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23 October 2018

Ms Carina Oh
Assistant Director
Anti-Dumping Commission
Level 35, 55 Collins Street
Melbourne
Victoria 3000

By email

Dear Carina

Scaw South Africa and Haggie Reid
Anti-circumvention inquiry – wire ropes from South Africa

We refer to the letter from BBRG Australia Pty Ltd ("BBRG") to the Anti-Dumping Commission ("the Commission") dated 9 October 2018, as has been placed on the public record of this inquiry.

That letter attempts to rebut our clients' well-evidenced and well-explained submissions. Our clients confidently stand behind everything that they have said and have presented to the Commission.

The BBRG letter has an air of desperation and, in its incoherence, presents a case – whether factually correct or not – against BBRG's own application. It highlights numerous differences between different kinds of wire rope. We intend to comment upon that submission separately.

A Legal standard

An anti-circumvention inquiry involves an assessment of whether the alleged circumvention goods are only a slight modification of the goods against which the dumping measures already apply.[1] In making this judgement the Commissioner is advised by Regulation 48(3) of the *Customs (International Obligations) Regulation 2015* to:

> *…compare the circumvention good and the good the subject of the notice, having regard to any factor that the Commissioner considers relevant, including any of the following factors:*

We set out the factors mentioned in Regulation 48(3), which are illustrative and not exclusive, and a summation of what our client's evidence establishes with respect to each of them, as now follows:

[1] This submission proceeds on the basis that an entirely new product (in this case, our client's 9 strand wire rope) may be a slight modification of a product already subject to measures (in this case, our client's 6 or 8 strand wire rope). However, our client is not to be taken to accept that this is a legally correct basis. The words of the legislation state, in our view clearly, that it is only when a slight modification is made to the product subject to measures *in specie* that the modified product can be a "circumvention good". If that is correct, then the Commission would only have a basis for considering whether there had been a "slight modification" of our client's 8 strand wire rope if something additional had been done to it such as to turn it into something different.

Regulation 48(3) factor:	**Evidence and submissions establish that:**
Each good's general physical characteristics	The goods are different, and not just slightly. Nine strand rope has different physical characteristics. Evidently, it is made with more strands, and evidently this causes 9 strand ropes to perform differently. This is not the only technical difference, and we believe that our submissions make the multiple differences very clear. Even the various disparagements of our clients' wire rope in BBRG's letter, if true, would prove that point. Relative to 6 and 8 strand wire ropes, our client's 9 strand wire rope is stronger (higher minimum breaking load), more flexible (therefore more resistant to fatigue and easier to install and handle) and more abrasion resistant. **[CONFIDENTIAL TEXT DELETED – product enhancements]**
Each good's end use	An inquiry of this kind would not take place unless goods were capable of doing the same thing *in a broad sense*. Thus the only way in which this factor can be considered to be relevant to the Commissioner's consideration is at a level of granularity that is suited to the exercise. In that context, field tests and customer usage suggest that our clients' 9 strand rope excels and exceeds 6 and 8 strand ropes **[CONFIDENTIAL TEXT DELETED – product performance]**. As detailed in our submission of 1 October 2018 with regard to "end for ending", the increased flexibility of the 9 strand rope allows it to be used in a fundamentally different way from 6 and 8 strand ropes. **[CONFIDENTIAL TEXT DELETED – customer operations]** **[CONFIDENTIAL TEXT DELETED – product performance]** In these respects, the different characteristics of the wire ropes concerned give them different performance capabilities.
The interchangeability of each good	We refer to and repeat our comments with respect to each good's end use, as above.
Differences in the processes used to produce each good	The modifications to the machinery used and processes adopted by Scaw to manufacture 9 strand wire rope have been well-documented in our previous submissions.
The cost of modification	Cost of modification, including the immediate/recent research and development costs, re-tooling and on-going intellectual property costs have been explained.
Differences in the cost to produce each good	Cost comparisons have been provided to the Commission. The differences are substantial and are both indicative and reflective of a different product to the goods subject to measures.

Changes in the pricing of each good	Price comparisons have been provided to the Commission. The differences are substantial and by no means slight.
The way in which each good is marketed	The introduction of the new, different and - as admitted by BBRG - unique 9 strand wire rope has involved extensive technical explanations and educational efforts on the part of our clients, in order to achieve acceptance. It is not the case that any customer has unnoticeably and noiselessly moved from using its existing wire ropes to the newly-offered 9 strand wire ropes. Scaw has made it quite clear that its 9 strand wire rope is a new product in the market. **[CONFIDENTIAL TEXT DELETED – customer operations]**
Channels of trade and distribution for each good	There is no difference here.
Patterns of trade for each good	**[CONFIDENTIAL TEXT DELETED – customer service and acceptance]**
Changes in the export volumes for each good	We refer to and repeat our comments with respect to the patterns of trade for each good, as above.

B Administrative precedent

The administrative precedent referable to the Commission's consideration of "slight modification" more than fortifies the conclusion that the 9 strand wire rope is not a "slight modification" of the goods subject to the measures.

Our review of the applicable law and precedent indicates that the evaluation that must be made is whether goods are the "same" or "almost the same", or whether they are more than "slightly different". If something is a more than slightly different product, then it would be incumbent on the Australian industry to make a new application in order to establish that the different goods were in fact dumped and had caused material injury.

Looked at in this way, the assessment of whether goods have been slightly modified is "tied back" to the dumping and injury concepts that led to the imposition of the duties in the first place. The anti-circumvention laws are not an avenue for the relevant Australian industry to avoid the requirement to establish dumping and injury, and whether the former caused the latter. If this was not the case, then Australia would too-easily transgress the constraints of the WTO *Anti-Dumping Agreement*, in that goods might have dumping duties imposed against them without ascertaining whether they were dumped, without considering whether the Australian industry had been materially injured, and without considering the reasons for that injury.

For example, innovatively different products, that are more expensive than before, may secure sales because of their consumer appeal in terms of performance and cost-savings, and not by reason of price. However, the slight modification law accepts that some goods may be so slightly modified as to effectively "be" the goods subject to the dumping duties. That is the perceived "evil" to which the anti-circumvention laws are directed.

The example cases that set out the Commission's prior thinking, and to which the Commission would necessarily refer in considering whether Scaw's 9 strand wire rope was only a slight modification of

its previous 6 and 8 strand ropes, are ADC 291 and ADC 290/298.

1 ADC 291 – alloy HSS compared to non-alloy HSS

This was an anti-circumvention inquiry against imports of alloy hollow structural sections ("HSS") in circumstances where dumping duties had been imposed against non-alloy ("carbon") HSS. The Commission adopted an exporter-by-exporter approach in identifying whether or not the alloy HSS exported by each of them was or was not "slightly modified".

In the case of all exporters, the alloy HSS was visually indistinguishable from the non-alloy HSS. The common difference shared by all alloy HSS was the presence of boron in the steel used to form the HSS in a quantity exceeding 0.0008%, or of some other alloying materials, and the different mechanical properties that such a difference imparts.

In the case of HSS exported by one such exporter ("Dalian"), the Commission said there was *"little to no difference"* in general physical characteristics other than the presence of slightly more boron. The alloyed HSS had a higher tensile strength, and there was some evidence to suggest that the alloyed HSS was *"lighter and stronger"*. The pattern of trade showed that Dalian had shifted from supplying certain volumes of non-alloyed HSS to alloyed HSS. The products were not marketed differently. The Commission found that the goods continued to be supplied through the same marketing and trade and distribution channels, to the same customers, *"likely for the same end uses with the same expectations"*. The boron-addition cost was found to be *"representative of a negligible amount of the total cost to make and sell HRC that would be incurred by a fully integrated manufacturer of HRC [sic]"* and that *"there [was] little to no difference in the cost to produce each good"*. Whatever the change to price had been (information which was not revealed because of its confidentiality), the Commission noted that its findings *"did not cause it to consider that the modifications of alloyed HSS exported by Dalian Steelforce are greater than 'slight'"*.

The Commission found the alloyed HSS exported to Australia by Dalian to be only *"slightly modified"* in that there had only been a *"minor change"* in manufacturing process. We assume that this minor change involved the different chemical composition of the steel used by Dalian to manufacture HSS.

However, in the case of alloy HSS exported to Australian by another exporter ("Qingdao"), the Commission reached the opposite conclusion. Reading the relevant passages of the report suggests that the modification of Qingdao's HSS was complex rather than simple, or at least was more complex than that demonstrated in the case of Dalian's HSS, and that this was the key factor in reaching the opposite conclusion.

In terms of its physical characteristics, the alloyed HSS exported by Qingdao included numerous alloys, and not just boron. The only alloy at a concentration at or above the threshold required by the notes to Chapter 72 of the Tariff Act (allowing classification as an alloy) was boron. This was present at a concentration of approximately the level of the Tariff Act threshold, which was 0.0008%. Thus, the alloy difference in the exported product was imparted by a number of different elements, rather than just the one. The Commission found that Qingdao's alloy HSS had high tensile strengths, which were higher than those of Dalian, and higher than the minimum tensile strengths at which the Australian industry supplied its non-alloy HSS. On this basis the Commission accepted that Qingdao's HSS was stronger than standard HSS, and accordingly was not in the nature of "circumvention goods".

We point out these factors for emphasis and contrast. In ADC 291, the Commission found no difference in the cost to make and sell each product (the alleged circumvention goods and the goods already subject to measures) nor any differences between the selling prices, with respect to Dalian's exports or Qingdao's.

The circumstances presently before the Commission clearly establish that there are differences

between 6 and 8 strand wire rope on the one hand, and 9 strand wire rope on the other, which are far more exaggerated than those which led to the decision that alloy HSS exported by Qingdao was not in the nature of "circumvention goods". The engineering, design and specification of Scaw's 9 strand rope is very different to that of 6 or 8 strand wire rope. They are made using differently configured equipment. Nine strand wire rope has different performance characteristics to 6 and 8 strand wire rope **[CONFIDENTIAL TEXT DELETED – product performance, cost and price information]**.

Accordingly, the main focus of the Commission can be seen to have been the higher tensile strength of Qingdao's HSS. This is instructive as to the frame of reference that the Commission adopts in undertaking such an analysis. "Slight modification", as the words suggest, is all about the degree to which goods are different. Goods that are the same or only slightly different may be found to be slightly modified goods such as would justify the extension of the scope of existing measures to include them as well. Including goods that are more than slightly different to those subject to existing measures, without undertaking the investigations necessary to impose such measures in the first place, is not justified.

This appears to be a literal, objective and common sense approach towards implementing the relevant legislation.

2 ADC 290/298 - alloy galvanised steel v non-alloy galvanised steel

This is another case in which the treatment of two exporters, one of which was found to have exported slightly modified products and the other not to have, can be contrasted. Similarly to the HSS example (ADC 291, above), the situation was that the substrate used for the purposes of galvanising the coil was different. The measures applied to non-alloy coil, but the Australian industry applied for them to be extended to exports of galvanised steel that used alloy coil as the substrate.

One of the exporters ("Yieh Phui") said it switched to alloyed galvanised steel to minimise the strain-ageing effect of the galvanised steel. However Yieh Phui's exports only had a boron percentage marginally above 0.0008%. This had only a *"small to negligible"* impact on the cost to produce the goods, and on the selling price of the goods. In these circumstances the Commission found the alloy galvanised steel exported by Yieh Phui to have been only slightly modified.

With respect to a second exporter ("Bao") the opposite conclusion was reached. This came down to a much greater difference in the alloy content of the coil concerned and its different performance as a result. It appears that there were greater physical differences to the product when compared to non-alloyed coil, and greater differences even when compared to boron-enhanced coil such as that exported by Yieh Phui.

For all imports of alloyed steel from Bao during the inquiry period, the level of alloys were said to be *"well above"* the minimum levels required for products to be classified as an *"alloy steel"*. It seems that the alloyed galvanised steel exported by Bao was better-suited to a particular usage, namely as a more specialised steel for automotive components. Consequently the Commission found the alloy galvanised steel exported by Bao not to have been only slightly modified, and accordingly that no circumvention activity had occurred in the case of Bao.

Again, we see parallels between the considerations applied by the Commission to Bao's goods in that case, and Scaw's goods in the present case. Rather than being only slightly different to the products subject to dumping duties, the products are greatly different, with different characteristics **[CONFIDENTIAL TEXT DELETED – product performance]**.

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We submit that the evidence demonstrates the more-than "slight difference", and indeed substantial differences, that distinguish 9 strand wire rope from the 6 and 8 strand wire ropes that are subject to

measures.

Viewed through the prism of the words themselves – “slight modification” - and the Commission’s own administrative precedent, 9 strand wire rope is not a slight modification of the 6 or 8 strand wire ropes that are subject to measures.

We ask the Commission to correctly recognise this to be the case, and to give the Minister a report recommending that the original notice remain unaltered.

Yours sincerely

Daniel Moulis
Partner Director