

Our reference  
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17 May 2012

**By email:**  
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Australian Customs & Border Protection  
Service  
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Dear Ms Reid,

**Non-Confidential**

## **Anti-dumping and subsidy investigation - aluminium road wheels exported from the People's Republic of China**

As you are aware, we act for CITIC Dicastal and its related bodies corporate in relation to this investigation and, on behalf of our clients, we make the following submissions in relation to Australian Customs and Border Protection Service's (**Customs**) Statement of Essential Facts No. 181 dated 27 April 2012 (**SEF**).

### **1. Calculation of normal values**

In the SEF Customs found that:-

- the Government of China, through various macroeconomic policies and their implementation, influenced the price of aluminium and aluminium alloy in the Chinese market resulting in artificially low aluminium and aluminium alloy prices;
- the price of aluminium on the Shanghai Futures Exchange was 13% to 14% less than aluminium prices on the London Metal Exchange during the investigation period of 1 July 2010 to 30 June 2011;
- the price of aluminium alloy on the Yangtze River Exchange was 6.42% higher than the price of aluminium, whereas the applicant contended that it should be 10% higher;
- based on the "artificially low prices" for aluminium and aluminium alloy, Customs concluded that the cost of aluminium and aluminium alloy used in the manufacture of aluminium road wheels manufactured in China do not reasonably reflect competitive market costs; and
- based on the foregoing, sales of aluminium road wheels in China were not suitable for use in determining normal values under s.269TAC(1) of the *Customs Act 1901*.

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According to the SEF Customs, therefore, calculated normal values pursuant to s.269TAC(2)(c) of the *Customs Act 1901* and in accordance with regulations 180 and 181 of the Customs Regulations as required by s.269TAC(5A) of the *Customs Act 1901*.

On this basis normal values were calculated by substituting the price of aluminium on the London Metal Exchange and an uplifted price of aluminium on the London Metal Exchange for the actual cost of aluminium or aluminium alloy incurred by manufacturers of aluminium road wheels in China.

For the reasons set out below, we submit that normal values could not lawfully have been calculated in this manner:-

- the macroeconomic policies and their implementation in any country may affect prices of a range of goods. However, it does not follow that sales of those goods in that country are not at competitive, market prices. Australian governments have an extensive range of policies that affect prices of electricity, fuel, groceries, motor vehicles, etc. Producers of these products would be surprised to learn that the price at which those products are sold in Australia are not market competitive prices because they have been "influenced" by a government policy, whether upwards or downwards;
- none of the "evidence" presented in the SEF establishes that the Government of China deliberately set out to "artificially" reduce the price of aluminium and aluminium alloy in China. Had it wished to do so, appropriate legislation could have been enacted that enabled the Government of China to control the price of aluminium and aluminium alloy in China but it has not done so, nor was any reason given, supported by evidence, why the Government of China would seek to "artificially lower" the price of aluminium and aluminium alloy in China;
- none of the "evidence" presented in the SEF as establishing that the Government of China "influenced" the price of aluminium and aluminium alloy identifies or establishes "how" the Government of China's macroeconomic policies and their implementation actually "influenced" aluminium and aluminium alloy prices in China;
- the use of the term "influence", that is, that the Government of China has "influenced" the price of aluminium and aluminium alloy in the SEF can only mean that the Government of China deliberately and consciously sought to lower the price of aluminium and aluminium alloy in China and lower by approximately 13% to 14% less than the price for those products on the London Metal Exchange but none of the "evidence" referred to in the SEF evinces such an intention by the Government of China, nor is there an explanation as to why it would wish to artificially lower the price of aluminium or aluminium alloy;
- at page 29 of Appendix A to the SEF Customs "*considered that the GOC's various measures on the raw materials used in the manufacture of ARWs in the form of taxes, tariffs, VAT rebates, licences and export restrictions, can reasonably be considered to have had a significant impact on the domestic industry*", presumably the aluminium industry in China. While such a conclusion may be reasonable, the

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effect of such measures, with the possible exception of VAT rebates, is to increase the price of the raw materials in question (i.e. aluminium), not to reduce it;

- in its report to the Minister on aluminium extrusions dated 15 April 2010 (report No.148), which is referred to in the SEF, Customs found that aluminium prices on the Shanghai Futures Exchange were lower than those of the London Metal Exchange during the period July 2008 to January 2009 but were then higher during the period January 2009 to June 2009. This indicates that aluminium prices on the Shanghai Futures Exchange will at times be higher than those on the London Metal Exchange and sometimes higher and sometimes equal. This is simply a reflection that both markets are competitive markets with normal supply and demand factors determining prices;
- neither regulation 180 nor 181 of the Customs Regulations entitles the use of surrogate aluminium and aluminium alloy prices in the calculation of normal values. Surrogate prices may be used only pursuant to s.269TAC(4) of the *Customs Act 1901*, that is, where the government of the country of export has a monopoly or substantial monopoly of the trade in that country or determines or substantially influences the domestic price of goods in that country (i.e. it is a non-market economy) or pursuant to s.269TAC(5D) of the *Customs Act 1901*, that is, the country of export has an economy in transition but market conditions do not prevail in that country in respect of domestic selling prices of like goods to the goods under consideration. There is no suggestion in the SEF that either of these provisions apply and, to do so, would be in breach of the Memorandum of Understanding with the Government of China dated 18 April 2005 in which Australia recognised China as having a "full" market economy. If Customs is of the view that there is a provision in Part XVB of the *Customs Act 1901* or in the Customs Regulations that authorises it to use surrogate prices in the construction of normal values in the present circumstances, we request that Customs file on the electronic public record a memo identifying the provision(s) and an explanation as to why they authorise the use of surrogate prices in the calculation of normal values in the present circumstances;
- alternatively, the finding that the Government of China, through its macroeconomic policies and their implementation, influenced aluminium and aluminium alloy prices in China and thereby rendered the domestic selling prices of aluminium road wheels in China unsuitable for use in determining normal values because they were not market competitive prices is, in substance, to find that the Government of China substantially influences the domestic price of aluminium and aluminium alloy in China for the purposes of s.269TAC(4) of the *Customs Act 1901*. Such a finding is contrary to the Memorandum of Understanding with the Government of China dated 18 April 2005 in which Australia recognised China as having a "full" market economy; and
- the finding that the domestic selling price of aluminium road wheels in China is lower than it should be because of the "artificially" low prices of aluminium and aluminium alloy is not supported by any evidence. There is no evidence that the "artificially" low price of aluminium and aluminium alloy has flowed through into the

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selling price of aluminium road wheels and there is no reason why it necessarily would flow through. Quantification of the amount of any such flow through of the allegedly "artificially" low prices for aluminium and aluminium is necessary in order to determine whether the price of aluminium road wheels have been so affected. In the absence of such quantification, there is no evidence that it has

For these reasons the calculation of normal values using as a surrogate price an uplifted London Metal Exchange price for the actual price paid for aluminium alloy by our clients is not permitted and the original calculations in the visit report must be reinstated.

**2. Program 1**

In the SEF it is contended that state-owned enterprises that supply aluminium and aluminium alloy are 'public bodies' and that the supply of aluminium and aluminium alloy is at prices that are less than adequate remuneration. It, therefore, is concluded in the SEF that the supply of aluminium and aluminium alloy are at subsidised prices with the amount to the subsidy being the difference between the price of aluminium and aluminium alloy in China and the London Metal Exchange prices.

We submit that state-owned enterprises supplying aluminium and aluminium alloy are not "public bodies" and none of the "evidence" referred to in the SEF demonstrate that those entities are vested with and carry out government functions. In this regard, we refer to and concur with the submission of Moulis Legal on this issue.

In relation to the use of the London Metal Exchange aluminium and aluminium alloy prices as benchmark, while such a benchmark may be used, in order for it to be used, *"it must be demonstrated that, based on the facts of the case, that the benchmark relates or refers to, or is connected with, the conditions prevailing in the market of the country"* in question.<sup>1</sup>

In the SEF Customs noted, at page 63, that:-

*"China does not import significant quantities of aluminium or alloy in any case (appearing to be somewhat isolated from the global aluminium market)..."*

If isolated from the global aluminium market, presumably London Metal Exchange prices do not "relate or refer to, or are connected with, prevailing market conditions in China"? If so, then those prices cannot be used as an external benchmark under WTO rules and under Australia's anti-dumping legislation, which is required to be interpreted consistently with such rules: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

There is no evidence in the SEF that the London Metal Exchange aluminium and aluminium alloy prices relates or refers to, or is connected with, the conditions prevailing in the aluminium and aluminium alloy market in China. Accordingly, consistent with s.269TACC of the *Customs Act 1901*, Article 14(d) of the *WTO Agreement on Subsidies and Countervailing Measures* and WTO jurisprudence, London Metal Exchange aluminium and aluminium alloy prices cannot be used as benchmarks.

Finally, while the so-called "Program I" is referred to as a "program", that is, as 'Program I - Sales at Less than Adequate Remuneration', Customs was unable to identify any specific

<sup>1</sup> United States - Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada' (WT/DS257/AB/R; 19 January 2004) at paragraphs 89, 103 & 106

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legal basis for this "program". That is, according to the SEF Customs was not able to identify any specific law, regulation or other document or legal instrument that provides for the establishment of this "program". The reason why Customs was unable to identify any such document is because the "program" does not exist.

**3. Material injury and causation**

We submit that exports of aluminium road wheels from China have not caused injury to Arrowcrest in the 'original equipment manufacture' (OEM) market in Australia for the following reasons.

The OEM market in Australia is made up of three motor vehicle manufacturers, Ford Australia, GM Holden and Toyota.

Holden Special Vehicles and Ford Performance Vehicles are not motor vehicle manufacturers. Rather, they take standard motor vehicles from, respectively, GM Holden and Ford Australia and then re-work them into performance motor vehicles. Properly characterised they form part of the Australian After market.

Also, we understand that Holden Special Vehicles is a joint venture between GM Holden and Tom Walkinshaw Racing. The joint venture is with Premoso Pty Ltd, which is owned by the Walinshaw family company Riverson Pty Ltd. Similarly, we understand that Ford Performance Vehicles is a joint venture between Ford Australia and Prodrive.

It, therefore, is incorrect to assert that the OEM market consists of GM Holden, Ford Australia and Toyota together with their performance brands, Holden Special Vehicles and Ford Performance Vehicles. The latter two are not OEM motor vehicle manufacturers.

In relation to the OEM market in Australia, Arrowcrest effectively has only one customer, Toyota.

Ford Australia ceased to be a customer for more than a decade for well documented reasons that did not relate to price.

GM Holden also ceased to source aluminium road wheels from Arrowcrest in any substantial quantities for a considerable period of time, again for reasons that did not relate to price.

Customs noted that Arrowcrest recently tendered to supply GM Holden for a particular model motor vehicle but was unsuccessful. While GM Holden advised Customs that the reason why Arrowcrest was not due to price, Customs nevertheless "*considers it reasonable to conclude, however, that price would be an important factor in any tender process*". That simply is not correct.

If a potential supplier cannot meet the requirements of an automotive manufacturer such as quality, security of supply, etc., then price is irrelevant. Considerable verified evidence has been provided to Customs demonstrating the requirements of each of the motor vehicle manufacturers our clients supply aluminium road wheels to that must be met in order for our clients to qualify as suppliers of aluminium road wheels to those motor vehicle manufacturers. Only if those requirements are met does price become relevant.

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If price is as an "important factor" in any tender process, as claimed, and if Chinese aluminium road wheels significantly undercut Arrowcrest's prices, why has Toyota continued to source its wheels from Arrowcrest? Why has it not sourced less expensive aluminium road wheels from Chinese or other overseas manufacturers, which would assist in lowering the cost to make a motor vehicle?

Clearly factors other than price are more important than price in awarding contracts to supply aluminium road wheels in the OEM market.

Accordingly, any injury being incurred by Arrowcrest in the OEM market cannot be attributed to our clients' exports at allegedly dumped prices.

Further, our clients do not export aluminium road wheels to the Australian After market and, therefore, its exports cannot have caused any injury to Arrowcrest in that market, given that the OEM and After markets in Australia operate separately and independently of each other.

Consequently, Customs must terminate the investigation under s.269TDA(13) of the *Customs Act 1901* in relation to aluminium road wheels exported from China for the Australian OEM aluminium road wheel market as such exports are not causing material injury to the Australian industry producing like goods for that market.

**3. Conclusion**

We submit that the dumping margin calculation in the visit report in respect of our client was correctly calculated and the one in the SEF has not been calculated in accordance with the law. Consequently, the finding in respect of our clients' must be that our clients' exports of aluminium road wheels have not been at dumped or subsidised prices and, therefore, the investigation must be terminated in respect of our clients.

Further, it is evident that any injury incurred by Arrowcrest cannot be attributed to exports of aluminium road wheels by our clients and, again, the investigation must be terminated in respect of our clients.

Yours faithfully

**Corrs Chambers Westgarth**

**Andrew Percival**  
Special Counsel