARW compete on price if by that it meant to imply that ARW sold in the OEM competes with price to that sold in the AM and vice versa..

In the Application, Arrowcrest state that the sales process in the OEM market is driven by the motor vehicle manufacturers with the design being predetermined by the motor vehicle manufacturer.⁴ This supports the very point being made by Ford and presumably likewise reflects Arrowcrest's dealings with Toyota. However, it is not correct to say that the design of ARW by motor vehicle manufacturers is specifically about the outer appearance, with the task of producing a safe and reliable ARW left to the ARW manufacturer. In this respect, Ford directs Customs' attention to the submission it has made on the issue of quality etc.

Arrowcrest likewise incorrectly states that an ARW manufacturer may be given design freedom and can develop an ARW to suit the vehicle and that generally motor vehicle manufacturers will collaborate with the

² See page 2 Hogan Lovells submission which is attached to the previous Ford submission

³ Application for Anti Dumping and Countervailing Duties Aluminium Road Wheels exported from the Peoples Republic of China, page 13

⁴ Application page 18

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ARW manufacturer to develop a new design. Ford notes that no evidence has been provided by Arrowcrest to support this allegation. To the extent that the reference is meant to apply to the supply of OEM ARW, Ford considers the statement to be misleading.

As pointed out in the Mullins Wheel's submission, apart from price being the determinative issue in the AM, the market is driven by fashion and style and the need to keep pace with fashion trends.⁵ Different considerations apply to the OEM market for the reasons already given.

There are major differences in selling into the OEM market and in selling into the AM. In relation to the OEM market there is a contract to supply the ARW which meets the detailed design, technical and quality specifications prescribed in detail by the relevant manufacturer. The wheels themselves are supplied in bulk orders without the packaging requirements of a sale to the AM.

As noted in the Mullins Wheels submission of 19 December 2011 the characteristics of the AM are as follows:

- warehouses, state managers, and sales and marketing staff in strategic locations Australia-wide;
- significant operating costs for each warehouse and sales office;
- intensive representation on a state by state basis - thousands of aftermarket clients;
- increased intra state freight costs to get wheels to state warehouses for sales to customers;
- appropriate stock levels, sales and warehousing staff required in each capital city to provide prompt and efficient service to customer needs;
- substantial credit control costs;
- consistent advertising and promotion to influence end use purchasing decision making process;
- regular catalogue distribution with new designs for distribution to retailers;
- magazine advertising of current new wheel designs;
- sophisticated website presence with fitment information updated regularly;
- targeted brand promotion at significant events;
- provide display wheels and display stands for a large number of key clients;
- provide various other display and promotional material at point of sale;
- the sector demands regular design releases to appeal to the discretionary spend consumer;

⁵ Page 18 of Mullins Wheel submission

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- regular tooling investment to match new design releases in multitude of sizes for many different model fitments;
- low production runs for each tool - meaning gravity casting method is predominantly used; and
- engineering and technical support for aftermarket is not as intensive as in the OEM sector.

This list illustrates just how different the OEM and AM are and that there are no similarities between the two markets.

Ford draws Customs' attention to the submission made by Hunt & Hunt on behalf of its client⁶ and the Visit Report by Customs to Holden⁷, which supports the position that ARW produced for the OEM market and those produced for the AM cannot be considered like goods. At point 6.2 of that submission Holden state that there are significant quality differences between an ARW produced for the AM and one produced for Holden to be included on its production vehicles. Indeed Holden state that an ARW produced for the AM would not qualify for use in the manufacture of a passenger motor vehicle in Australia. The Visit Report to Holden likewise provides reasons why ARW produced for the OEM market are not like goods to those produced for the AM.

Arrowcrest states that in the past, Ford did use AM in Ford assembly in relation to wheel branded as "Tickford" which it manufactured and that Ford is not alone in sourcing AM ARW for its dealers to fit new vehicles whilst retaining new car warranty. Arrowcrest also states that a consumer need not go to the AM but can instead purchase AM ARW from Ford Dealers for a new Ford vehicle. Arrowcrest argues that this fact provides irrefutable evidence that OEM and AM are indeed like goods.

This issue has been dealt with in the Visit Report by Customs to Ford. In that report, Ford makes it clear that:

- Ford dealerships can provide new vehicle buyers with the opportunity to fit Non OEM Alloy Wheels to their vehicles through the purchase of independently sourced AM SBA (Supplier Branded Accessories) wheels sourced from suppliers participating in Ford's SBA Program.
- SBA wheels are wheels that meet ADR Standards, but have not been tested by Ford against its engineering requirements (which an OEM Alloy wheel would be required to meet).
- SBA wheels cannot and have never been fitted on a production vehicle build at a Ford Plant.
- If a customer chooses to have a SBA wheel fitted to their vehicle the Ford Vehicle warranty does not apply to those wheels. The warranty for the SBA wheel is provided by the supplier of the wheel. If the SBA wheel causes damage to the vehicle, that damage is the responsibility of the supplier of the wheel and is not covered under the Ford vehicle warranty.

⁶ Page 7 Hunt and Hunt submission dated 19 December 2011.

⁷ Investigation into Alleged Dumping and Subsidisation of Aluminium Road Wheels Exported from the People's Republic of China, Importer Visit Report GM Holden Ltd January 2012 section 4.2

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- Ford's role in ordering the SBA wheels is to oversee the payment process between the dealership and the supplier, while having no further commercial jurisdiction over the business, product satisfaction, quality, reliability or performance. This is totally different to an OEM wheel or GFA (Genuine Ford Accessory) where the buyer and engineer fully interface with the sourcing process and associated performance and quality requirements. This process has been fully detailed in the previous submissions by Ford in this matter.

The statement that the placement of an AM ARW on a vehicle at the dealer delivery stage does not, as asserted by Arrowcrest, provide irrefutable evidence that AM and OEM ARW are like goods. Rather, in such a case, the ARW is being supplied to the purchaser of the vehicle as an AM product.

In relation to the supply of the Tickford ARW, Ford observes that these wheels were supplied in 2002, which is outside the extended injury investigation period and lacks any relevance to the current issue of the selection of OEM ARW by Ford. Leaving that aside, the Tickford wheels were fitted to high performance vehicles under then current Joint Venture arrangements with Tickford and were tested to (and met) all of Ford's then current performance and quality requirements. Accordingly, these wheels were OEM ARW warranted by Ford in the same way as any other OEM ARW, unlike the provision of AM ARW where the warranty is provided by the supplier.

It is illustrative to consider the criteria for commercial likeness set out in the Dumping Manual. The criteria are as follows:

Commercial likeness

Commercial likeness refers to attributes identifiable from market behaviour:

- Are the goods directly competitive in the market? For example, do the goods compete in the same market sector? Within a market sector, are the goods similarly positioned?
- To what extent are participants in the supply chain willing to switch between sources of the goods and like goods? e.g. willingness of participants to switch between sources may suggest commercial interchangeability.
- How does price competition influence consumption? For example, close price competition may indicate product differentiation is not recognised by the market.
- Are the distribution channels the same?
- How similar is the packaging used? Does different packaging reveal significant differences in the goods, or highlight different market sectors?

On the facts of this case:

- the goods do not compete in the same market place. The purchasing decision to install an AM ARW is made by the vehicle owner, while OEM ARW are installed by the vehicle manufacturer;
- there are separate supply chains and AM ARW are not supplied to vehicle manufacturers for use in production vehicles. As such there is no commercial interchangeability;

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- there is no price competition between ARW sold in the OEM market to those sold into the AM market.
- different packaging is used in the OEM market which is bulk orders supplied to manufacturers compared to the AM which is consumer driven.
- Applying the criteria set out in the Dumping Manual establishes that there is no commercial likeness between ARW sold to the OEM market when compared to the AM market.

Functional likeness

The Issues Paper does not include a separate heading for this criteria. However, in essence the conclusion reached is that the ARW supplied to an OEM is functionally alike to that supplied to the AM market, and that the fact that ARW are placed on new car vehicles by dealers before delivery provides support for the functional likeness. In effect, the argument is that the two types of ARW are functionally alike.

It is Ford's submission that one of the key issues in considering the question of functional likeness is that of quality. Ford's position is supported by the Dumping Manual. The issue is whether there is a quality difference is objective and not subjective, and differentiates one good from another - ie, whether the consumer would be willing to use the goods to perform the required function.

It is Ford's submission that the qualitative differences are such that Ford will not put an AM ARW on a production vehicle it builds, nor (to Ford's knowledge) will any other car manufacturer. As such it cannot be said that the goods perform the same function.

The fact that a consumer for whatever reason decides in rare cases to replace the factory-fitted ARW with an AM does not in any way mean that there is a functional likeness between the two goods. Indeed, that a consumer decides to replace the OEM ARW with an AM ARW could in fact suggest that the products are not functionally alike. Otherwise, why would a consumer go to the expense of replacing the ARW?

Production likeness

Ford repeats the points relevant to this criteria dealt with above. Further, Ford draws attention to the totality of its previous submission and in particular the criteria it uses to select a OEM manufacturer, the materials to be used and the standards to be met, and contrasts that with the price-driven approach of the AM.

Arrowcrest asserts that the production process and quality aspects are either identical or that the process is generic in all respects. However, Arrowcrest admits in its submission in response to Ford that the cost design and manufacture of an OEM ARW can be more expensive than an AM ARW but this is not necessarily due to differences in materials use. No further justification or explanation is provided for this statement. Ford submits that the cost differential suggests that there are material differences in the production of OEM and AM ARW.

In respect of the issue of physical and chemical differences, Arrowcrest assert that the physical and chemical properties of OEM and AM ARW must be essentially the same or else they would literally be falling off Ford vehicles. This statement is an absurd over generalisation and ignores such matters such as performance and durability and cannot be accepted by Customs as offering any evidence of similarities in production processes.

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Mr David Turner, Director Operations 2, Australian Customs and Border Protection Service 12 April 2012**Consideration of Report No 41.**

In its previous submission, Ford referred to the previous decision of Customs in the Pineapples case to illustrate the point that where goods are sold into two distinct markets, are not directly competitive and are only marginally substitutable then the goods should be considered to be separate and not like goods.

In that case, the goods in question were pineapples, sold into two separate markets, one being the consumer market and the other being the food service market. Customs in that case accepted the characterisation of the market and difference in the physical description of the goods put forward by the Thai Food Processing Association¹.

In its submission, the Thai Food Processing Association stated that although the fruit within the containers had identical characteristics and had undergone the same manufacturing processes, the containers sizes within each category were produced for two separate markets. The goods were produced in the same factory but on separate filling lines.

The differences between the Consumer and Food Service product were two fold:

Firstly, containers used for the retail consumer market did not exceed one litre, whereas containers for the food service market were much larger, such that they were too large to be bought and stored in a refrigerator for consumer use.

Secondly, the treatment of the pineapples was different - for example; the food services industry required crushed pineapple to be mixed with the product. As such, there was some difference in the composition of the product.

Customs accepted that the physical differences between fruit and the food services industry and consumer markets had implications for their end use and substitutability.

Customs elaborated its view at page 19 of Report No 41 where it found that:

- fruit for the food services industry and fruit for the consumer market had different presentations, used different grades of pineapple and had different package sizes.
- presentation of fruit for the food services industry, was pizza cut, tidbits and slices crushed in syrup, whereas presentation of fruit for the consumer market was pieces, slices, crushed, and chunks in syrup.
- fruit for the food services industry was used in the food service sector and industrial sector and it would be impractical for food services end users to use consumer sized cans, while family shoppers would be hard pressed to consume 3.00 to 3.2 kilograms of canned pineapple or to even store them.
- there were completely separate methods of distribution for each size of can with the food services product normally not available in the retail consumer store such as supermarkets.

¹ "Customs view, consistent with the submission by the TFPA, is that there are physical differences between FSI and fruit consumer that have implications for their end use and substitutability." page 19 of Report No 41.

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The conclusion reached by Customs in the Pineapples case was, therefore, that fruit for the food services industry and consumer fruit were sold into two distinct markets, were not directly competitive and were only marginally substitutable with the implication that pineapple for the food services industry and pineapple for the consumer market were two separate goods.

Application of the decision in Report 41 to this case

In this case in contrast, Customs has stated that its preliminary view is that the difference between OEM and AM ARW relate to differences in the channels of distribution, not differences in product. Indeed Customs states that OEM and AM share similar physical and technical characteristics and are interchangeable.

It is Ford's submission that the present case is analogous to the situation in the Pineapples case.

In the Pineapples case there were observable differences between the product sold into the two markets. As stated in Report 41 the differences had to do with presentation, quality and how the pineapple was cut and how it was distributed.

Having regard to these factors, Ford submits that Customs correctly came to the view that these differences were significant. These differences reflected the different demands of consumers in each market and it was evident that there were two different markets and separate distribution channels which supported the fact that the markets were indeed separate. Critically, Customs found that the pineapple sold into each market did not compete with each other and were only marginally substitutable.

Applying the same considerations to this case, it is even clearer in this case that there were two products for two separate markets, two distribution channels and that ARW in the OEM market are not competitive or substitutable for aluminium wheels sold into the AM.

Indeed, it is Ford's submission that in this case the evidence is much stronger than in the Pineapples case. Here, the development and design of ARWs for the OEM market are controlled by the car manufacturers. As stated above, the aluminium wheels are built to the exacting standards required by a car manufacturer to be fitted to a particular vehicle model. There is no evidence that any car manufacturer goes to the AM and obtains aluminium road wheels to put on its production vehicles. Indeed, not even the applicant in this case suggests that this is the case. In other words there is no evidence that an AM ARW is substitutable for an OEM produced wheel.

The failure to take into account the difference between the two products, sold into two different markets for different consumers, the fact that OEM and AM ARW do not compete with each other and are not substitutable stands in contrast to the decision in the Pineapples case - and no explanation is given for Customs' different approach in this case.

Reference is made in the Report to the goods in question being interchangeable. Again this reference is misleading. At the point of sale to the OEM consumer - the car manufacturer - the aluminium wheels are not interchangeable and no evidence has been provided that they are. If the purchaser of a new motor vehicle decides to purchase a new set of ARW this does not make the goods interchangeable, and different considerations apply at that time than apply when the aluminium road wheel are incorporated in a production vehicle. Indeed, the fact that a consumer decides to go to the expense of having AM ARW when the vehicle comes with OEM ARW suggests that the end user considers that the two products have different characteristics.

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It should be also noted that in the Pineapples case, Customs concluded that the goods in question were separate goods even though there was marginal substitutability. This was on the basis that the vast majority of sales were confined to each sector and that some minor leakage between the two sectors would not affect the overall conclusion.

Allegation that AM ARWs are placed on new passenger motor vehicles by motor vehicle dealers before Customer takes delivery without affecting new car warranty.

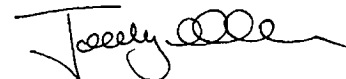
Ford has in its Visit Report made it clear that there is an option at the dealer level to fit a non OEM ARW to a vehicle. The first point is exactly that: it is a non OEM wheel - i.e., it is an AM product. Secondly, these particular ARW have never been fitted on a production vehicle by Ford. Thirdly the Ford new car warranty does not apply to AM ARW. These wheels are not considered to be genuine Ford parts. When the dealer installs the AM ARW it is being supplied to the purchaser of the vehicle as an AM product. If an AM ARW is fitted to a Ford vehicle it does not invalidate the Ford warranty in respect of the vehicle, but any damage caused the vehicle by the fitting of an AM ARW is not covered by the Ford warranty. Therefore it is not correct to say - as Arrowcrest has stated - that the fitting of an ARW prior to delivery does not "affect" the new car warranty.

In considering the issue of interchangeability, it is not sufficient for the applicant or Customs to suggest that an aluminium wheel produced for the AM can be physically be fitted onto a new car. The question of interchangeability is based on commercial interchangeability. What is abundantly clear in this case is that there is no commercial interchangeability that would result in a AM wheel being placed on a production vehicle. Further, that a consumer would go to the expense of installing an AM ARW on a brand new vehicle suggests that the products are not interchangeable to the consumer.

Conclusion

It is not correct to state that the ARW sold into the OEM and AM markets share similar physical and technical characteristics and are interchangeable. The critical issue is to what extent are they not the same and do these essential character differences mean that that the goods cannot be considered to be like goods. When regard is had to the criteria set out in the Dumping Manual then the correct conclusion is that the goods sold into the OEM market are not physically and technically the same, have different quality differences, are not commercially like and are manufactured to different standards. There is no evidence at all of commercial interchangeability. Ford's position is supported by Customs' previous decision in the Pineapples case set out in Report 41.

Yours sincerely



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