



Australian Government  
Department of Industry,  
Science and Resources

**Anti-Dumping  
Commission**

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# **EXEMPTION INQUIRY REPORT EX0096**

**CERTAIN HOLLOW STRUCTURAL SECTIONS  
EXPORTED TO AUSTRALIA  
FROM COUNTRIES SUBJECT TO ANTI-DUMPING  
MEASURES**

**Applicant: Emro Products Pty Ltd**

**6 September 2023**

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## ABBREVIATIONS

Abbreviation	Full reference
ADN	Anti-Dumping Notice
the applicant	Emro Products Pty Ltd
ATM	Austube Mills Pty Ltd
China	the People's Republic of China
ROK	Republic of Korea
the commission	the Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
Customs Act	<i>Customs Act 1901</i>
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
the duties	collectively, interim dumping duty, dumping duty, interim countervailing duty and countervailing duty
EPR	electronic public record
exemption goods	the goods subject of the application as described in chapter 2.2.2
HSS	hollow structural sections
ICD	interim countervailing duty
IDD	interim dumping duty
the Minister	the Minister for Industry and Science
Orrcon	Orrcon Manufacturing Pty Ltd
questionnaire	'Exemption Application' questionnaire

# 1 SUMMARY

This report sets out the findings of the Anti-Dumping Commission (the commission) in response to an application by Emro Products Pty Ltd (the applicant). The application seeks an exemption from the anti-dumping measures applying to certain hollow structural sections (HSS).<sup>1</sup>

Interim dumping duty (IDD) applies to HSS exported from the People's Republic of China (China), the Republic of Korea (ROK), Malaysia and Taiwan. Interim countervailing duty (ICD) applies to HSS exported from China, except for exports by Huludao City Steel Pipe Industrial Co. Ltd, Qingdao Xiangxing Steel Pipe Co and Dalian Steelforce Hi-Tech Co Ltd.

The application requests an exemption from IDD and ICD (collectively, the duties), under sections 8(7)(a) and 10(8)(a) of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act).<sup>2</sup> These sections apply when:

[L]ike or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

The Commissioner of the Anti-Dumping Commission (the Commissioner) has relied on the findings in this report to make a recommendation to the Minister for Industry and Science (the Minister) on whether or not to exempt goods from the duties.

## 1.1 Findings and conclusions

The applicant claimed in its application that the Australian industry does not produce like or directly competitive goods to the exemption goods.

Based on the submissions from the Australian industry and a review of the evidence available (detailed in this report), the commission finds that there is a difference between the exemption goods and the HSS produced and offered for sale by the Australian industry. The commission also found that the Australian industry does not currently have the capability to produce HSS in the same specification as the exemption goods.

The Commissioner has therefore concluded that like or directly competitive goods to the exemption goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade. Accordingly, the conditions of sections 8(7)(a) and 10(8)(a) of the Dumping Duty Act for granting an exemption are satisfied.

## 1.2 Recommendation

The Commissioner recommends that the Minister decide to grant an exemption from the duties for the exemption goods.

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<sup>1</sup> As detailed in Anti-Dumping Notice (ADN) No [2022/110](#).

<sup>2</sup> A reference to a division or section in this report is a reference to a provision of the *Customs Tariff (Anti-Dumping) Act 1975* unless otherwise specified.

## 2 BACKGROUND

### 2.1 The Anti-Dumping Measures

Anti-dumping measures applying to HSS exported to Australia from China, the ROK, Malaysia and Taiwan were originally imposed by public notices on 3 July 2012.<sup>3</sup> A dumping duty notice applies to certain HSS exported to Australia from China, the ROK, Malaysia and Taiwan. A countervailing duty notice applies to certain HSS exported to Australia from China. Further details regarding the measures applying to HSS are available on the Dumping Commodity Register.<sup>4</sup>

#### 2.1.1 The goods subject to measures

The goods subject to the anti-dumping measures<sup>5</sup> are:

Certain electric resistance welded pipe and tube made of carbon steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes. The goods are normally referred to as either CHS (circular hollow sections) or RHS (rectangular or square hollow sections). The goods are collectively referred to as HSS (hollow structural sections). Finish types for the goods include inline galvanised (ILG), pre-galvanised, hot-dipped galvanised (HDG) and non-galvanised HSS.

Sizes of the goods are, for circular products, those exceeding 21 millimetres (mm) up to and including 165.1 mm in outside diameter and, for oval, square and rectangular products those with a perimeter up to and including 1277.3 mm. Categories of HSS excluded from the goods are conveyor tube, precision RHS with a nominal thickness of less than 1.6 mm and air heater tubes to Australian Standard (AS) 2556.

The conveyor tube that is excluded from the anti-dumping measures is conveyor tube made for high-speed idler rolls on conveyor systems with inner and outer fin protrusions removed by scarfing (not exceeding 0.1 mm on outer surface and 0.25 mm on inner surface) and out of round standards (i.e. ovality) which do not exceed 0.6 mm in order to maintain vibration free rotation and minimum wind noise during operation.

Following the circumvention inquiry set out in *Anti-Dumping Commission Report No 291*, certain exporters of HSS are also subject to the measures, if they export alloyed HSS products which would otherwise meet the goods description.<sup>6</sup>

The following goods are exempt from the measures.

#### Ministerial Exemption Instrument No 1 of 2016

IDD and ICD do not apply to goods subject to Tariff Concession Order 1609617 with an effective date of 16 February 2016.<sup>7</sup>

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<sup>3</sup> ADN No 2012/31 contains details of the measures imposed at that time.

<sup>4</sup> Available on the commission website at [www.adcommission.gov.au](http://www.adcommission.gov.au). Note that certain exporters are exempt from aspects of the measures.

<sup>5</sup> [Dumping Commodity Register: Hollow Structural Sections](#).

<sup>6</sup> Anti-Dumping Notice No. 2016/24 - electronic public record (EPR) for case 291 - document no 38. The affected exporters from China are Dalian Steelforce Hi-Tech Co., Tianjin Friend Steel Pipe Co., Ltd, Tianjin Ruitong Iron and Steel Co., Ltd and Roswell S A R L Limited. The affected exporter from Malaysia is Alpine Pipe Manufacturing SDN BHD.

<sup>7</sup> ADN No 2016/116. The commission's policy is to recommend to the Minister that the date of the effect of an exemption is the date of the application.

Tubes, square or rectangular, electric resistance welded, complying with Australian / New Zealand Standard 1163:2009, Grade C350L0 or C450L0, with a perimeter not less than 1050 mm and having either (a) or (b) as follows:

- a) silicon content plus 2.5 times the phosphorus content NOT greater than 0.09%;
- b) silicon content greater than 0.14% and NOT greater than 0.24%.

#### Ministerial Exemption Instrument No 3 of 2021

IDD and ICD do not apply to the following goods with an effective date of 14 May 2020.<sup>8</sup>

Electrical Resistance Welded Hot-dip Galvanised Shouldered Pipe produced in accordance with American Petroleum Institute Standard Specification 5L (API 5L). The steel grade for the pipe and the shoulder rings that are welded to both ends of the pipe is API 5L Grade B PSL1.<sup>9</sup> A full penetration fillet weld secures the rings to the ends of the pipe. Following welding, the full length of shouldered pipe is hot-dip galvanised to a minimum zinc coating thickness of 300 g/m<sup>2</sup>.

The exemption goods are also specified according to the following dimensions:

- Outer diameter (mm): 165.1
  - ends tolerance (mm): -0.4, +1.6
  - wall thickness (mm):  $2.5 \pm 0.32$
- ring and shoulder:
  - nominal ring thickness (mm):  $4.8 \pm 0.15$
  - shoulder outside diameter (mm):  $174.5 \pm 0.8$
  - ring length (mm):  $17.5 \pm 0.4$
  - maximum out of square (mm): 1.0
- Length not less than 6,000 mm and not greater than 6,500 mm with a tolerance of -50 mm, +20 mm.

#### Ministerial Exemption Instrument No 5 of 2022

IDD and ICD do not apply to the following goods with an effective date of 29 September 2021.<sup>10</sup>

Curtain rods with:

- 25 mm outside diameter in 0.5 mm gauge / wall thickness in both powder coated (White / Ivory / Black) and electroplated (Brushed Chrome).
- 32 mm outside diameter in 0.7 mm gauge / wall thickness in electroplated finish (Brushed Chrome).

The curtain rods come in lengths 2.0 m and 3.0 m, and are individually heat / shrink wrapped and labelled. The curtain rods are made of A class hot-rolled strip metal comprising of 0.12% carbon and are made using a roll forming process and a longitudinal welding technique.

#### Ministerial Exemption Instrument No 1 of 2023

IDD and ICD do not apply to the following goods with an effective date of 6 April 2022.<sup>11</sup>

STEEL ELECTRIC RESISTANCE WELDED PIPE, CIRCULAR, EN10305 Standard, cold drawn, in the following sizes:

- 69 mm Outside Diameter x 57 mm Inside Diameter, Wall Thickness 6.0 mm

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<sup>8</sup> ADN No 2021/112

<sup>9</sup> American Petroleum Institute Specification 5L, Line Pipe, 46th edition.

<sup>10</sup> ADN No 2022/084.

<sup>11</sup> ADN No 2023/020.

- 83 mm Outside Diameter x 70 mm Inside Diameter, Wall Thickness 6.5 mm
- 89 mm Outside Diameter x 79 mm Inside Diameter, Wall Thickness 5.0 mm
- 101 mm Outside Diameter x 88 mm Inside Diameter, Wall Thickness 6.2 mm
- 114 mm Outside Diameter x 101 mm Inside Diameter, Wall Thickness 6.5 mm
- 120 mm Outside Diameter x 107 mm Inside Diameter, Wall Thickness 6.5 mm
- 139 mm Outside Diameter x 127 mm Inside Diameter, Wall Thickness 6.0 mm
- 152 mm Outside Diameter x 127 mm Inside Diameter, Wall Thickness 12.5 mm
- 165 mm Outside Diameter x 152 mm Inside Diameter, Wall Thickness 6.5 mm

And having all of the following specifications and confirmed on mill certificates:

- Length ranging from 5.8 metres to 8.9 metres, and;
- Surface roughness (Ra) no greater than 1.6 micrometres, and;
- Outside and inside diameter tolerance no greater than  $\pm 0.25$  mm, and;
- E355-SR grade steel, cold drawn and stress relieved in a controlled atmosphere.

### 2.1.2 Tariff classification

The goods subject to measures may be classified in Schedule 3 to the *Customs Tariff Act 1995* as follows:

Tariff Subheading	Statistical Code	Description
7306		OTHER TUBES, PIPES AND HOLLOW PROFILES (FOR EXAMPLE, OPEN SEAM OR WELDED, RIVETED OR SIMILARLY CLOSED), OF IRON OR STEEL:
7306.30		Other, welded, of circular cross-section, of iron or non-alloy steel:
7306.30.00		Exceeding 21 mm but not exceeding 60.3 mm external diameter:
	31	Wall thickness not exceeding 2.5 mm
	32	Wall thickness exceeding 2.5 mm but not exceeding 3.6 mm
	33	Wall thickness exceeding 3.6 mm
		Exceeding 60.3 mm but not exceeding 114.3 mm external diameter:
	34	Wall thickness not exceeding 3.2 mm
	35	Wall thickness exceeding 3.2 mm but not exceeding 4.5 mm
	36	Wall thickness exceeding 4.5 mm
	37	Exceeding 114.3 mm but not exceeding 165.1 mm external diameter
7306.50.00	45	Other, welded, of circular cross-section, of other alloy steel
7306.6		Other, welded, of non-circular cross-section
7306.61.00		Of square or rectangular cross-section, of iron or non-alloy steel, not exceeding 279.4 mm perimeter:
	21	Wall thickness not exceeding 2 mm
	22	Wall thickness exceeding 2 mm
	25	Exceeding 279.4 mm perimeter
	90	Other
7306.69.00	10	Of other non-circular cross-section
7306.90.00	12	Other

**Table 1: General tariff classification for the goods<sup>12</sup>**

<sup>12</sup> The tariff subheadings 7306.61.00 (90) and 7306.50.00 (45) only apply to the following exporters / suppliers: Dalian Steelforce Hi-Tech Co. (China), Tianjin Friend Steel Pipe Co. Ltd (China), Tianjin Ruitong Iron and Steel Co. Ltd (China), Roswell S A R Ltd (China) and Alpine Pipe Manufacturing SDN BHD (Malaysia).

## 2.2 Exemption Inquiry

On 1 November 2022, the applicant requested an exemption from the duties in relation to its imports of HSS. The applicant's letter outlined the following grounds in support of its application for an exemption from the duties:

[L]ike or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

The commissioner accepted the applicant's letter as an application for an exemption from the duties. On 23 December 2022, the Commissioner published ADN No 2022/110. ADN No 2022/110 advised that an exemption inquiry had been initiated, provided details of the goods subject to the inquiry and outlined the procedures to be followed during the inquiry.

The Australian industry members were invited to respond to the 'Exemption Application' questionnaire (the questionnaire).

Completed questionnaire responses received from Australian industry member Orrcon Manufacturing Pty Ltd (Orrcon).<sup>13</sup>

### 2.2.1 Goods subject to the application for exemption

The application describes the exemption goods as follows:

Chrome plated steel tube in 25 mm outside diameters (circular)

Chrome plated steel tube 30 x 15 mm (oval)

#### Revised exemption goods description

On 23 December 2023, Orrcon responded to the commission by writing (email) with a preliminary view based on the goods description that they are likely to be substitutable as like goods for products that are manufactured by Orrcon. To make a final assessment, Orrcon requested a more detailed description of the exemption goods, including the surface finish and coating specification or standard, the tube material standard and grade of the pipe material, the designated wall thickness, the length or lengths for each size, and any packaging or product labelling.

On 1 February 2023, Orrcon advised it manufactures goods that are identical in terms of dimensional characteristics, and as such share a functional and production likeness. Orrcon's assessment indicates that the exemption goods are likely to be substitutable as like goods for products currently manufactured by Orrcon, and on this basis Orrcon objects to the granting of an exemption. The applicant operates in the household architectural and general purpose furniture application market sector, as does Orrcon.<sup>14</sup>

On 7 February 2023, the applicant responded to the Orrcon submission stating that 'there is no comparison of functional likeness of the product we import and that manufactured by Orrcon Steel, and the market sector in which we operate is targeted towards home DIY via hardware stores and bathroom/plumbing retailers (i.e. in no direct competition with Orrcon Steel)'.<sup>15</sup>

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<sup>13</sup> Two submissions from Orrcon received in relation to this inquiry. One before the revision of goods (EPR Item no: [004](#) ) and one after the revision of goods (EPR Item no: [010](#)).

<sup>14</sup> See EPR EX0096 Item no: [004](#)

<sup>15</sup> See EPR EX0096 Item no: [005](#)



On 24 March 2023, Orrcon provided a submission in response to the applicant's response, indicating that the goods description subject to the exemption inquiry was 'overly simplistic' and 'insufficient' and accordingly, recommended that the goods description be revisited.<sup>16</sup>

On 26 April 2023, the applicant submitted a revised goods description:<sup>17</sup>

Curtain rods meeting the below specification and finishes:

- 25 mm outer diameter (circular), 1.0 mm wall thickness, polished chrome electroplated finish
- 30 x 15 mm dimension (oval), 1.0 mm wall thickness, polished chrome electroplated finish

The exemption goods are comprised of cold-rolled strip metal, which is longitudinally welded, cut to length, polished, and then chrome electroplated. The material composition is iron steel, ~0.8% carbon.

The curtain rods come in the following lengths:

- 25 mm outer diameter (circular): 900 mm, 1200 mm, 1800 mm, 2400 mm, 2700 mm and 3600 mm
- 30 x 15 mm dimension (oval): 1800 mm, 2400 mm and 3600 mm

Packaging/product labelling: tubes are individually sleeved and barcoded, and packaged (bundles of 5 pieces for 25 mm OD (circular), bundles of 10 for 30 x 15 mm (oval)) within rectangular cardboard cartons with an outer carton GTIN barcode.

On 31 May 2023, the commission published a file note on the EPR to inform interested parties that the applicant had provided a revised description of the exemption goods, and to invite submissions in response no later than 14 June 2023.<sup>18</sup>

Orrcon submitted that it 'does not produce goods that are identical in all respects to the exemption goods, nor is it capable of producing such goods.'<sup>19</sup> No other submissions on the revised exemption goods description were received.

The commission has therefore revised the description as the basis for this inquiry.

### Tariff classification

The exemption goods are generally classified to the tariff subheading 7306.30.00 (statistical code 31) for circular tube and 7306.69.00 (statistical code 10) for oval tube of Schedule 3 to the *Customs Tariff Act 1995*.

### **2.2.2 Previous exemption inquiry - EX0091**

The applicant has previously applied for an exemption from the measures applying to precision pipe and tube steels, which was the subject of *Exemption Inquiry Report EX0091*.<sup>20</sup> The exemption goods in that inquiry were similar to those in the present inquiry, described as:

Chrome plated steel tube in 16 mm and 19 mm outside diameters.

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<sup>16</sup> See EPR EX0096 Item no: [007](#)

<sup>17</sup> See EPR EX0096 Item no: [008](#)

<sup>18</sup> See EPR EX0096 Item no: [009](#)

<sup>19</sup> See EPR EX0096 Item no: [010](#)

<sup>20</sup> Available on the EPR for [EX0091](#).

In that case, the exemption was granted on the basis that like or directly competitive goods were not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.<sup>21</sup>

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<sup>21</sup> [Ministerial Exemption Instrument No 4 of 2022](#).

## 3 ASSESSMENT OF CLAIMS

### 3.1 The applicant's claims

The applicant claimed that the Australian industry producing HSS does not produce the exemption goods. In its application, the applicant notes its efforts to source chrome plated steel tubing from local manufacturers and provides confidential correspondence confirming that the product is not manufactured in Australia. The applicant also provided information in relation to a prior exemption inquiry EX0091 concerning chrome plated imports of precision pipe and tube steel.<sup>22</sup>

On the basis of the information in its application, the applicant claimed that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

The applicant also made further statements by submitting the grounds for exemption in its application share similarities with those that were relied on for inquiry EX0087.<sup>23</sup> Inquiry EX0087 resulted in an exemption being granted for imports of HSS with a chrome surface finish.

The commission notes that the confidential correspondence referred to above cites the description of the exemption goods as contained in the application rather than the revised version it submitted on 26 April 2023.<sup>24</sup> The applicant made no further claims after providing an amended version of the exemption goods description.

### 3.2 Australian industry claims

The commission's consultation with all known members of the Australian industry established they do not object to the granting of an exemption. This includes Orrcon, who, after considering the applicant's revised goods description, confirmed that it does not produce goods that are identical in all respects to the exemption goods, nor that it is capable of producing such goods.<sup>25</sup> A second member of the Australian industry, Austube Mills Pty Ltd, did not express any views regarding the applicant's claim and advised it would not be participating in the inquiry.<sup>26</sup>

### 3.3 Legislative requirements for an exemption

Sections 8(7) (a) and 10(8) (a) of the Dumping Duty Act state the Minister may grant an exemption from the duties where:

[L]ike or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

**Appendix A** provides further details of the legislative framework for a 'like or directly competitive goods' exemption.

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<sup>22</sup> As stated in its application on the EPR EX0096 Item no: [001](#) at page 4

<sup>23</sup> See EPR EX0096 Item No. [005](#)

<sup>24</sup> Chapter 2.2.1 refers.

<sup>25</sup> See EPR EX0096 item no [010](#) at Part B.2.

<sup>26</sup> Item no: [006](#) and [011](#) on the EPR for EX0096.

### **3.4 The commission's assessment**

The commission finds that neither like nor directly competitive goods to the exemption goods are offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade. The commission considered the applicant's claims and questionnaire responses from the Australian industry, and submissions from the applicant and Orrcon, noting that interested parties were provided an opportunity to make submissions and the only submissions received from Australian industry members were the submissions made by Orrcon.

The commission considers the conditions for granting an exemption are satisfied.

The available evidence shows that:

- Submissions received from Orrcon confirm that it does not produce goods that are identical in all respects to the exemption goods, nor is it capable of producing such goods.
- No other submissions were received which indicate that the Australian industry can produce goods within the revised description.

### **3.5 Conclusion**

The commission finds that the Australian industry does not offer for sale like or directly competitive goods to the exemption goods. It follows that the like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade. Accordingly, the conditions of sections 8(7)(a) and 10(8)(a) for granting an exemption are satisfied.

## 4 RECOMMENDATION

Based on the commission's examination of the application and submissions made to the inquiry, the Commissioner considers that the exemption goods are not offered to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

Accordingly, the Commissioner recommends that the Minister exercise their discretion to exempt the exemption goods being: <sup>27</sup>

Curtain rods meeting the below specification and finishes:

- 25 mm outer diameter (circular), 1.0 mm wall thickness, polished chrome electroplated finish
- 30 x 15 mm dimension (oval), 1.0 mm wall thickness, polished chrome electroplated finish

The exemption goods are comprised of cold-rolled strip metal, which is longitudinally welded, cut to length, polished, and then chrome electroplated. The material composition is iron steel, ~0.8% carbon.

The curtain rods come in the following lengths:

- 25 mm outer diameter (circular): 900 mm, 1200 mm, 1800 mm, 2400 mm, 2700 mm and 3600 mm
- 30 x 15 mm dimension (oval): 1800 mm, 2400 mm and 3600 mm

Packaging/product labelling: tubes are individually sleeved and barcoded, and packaged (bundles of 5 pieces for 25 mm OD (circular), bundles of 10 for 30 x 15 mm (oval)) within rectangular cardboard cartons with an outer carton GTIN barcode.

from IDD and dumping duty in accordance with section 8(7)(a), and ICD and countervailing duty in accordance with section 10(8)(a) of the Dumping Duty Act.

### 4.1 Effective date of exemption

The Minister has discretion over the date of effect of the exemption, if granted. If the exemption is given because of an application for exemption, the Dumping Duty Act limits the Minister's discretion to a date not earlier than the date of application for an exemption.<sup>28</sup> The commission's policy is to recommend to the Minister that the date of the effect of the exemption is the date of the application.

As Emro Products Pty Ltd applied for the exemption on 1 November 2022, the commission recommends granting the exemption effective from 1 November 2022.

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<sup>27</sup> The commission has amended the exemption goods description to remove goods that are not subject to the HSS measures due to their outside diameter.

<sup>28</sup> Sections 8(8A) and 10(9A) of the Dumping Duty Act.

## 5 APPENDIX A – ‘LIKE OR DIRECTLY COMPETITIVE GOODS’ FRAMEWORK

### Legislation

Section 8(7) provides:

- (7) The Minister may, by notice in writing, exempt goods from interim dumping duty and dumping duty if he or she is satisfied:
  - (a) that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

and Section 10(8) provides:

- (8) The Minister may, by notice in writing, exempt goods from interim countervailing duty or countervailing duty if he or she is satisfied:
  - (a) that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

### Definition of ‘like or directly competitive goods’

#### Like goods

The term ‘like goods’ is defined in section 269T(1) of the *Customs Act 1901* (the Customs Act). Section 6 of the Dumping Duty Act provides that the Customs Act is incorporated and shall be read as one with the Dumping Duty Act. Accordingly, the definition of ‘like goods’ in the Customs Act is applicable to the Commission’s assessment of whether the exemption goods are ‘like goods’ under sections 8(7)(a) and 10(8)(a) of the Dumping Duty Act.

Section 269T(1) of the Customs Act defines ‘like goods’ as:

Goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

Chapter 2 of the commission’s *Dumping and Subsidy Manual* embodies the commission’s established policy and practice in relation to like goods. Where two goods are identical they are automatically like goods, but where two goods are not alike in all respects the commission will assess whether they have characteristics closely resembling each other including assessing their physical likeness, commercial likeness, functional likeness and production likeness.

#### Directly competitive goods

The term ‘directly competitive’ is not defined in the Dumping Duty Act or the Customs Act and has not been the subject of judicial consideration by Australian courts. Accordingly, assistance in understanding this term can be derived by having recourse to relevant dictionary definitions and case law.

Case law suggests an assessment of a 'direct' relationship is a question of fact and degree.<sup>29</sup> Drawing on the Macquarie Dictionary and case law, the commission defines 'directly' as:

excluding that which is indirect or remote;<sup>30</sup> absolutely; exactly; precisely.

The Macquarie Dictionary also defines 'competitive' as:

of, relating to, involving, or decided by competition; and

having a feature comparable or superior to that of a commercial rival.

The phrase 'directly competitive' can therefore be taken to refer to goods with comparable features that rival each other in a commercial market. The assessment will be one of fact and degree, and the goods will not merely remotely or indirectly compete.

#### Alternatives to satisfying sections 8(7)(a) and 10(8)(a) of the Dumping Duty Act

The exemption provisions in sections 8(7)(a) and 10(8)(a) of the Dumping Duty Act specifically provide for exemptions where either like goods or directly competitive goods are not offered for sale in Australia. It is not necessary to be satisfied that there are both like goods and directly competitive goods for sale in Australia in order to deny the application for an exemption. It is sufficient for there to be either like goods or directly competitive goods for sale in Australia for the requirements of the exemption not to be met.

If there are no like or directly competitive goods offered for sale in Australia, then the requirements for exemption in sections 8(7)(a) and 10(8)(a) of the Dumping Duty Act will be met.

If there are like or directly competitive goods, then it is necessary to consider whether these like or directly competitive goods are offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

#### **Definition of 'custom and usage of trade'**

Although the domestically produced goods may be 'like or directly competitive goods', the Minister may still grant an exemption to duties in circumstances where the 'like or directly competitive goods' are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the 'custom and usage of trade'.

The term 'custom and usage of trade' is not defined in the Dumping Duty Act or the Customs Act. The Macquarie Dictionary defines 'custom' as:

a habitual practice; the usual way of acting in given circumstance; and  
habits or usages collectively; convention.

The Macquarie Dictionary defines 'usage' as:

customary way of doing; a custom or practice;  
the body of rules or customs followed by a particular set of people;  
usual conduct or behaviour.

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<sup>29</sup> *Adelaide Development Co Pty Ltd v Corporation of the City of Adelaide and Anor* (1991) 56 SASR 497 at [45].

<sup>30</sup> *Ibid.*

As custom can only to be inferred from a large number of individual acts, the existence of a custom and usage of trade must involve:

the multiplication or aggregation of a great number of particular instances; but these instances must not be miscellaneous in character but must have a principle of unity running through their variety, and that unity must show a certain course of business and an established understanding respecting it.<sup>31</sup>

Custom or usage of trade is a term used in common law in the interpretation of implied terms in contracts within a particular trade or industry.<sup>32</sup> When considering what is 'custom or trade usage' the courts have concluded that:

1. Custom or usage was established mercantile usage or professional practice: *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 440; and
2. Evidence of actual market practices was crucial to the existence of a custom or usage. However, universal acceptance was not necessary: *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226.

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<sup>31</sup> *Anderson v Wadey* (1899) 20 N.S.W.R. 412 at p. 417.

<sup>32</sup> *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468.