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12 March 2019

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 write further to our previous submissions and in response to the Statement of Essential Facts ("the SEF") dated 11 February 2019.

A Introduction

The Commission must assess whether our clients' nine strand wire rope constitutes a slight modification based on facts, and on a proper assessment of those facts, in a manner that properly addresses and responds to the statutory test under Regulation 48 of the *Customs (International Obligations) Regulation 2015* ("the Regulation").

With respect, we submit that this has not been achieved by the SEF:

1 The Commission has misunderstood important facts presented to it. It has thus drawn incorrect conclusions in the SEF.

2 Important evidence presented by our clients appears not to have been considered by the Commission. As such, the Commission's conclusions in the SEF are contrary to what is shown by that evidence.

3 Relevant evidence has been given "no weight" by the Commission, and has therefore not been considered at all, except to reject it. Given its relevance, that evidence must be considered.

4 Various statements made by the Commission are not consistent with our clients' position. This submission explains some of the instances where that has arisen and seeks to correct the Commission's apparently erroneous impressions.

5 The Commission has applied the statutory test – *"that the goods are slightly modified"* – on the basis of incorrect facts and assumptions. We submit that the proper application of that test to the correct facts and assumptions will lead to the opposite conclusion, a conclusion which is both correct and preferable, and which does justice to our clients.

As a result, we submit that the Commission's finding in the SEF is wrong and unsafe. It not based on the relevant information and opinions that have been placed before the Commission, and is infected with incorrect assumptions.

We submit that the correct application of the legal test laid down by the relevant Regulation to the proper facts and the correct assumptions that flow from those facts will lead to the conclusion that our clients' nine strand wire ropes are not "slightly modified", in the absence of which they would have been the subject of the relevant notice. Those facts and assumptions establish that the

differences between our clients' six and eight strand wire ropes, and their nine strand wire ropes, are not slight.

We thus request that the Commission reconsider the facts and evidence before it, in light of the relevant law, and subsequently give the Minister for Industry, Science and Technology ("the Minister") a report recommending that the relevant notice remain unaltered.[1]

B Incorrect understanding of "fill factor" and improper rejection of evidence

In the SEF the Commission concludes that the concept of the *fill factor* of a wire rope refers to *filler wires*. The Commission states:

> *The term* fill factor *appear to be referring to the filler wires in the three of six models of* Inno 9 *product.*[2] [sic]

This is incorrect. The concept of *fill factor* is unrelated to what a *filler wire* is. All wire ropes have a *fill factor*.

The Commission refers to *fill factor*, as discussed in one of our submissions, in the following extract from the SEF:

> *Haggie Scaw claimed that the circumvention goods have higher "MBL" (Minimum Breaking Load) because of its greater "fill factor" than the goods.*[3][sic] [footnote omitted]

Our discussion of *fill factor* in that submission, as referenced by the Commission, is set out below:

> *This is because Scaw's 9 strand rope has a greater fill factor than its 6 and 8 strand ropes (recall from page 12 that a rope's fill factor influences its strength).*[4] [underlining supplied]

So, if there is any confusion about what *fill factor* is, the Commission is directed to return to page 12 of our submission for clarification. Therein it is stated, clearly, on that page, that *fill factor* is:

> *…the ratio of metallic cross section of the rope in relation to the rope's diameter (i.e. it is the proportion of a rope's cross section that is occupied by metal)...*[5]

BBRG also explains *fill factor* in one of its submission, as follows:

> *The fill factor is defined as the metallic area contained within a circle of the overall rope diameter.*[6]

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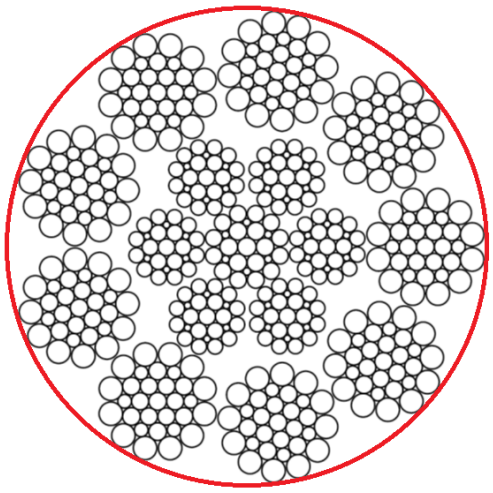
1 *Customs Act 1901* ("the Act"), Section 269ZDBG(1)(c) refers.
2 SEF, at page 28.
3 *Ibid.*
4 EPR 005, at page 18. References to "EPR" in this submission refer to the electronic public record maintained by the Commission for this inquiry.
5 *Ibid*, at page 12.
6 EPR 009, at page 3.

We also discussed *fill factor* in another of our submissions, and provided evidence that the *fill factor* of our clients' nine strand wire ropes is higher than that of corresponding six and eight strand wire ropes.[7]

Even if the above explanations of *fill factor* are unclear, a search on Google readily yields results which illustrate and explain what *fill factor* is.

The below diagram should further assist the Commission to properly understand what *fill factor* is:



The area inscribed by the red circle defines the nominal cross-sectional area of the rope. For a 64mm diameter rope, the cross-sectional area would be **[CONFIDENTIAL TEXT DELETED – number]** mm^2 (area = π x $radius^2$).

The area inscribed by the black circles (i.e. each metallic wire), added together, is the metallic cross-sectional area of the rope. In this example, let us assume the metallic cross-sectional area is **[CONFIDENTIAL TEXT DELETED – number]**mm^2.

The *fill factor* for this rope is the ratio of the metallic cross-sectional area of the rope to the nominal cross-sectional area (the red circle), which in the example we have assumed is **[CONFIDENTIAL TEXT DELETED – number]** or **[CONFIDENTIAL TEXT DELETED – number]**% (**[CONFIDENTIAL TEXT DELETED – number]**mm^2 / **[CONFIDENTIAL TEXT DELETED – number]**mm^2).

Filler wire is not *fill factor*. *Filler wires* are small diameter wires which support adjacent and larger wires in a wire rope.

The Commission refers to another of the documents we submitted, being our clients' nine strand wire rope patent specification,[8] as illustrating *filler wires*. The Commission will note that there is no textual reference to *filler wire* in that document. Additionally, that document discusses *fill factor* in a manner which makes it clear that the concept of *fill factor* cannot be understood to mean *filler wire*:

> *Compressing the outer wires increases the steel fill factor of the outer strands*[9]

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7 EPR 012, at pages 3 and 4.

8 EPR 006.

9 *Ibid*, page 2

Fill factor is a ratio. It is a number which describes the proportion of a rope's cross-sectional area that is occupied by metal. *Filler wire* is a type of wire which provides support to surrounding wires.

Fill factor is so unrelated to *filler wire* that it is difficult to understand how the Commission has confused the two, particularly given the detailed discussion concerning the topic by BBRG and our clients on the public record. The Commission's understanding of *fill factor* in the SEF is not remotely close to what it actually is. To have been presented with explanations of what *fill factor* is and to still misunderstand it at such a fundamental level is deeply concerning.

Again, fill factor is a ratio. Filler wire is a wire serving a particular support function. Without appreciating this difference, the Commission has made its finding in the SEF because, it claims, there was an:

> *…absence of evidence to show Inno 9 products that were exported to Australia between 1 January 2016 and 1 June 2018 had the fill factor.*[10]

The Commission will now appreciate that every wire rope has a fill factor. To state in the SEF that the wire ropes did not have *"the fill factor"* makes no technical or linguistic sense. It is akin to stating that *"the wire ropes did not have the density"*.

It is also deeply concerning that the Commission did not seek to clarify its misunderstanding with our clients. In the SEF, the Commission acknowledges its uncertainty about what *fill factor* is:

> *The term fill factor appear to be referring to the filler wires in the three of six models of Inno 9 product.*[11] [sic] [underlining supplied]

The word *"appear"* in the above statement indicates the Commission's uncertainty about what *fill factor* is. And yet, throughout the entire inquiry, the Commission did not ask us to clarify the meaning of *fill factor*.

Moreover, if the Commission had understood the submissions presented to it, the meaning of *fill factor* would have been clear (and even if it is not clear, the submissions would not lead one to conclude that *fill factor* is synonymous with *filler wire*).

Furthermore, the Commission presumably never conducted its own research because if it had done so, the meaning of *fill factor* would be clear.[12]

It is one thing for the Commission to be certain about a conclusion, and thus not request clarification or conduct independent research. It is quite another for the Commission to acknowledge its own uncertainty but never seek to rectify it. With this misunderstanding of *fill factor* alone, it is clear that the Commission:

- has not fully understood the material before it;

---

10 SEF, at page 28.

11 *Ibid.*

12 The second result retrieved by Google when the following keywords are searched explains what *fill factor* is: (*fill factor wire rope*). The result can be viewed here: http://www.verope.co/en/technology/all-about-the-rope/

- is inclined to rely on untested assumptions – what *appears* to be the case rather that what *is* the case; and

- has not conducted a proper inquiry directed towards discovering and considering the objective facts.

A further error in the Commission's understanding is revealed by the two last-quoted extracts from the SEF, namely the Commission's incorrect reference to *"six models of Inno 9 product"*[13] and the Commission's question of whether *"those Inno 9 model* [sic] *with filler wires were exported to Australia"*. The Commission's misunderstanding here was addressed in our confidential email to the Commission of 16 November 2018, an excerpt of which is below:

> *We expect the above clarifies why* [the Commission's] *questions about "models" are misplaced, though please let us know if you require further clarification.*

The above excerpt alone makes clear that we have sought to explain to the Commission why its investigation of the *"six models of Inno 9 product"*[14] is misplaced. It is also clear that we have invited the Commission to seek clarification from us should the Commission have any uncertainties.

The fact that the Commission, in the SEF, still considers that *"Haggie Scaw did not respond when the Commission sought to clarify whether any of those Inno 9 model with filler wires were exported to Australia"* reveals a failure to understand the material as we presented it and to make a genuine effort to clarify those misunderstandings.

After making all of the above misunderstandings, the Commission states:

> *In the absence of evidence to show Inno 9 products that were exported to Australia between 1 January 2016 and 1 June 2018 had the fill factor, the Commission concludes that the fill factor is not applicable for the purpose of the current inquiry and therefore, the Commission considers that the validity of claim* [sic] *that the circumvention goods have higher* [sic] *MBL is not demonstrated.*[15]

For the reasons we have outlined, this makes no sense. It indicates a failure of the inquiry with respect to one of its key elements.

Below is a summary of the Commission's misunderstandings and incorrect conclusions that we have pointed out in this part of our submission, as compared with the actual evidence before the Commission:

Commission's assumptions	**Facts**
Fill factor is the same as *filler wire*	*Fill factor* is a ratio of metallic cross-sectional area to rope cross sectional area. Unrelatedly, a *filler wire* is a small diameter wire which plays a support function.

13 SEF, page 28
14 *Ibid.*
15 SEF, page 28.

Inno9 exports to Australia did not have *"the fill factor"*	All wire ropes have a *fill factor*.
Since the Inno9 product lacks *"the fill factor"*, the claim that Inno9 products *"have higher MBL is not demonstrated"*.	Changes in MBL are not correlated with whether there is a *fill factor* or not because all wire ropes have a *fill factor*. The Inno9 products have a greater *fill factor* than corresponding 6 and 8 strand ropes.[16] Attachment 4 of our confidential email of 16 November 2018 includes test certificates which prove that the MBL of Inno9 products is higher.[17] And, the Commission itself acknowledges that the Inno9 is stronger.[18] As such, how can the Commission assert that Inno9's higher MBL has not been demonstrated?

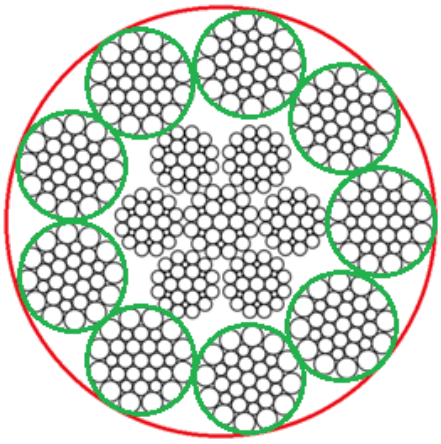
In case there is any confusion, the strength of a rope is indicated by the rope's MBL. The strength of a rope is a measure of how large a load the rope can carry. MBL refers to the minimum load a rope can carry before it breaks. In other words, the stronger a rope, the higher its MBL. Therefore, the only way the Commission can simultaneously maintain that Inno9 is stronger,[19] but not have a higher MBL,[20] is if the Commission erroneously believes that rope strength is not indicative of or correlated with MBL. If this is indeed the Commission's belief then we have yet again uncovered another basic aspect of wire rope technology that the Commission has not understood.

The Commission's confusion relating to *fill factor* and *filler wire* (and *strength* and *MBL*) does not arise from some nuanced aspect of wire rope technology. The confusion has arisen in relation to fundamental aspects of wire rope. This lack of technical competency is disturbing. If the Commission has misunderstood such macro and basic aspects of wire rope technology, it suggests that the Commission has misunderstood (or not appreciated) other crucial aspects of wire rope technology as well.

C Findings on strand metallic area and strength are confused and contradictory

In the SEF the Commission has misunderstood the concept of strand metallic area, and has made incorrect statements and conclusions about wire rope.[21]

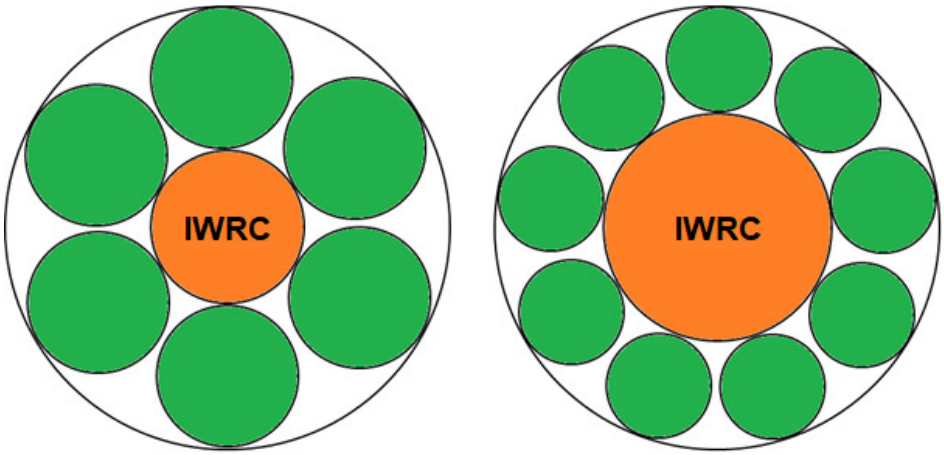
16 EPR 012, pages 3 and 4.
17 See also our confidential email of 19 November 2018 in which we provided the test certificates.
18 SEF, pages 20 and 21.
19 *Ibid.*
20 SEF, page 28.
21 SEF, page 36.



Strand metallic area ("SMA") refers to the cross-sectional area of the *outer* strands of a wire rope. With reference to the diagram above, the SMA is the total cross-sectional area of all the wires that make up the nine *outer* strands (the nine green circles). With reference to Part B of this submission, recall that we assigned the above hypothetical nine strand rope a *metallic* cross sectional area of **[CONFIDENTIAL TEXT DELETED – number]**mm^2. Well, the SMA would be an amount less than **[CONFIDENTIAL TEXT DELETED – same number]**mm^2, since SMA does not include the metallic cross sectional area of the independent wire rope core ("IWRC").

For two ropes with identical diameters and identical IWRCs, SMA can be determinative of strength. Consider two six strand 64mm diameter ropes, both with an identical IWRC. The rope with a larger SMA (e.g. a circumstance in which the individual wires in the six *outer* strands are greater in diameter and are more densely packed) will be stronger. This is physically intuitive: the cross sectional area of the rope with the larger SMA contains more metal and is thus harder to break (and is thus stronger). However, when changes to the IWRC are considered, the correlation between SMA and strength is not as straightforward.

For a given diameter, the SMA of our clients' nine strand wire rope is smaller than that of corresponding six or eight strand wire ropes. This is because more strands must fit within the same rope diameter. However, because the diameter of each outer strand of Inno9 is smaller, the diameter of the IWRC must be larger. This is illustrated in the below diagram:



The diagram above compares a six strand rope (left) with a nine strand rope (right) of the same diameter. As can be seen, to fit more *outer* strands into the same diameter rope, the diameter of the *outer* strands (green circles) must decrease. Consequently, the diameter of the IWRC (orange circle) must increase. These changes are acknowledged by BBRG:

> *As the number of strands increases, the size of the core increases, therefore, a 9 strand rope has a greater core area and less strand area.*[22]

These diameter changes to the outer strands and to the IWRC result in Inno9 having a greater *fill factor* and thus higher MBL (i.e. strength). The increased strength of Inno9 for any given diameter has been proven by third party-verified test certificates[23] and is acknowledged by the Commission in the SEF.[24] Therefore, the reduction in Inno9's SMA is not correlated with a reduction in rope strength. Any reduced carrying capacity of the nine outer strands is more than compensated by the increased carrying capacity of the larger IWRC. This is why our clients have drawn attention to Inno9's *"larger core which gives a higher... metallic cross section and results in a stronger rope..."*.[25]

The Commission incorrectly asserts that Haggie Reid argues that *"the size of the core is a determinant of strength instead of the strand's [sic] metallic area"*. [underlining supplied]

Our clients did not argue that core size determines strength "instead" of SMA. Clearly, when a rope carries a load, both the IWRC and the outer strands must work to carry the load. Therefore, both the IWRC and the SMA contribute to a rope's strength.

As per the diagram above, it is not that the *outer* strands do not contribute to a rope's strength; it is that as the number of *outer* strands increases (from six to eight to nine) the IWRC contributes more and more to a rope's strength, whereas the *outer* strands contribute less and less. This is why as the number of strands increases, a reduction in SMA does not necessarily mean that there will be a reduction in the rope's strength, and that is certainly not the case with our clients' wire rope.

The Commission's usage of the phrase *"strand's metallic area"*[26] is incorrect. SMA is a physical characteristic of wire rope, much like *fill factor*. The Commission's error in referring to a strand**'s** metallic area reveals the Commission has not fully understood what SMA is, nor what its interrelationship with core size and rope strength is. This is revealed when the Commission makes the following statement:

> *However the Commission understands that the strand metallic area has a direct impact on strength – and the contribution factor for six and eight strand ropes to be 92.5% of their measured strength.*[27]

Presumably, this 92.5% figure has been taken from a rope breaking force equation on page 35 of *Australian Standard AS3569 – 2010 Steel Wire ropes – Product Specification*. An excerpt of the equation is below, complete with our underlining:

---

22 EPR 009, page 6.
23 See our confidential email of 19 November 2018.
24 SEF, pages 20 and 21.
25 SEF, page 36
26 SEF, page 36
27 *Ibid.*

7.4.4 Breaking force based on component tests

For six-strand rope (round or triangular strand) and eight-strand rope having a breaking force in excess of 1500 kN, the following method of test is allowed as an additional alternative to the methods of testing referred to above. Each of the component strands and, if applicable, the wire rope core from a sample of the completed rope is tested and the rope breaking force is calculated from the component strand and core tests as follows:

(a) For wire rope with either six or eight round strands:

$$\text{Rope breaking force} = \text{sum of the test breaking force of each strand} \times 0.925 + \text{IWRC test breaking force} \times 0.45$$

We have already dealt with why the above equation is not applicable to Inno9. The equation itself states that it is only appropriate for six and eight strand rope having a specific geometry and breaking force.[28] We will not repeat ourselves here and direct the Commission to Part F of our confidential submission dated 8 November 2018.

The above equation was cited by BBRG. BBRG chose this equation because it specifically *discounts* the strength of the IWRC, by reason of the fact that the equation suggests only 45% of the IWRC test breaking force contributes to a rope's strength. This 45% factor may apply to specific six and eight strand ropes *but it does not apply to Inno9*. As illustrated in our diagram above, as the number of outer strands increases, the size of the core increases. A greater proportion of Inno9's strength thus lies in its larger IWRC, as compared with six and eight strand ropes which have smaller IWRCs.

Inno9 is stronger than six and eight strand wire ropes across all diameters, as proven by third-party verified test certificates.[29] This is true regardless of the fact that *"the circumvention goods have less strand metallic area than the goods"*.[30]

Indeed, the Commission has already accepted these verified test certificates and acknowledges that Inno9 is stronger[31]. As such, why does the Commission then turn to an equation that does not apply to nine strand wire ropes in order to assert that *"Haggie Scaw's statements on the alleged superior strength of the circumvention goods are questionable"*?[32] It is unclear why the Commission needs to contradict itself in the face of evidence it has already accepted. This unclear reasoning is summarised below:

Facts:

- Third party-verified test certificates prove that for a given diameter, Inno9 is stronger than six and eight strand wire rope.[33]

[28] Not only is this formula expressly inapplicable to nine strand wire rope, we are instructed that it is not accepted by any other rope makers, internationally, with respect to six and eight strand wire ropes; that this non-acceptance includes BBRG's related companies; and that it is not found in any other international wire rope standards.

[29] See our confidential email of 19 November 2018.

[30] SEF, page 36

[31] SEF, pages 20 and 21

[32] SEF, page 36

[33] See also our confidential email of 19 November 2018 in which we provided the test certificates.

- The Commission acknowledges that the circumvention goods are stronger based on the aforementioned test certificates.[34]

- The above rope breaking force equation is not applicable to Inno9.

Commission's conclusion:

- A rope breaking force equation that is not applicable to Inno9 suggests Inno9 should be weaker.

- Therefore, for theoretical reasons (which are wrong), our clients' *"claim"* that Inno9 is stronger is *"questionable"*,[35] despite third party-verified evidence to the contrary.

Here, the Commission comes to a conclusion about Inno9 that is not only contrary to the facts, it is contrary to facts which the Commission itself accepts. It is therefore evident that the Commission's reasoning in the SEF is not objective and is not based on the facts before it.

D SEF data-selectivity demonstrates lack of objectivity or coincidental error

On page 21 of the SEF, the Commission produces "Figure 2" below which allegedly illustrates *"differences in the strength of the goods to the circumvention goods by rope diameter"*.[36]

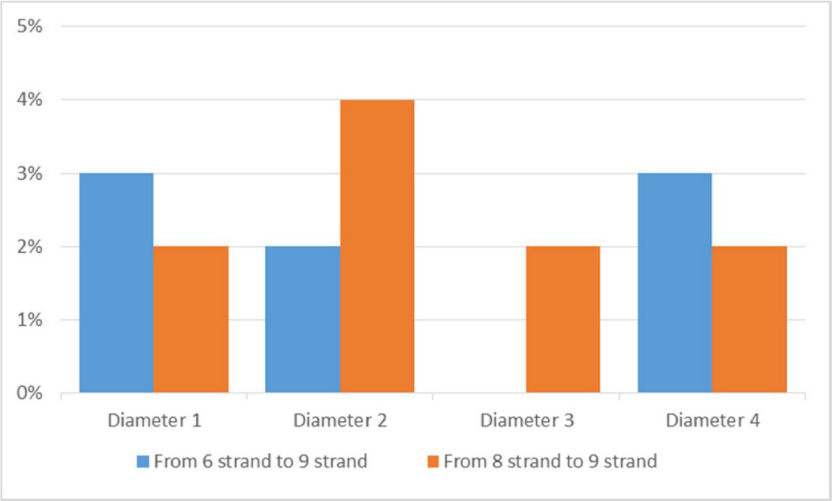


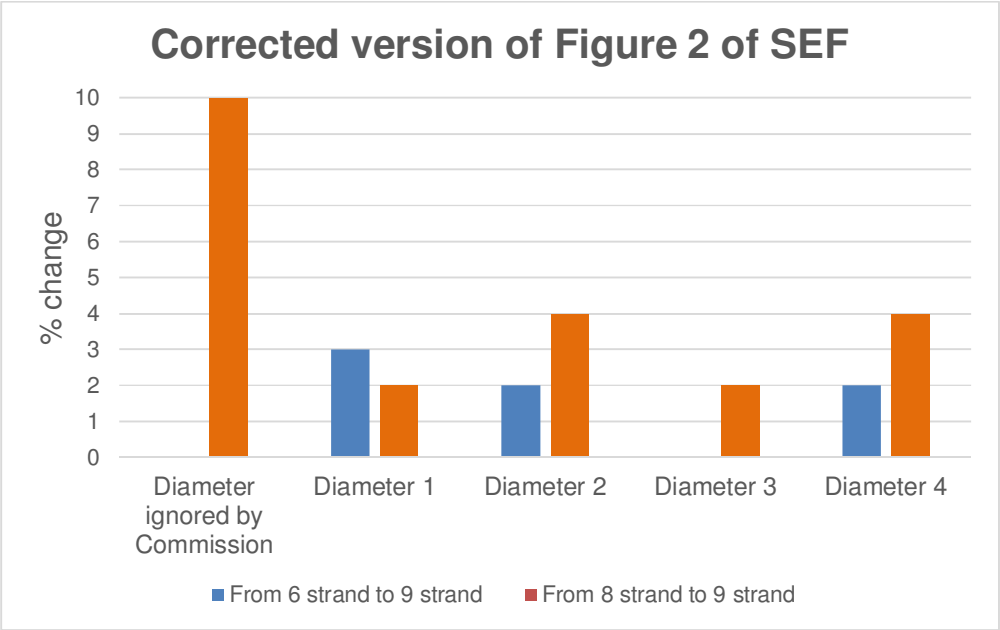
Figure 2: Change to wire rope strength from the goods to the circumvention goods by diameter

Figure 2 is inaccurate, and omits breaking force data relating to one of the rope diameters supplied to the Commission.

Figure 2 is based on breaking force values documented in confidential third party-verified test certificates that we provided to the Commission.[37] These test certificates provided breaking force data for five different rope diameters. The Commission has ignored the breaking force data for one of

34 SEF, pages 20 and 21.
35 SEF, page 36.
36 SEF, page 21.
37 See also our confidential email of 19 November 2018.

the five rope diameters, despite considering the fifth rope diameter elsewhere in the SEF.[38] We have produced a version of Figure 2 which includes the fifth rope diameter. It is below:



Is it a coincidence that the Commission has elected to ignore the rope diameter for which the percentage change in strength is greatest? Further, the Commission will also note that its own percentage change calculation for "Diameter 4" is incorrect.

In view of the above, the Commission has been selective – inadvertently or not - with the data it has considered and in how it has presented that data. The Commission has also failed to represent its self-selected data accurately (i.e. with respect to Diameter 4). The table below illustrates the Commission's selectivity when choosing what data to consider:

Figure in the SEF	**The data the Commission has elected to illustrate[39]**
Figure 1	Data relating to all **five** rope diameters are illustrated
Figure 2	Data relating to only **four** rope diameters are illustrated
Figure 3	Data relating to only **three** rope diameters are illustrated
Figure 5	Data relating to all **five** rope diameters are illustrated
Figure 7	Data relating to only **four** rope diameters are illustrated

[38] For example, Figures 1 and 5 of the SEF considers all five diameters.

[39] Given the misrepresentation of "Diameter 4" in Figure 2 of the SEF, the data in the other Figures in the SEF may also contain errors.

Figure 8	Data relating to only **three** rope diameters are illustrated

We see no justification, and none is presented in the SEF, as to why data relating to *all* rope diameters should considered in respect of certain metrics, whereas only data relating to *some* rope diameters are considered in respect of other metrics.

This data-selectivity, and the failure to represent data accurately, calls into question the objectivity of all "Figures" presented in the SEF, and all of the corresponding analysis undertaken by the Commission.

E Elevator ropes are not dragline ropes

In the SEF, the Commission has failed to distinguish between wire ropes used in traction type lifts (i.e. elevators), and wire ropes used in respect of draglines in surface mining.[40]

In the SEF, the Commission refers to an article cited by BBRG, the relevant excerpt of which is reproduced below (emphasis added):[41]

> **2.2 Single Layer Stranded Rope**
>
> These are by far the most usual type, the number of strands being six in nearly all cases. For traction type lifts, however, eight strand ropes (fig. 6) are generally used. Nine strand ropes are occasionally required for extreme flexibility, but their strength is almost 20% lower than a six strand rope of the same size, and resistance to crushing is poor. Three strand ropes are occasionally used for highway guards, borehole surveying and paravane towing rope. Four strand ropes were at one time fairly popular as crane ropes as their tendency to spin was slightly less than that of a six strand rope. In general, however, the best combination of strength and resistance to crushing and abrasion is to be found in a six strand rope which is nowadays in general use for running ropes.

The Commission asserts that Haggie Scaw responded that:

> *…the article can no longer be considered valid because it is outdated, and the circumvention goods are an improved version of the nine strand wire rope that was subject to the finding in 2005.*[42]

The Commission's assertion is false and incorrect.

We commented on the article in our submission dated 12 September 2018, as reproduced below:

> *It is clear from the [article] that the discussion of 9 strand ropes therein is in relation to "traction type lifts" (e.g. elevators). Wire rope that is used for such lifts typically has a fibre*

40 SEF, page 27.
41 EPR 001, Non-confidential Attachment 6, page 1.
42 SEF, page 29.

> *core, as opposed to a steel independent wire rope core (IWRC) used in Scaw's 9 strand wire ropes. Fibre cores used for lift applications contribute a negligible amount of strength to the actual rope used to hoist the lift. Such cores function primarily to support the rope's outer strands. This is why 9 strand wire ropes, as purposed for traction type lifts, can be said to be weaker and to have poor crush resistance.*[43]

Our clients do not consider the article to be invalid or outdated, and our clients do not assert that Inno9 *"is an improved version of the nine strand wire rope"*[44] described in the article. For the Commission to assert otherwise in the SEF is a fabrication and misrepresents our clients.

The Commission also asserts that *"Haggie Scaw did not provide any comparative details of the purportedly different two nine strand wire ropes"*.[45] The Commission's assertion reveals the Commission's unfamiliarity with wire ropes.

Firstly, wire ropes used for elevators are not the same kind of wire ropes as those used on dragline excavators in surface mining applications. Wire ropes used to hoist people up and down in an elevator obviously do not need to be as heavy duty or as strong as wire ropes used in surface mining. Therefore, elevator ropes are much thinner and weaker than surface mining ropes. To refer to these two types of ropes as being *"purportedly different"*[46] reveals that the Commission is not familiar with wire ropes and is willing to adopt assumptions against the interests of our clients in circumstances that just do not permit that to be done. One may as well consider bicycle tyres to be *"purportedly different"* from car tyres.

Secondly, despite the Commission's doubts about the differences between Inno9 and the nine strand elevator ropes referred to in the article, the Commission never sought clarification from us and never requested that we provide further information to substantiate that elevator ropes are different from surface mining ropes. The proposition that this would need to be substantiated, and that we would need to "read the mind" of the Commission to know what it required to be substantiated, was not understood by either ourselves or our client. The Commission presumably also neglected to conduct its own independent research, because a quick Google search reveals that surface mining ropes and traction type lift ropes are obviously not the same type of ropes.

To dispel any doubt, below is a table[47] detailing traction ropes (the emphasis, by way of the addition of red boxes, is ours) and clearly demonstrating that traction type lift ropes have much smaller diameters than wire ropes used in surface mining:

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43 EPR 005, page 34.

44 SEF, page 29.

45 *Ibid.*

46 *Ibid.*

47 https://www.elevatorbooks.com/Content/Site125/FilesSamples/179595ew0709pdf_00000121052.pdf

Rope diameter mm	Rope diameter inch	Europe: Traction Susp. rope	Europe: Roped hydraulic Susp. rope	Europe: Governor rope	U.S.: Suspension rope	U.S.: Governor rope	Japan: Tragseil
6		x[1]		x			
6.5		x[1]		x[2]			
8		x[2]	x	x			x
9		x					x
	3/18				(x)	x	
10		x[3]	x	x			x[7]
11	7/16	x[4]	x		x		
12		x					x[6]
	1/2				x[5]	x	x
13			x[2]	x	(x)		
14		x					x
15		x					
15.5		x					
16	5/8	x			x		x
	11/16				x		
18		x		x			
	3/4				x		
20		x					x
	13/16				x		
12	7/8				x		x

[1] Small freight elevators [2] most used in Germany [3] most used in France [4] most used in U.K. [5] most used in U.S. [6] most used in Japan [7] officially minimum in Japan

Table 1: The most commonly used rope diameters around the world

Also reproduced below is an excerpt from a BBRG resource[48] which details MBLs of elevator ropes:

Dia (mm)	MBL (kN)	Weight (kg/m)
9.5	39.71	.310
11	53.20	.420
13	74.30	.586
16	113.00	.888

The MBLs of wire ropes used in surface mining are over an order of magnitude (more than a factor of 10) greater than those used in traction type lifts. For example, our clients' 102mm Inno9 product has an MBL of almost **[CONFIDENTIAL TEXT DELETED – number]**kN, which represents about a **[CONFIDENTIAL TEXT DELETED –four digit whole number]** per cent increase over the strongest MBL above.

This part of submission has identified further shortcomings in the Commission's understanding of wire rope, and the Commission's conduct in the present inquiry. These are summarised below:

- False assertions are made in the SEF about our clients' position in relation to the article.
- Undue weight has been given to the article, considering that it was thought to be relevant to include in the SEF even though it was already shown to be irrelevant to surface mining ropes.
- The Commission did not make known that it had doubts regarding whether elevator ropes are the same kind of ropes as surface mining ropes.

48 http://bridon.co.nz/uploads/catalogues/wire-rope.pdf

- The Commission did not conduct its own research to answer whether elevator ropes are different from surface mining ropes.

- Even BBRG submitted that crane ropes, being smaller in diameter than the surface mining ropes, are not relevant to the present inquiry.[49] It is thus difficult to understand why the Commission would doubt that elevator ropes are different from surface mining ropes, particularly when crane ropes are more similar to surface mining ropes than elevator ropes.

- Because of the Commission's conduct and incorrect assumptions, the Commission still doubted that surface mining ropes are different from elevator ropes above, even at the very late stage of publishing the SEF. It would not be an understatement to say that this is analogous to spending months investigating car tyres, and then reaching the end of the investigation with doubts as to whether car tyres are the same as bicycle tyres.

The Commission's unfamiliarity with wire ropes at this late stage of the inquiry is frankly alarming.

Respectfully, we ask for a wholesale review of every fact, matter and thing that we have raised in this submission in response to the SEF. The Commission has relied on error and misapprehension to find that our client's nine strand wire ropes are only slightly modified when compared with six or eight strand wire ropes. The correction of those errors and the reversal of those misapprehensions defeat that finding.

F Incorrect accusation about non-rotation properties

We note that in one of the footnotes in the SEF the Commission states the following:

> *Haggie Scaw later resiled from its claims concerning non-rotation properties – see section 5.4.2.2 below.*[50]

In the passage of the SEF to which that footnote applies, and in that part of the SEF to which the footnote refers,[51] the Commission asserts **[CONFIDENTIAL TEXT DELETED – product performance characteristic]**. The Commission is incorrect.

Our confidential submission of 12 September 2018 discloses that because of the larger core of nine strand wire ropes, such ropes **[CONFIDENTIAL TEXT DELETED – product performance characteristic]**. Figure 20[52] is used to explain rotation-resistance to the Commission **[CONFIDENTIAL TEXT DELETED – product performance characteristic]**. This is made clear by the following statements in the confidential version of our submission (emphasis added):

> **[CONFIDENTIAL TEXT DELETED – product performance characteristic]**.[53]
>
> **[CONFIDENTIAL TEXT DELETED – product performance characteristic]**[54] [underlining supplied]

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49 EPR 009, page 2.
50 SEF, footnote 27.
51 SEF, page 16.
52 EPR 005, page 20.
53 See our clients' confidential submission dated 12 September 2018, page 21.
54 *Ibid.*

[CONFIDENTIAL TEXT DELETED – product performance characteristic].[55]

[CONFIDENTIAL TEXT DELETED – product performance characteristic] Our clients' position on this has not changed throughout the entire inquiry, and for the Commission to assert otherwise[56] is to misrepresent our clients and to further reveal that the Commission has not understood the material before it.

G Wrong understanding of coverage of patent

In the SEF, the Commission states the following:

> *The Commission acknowledges that Scaw has been granted an innovation patent by IP Australia for shovel and drag wire ropes with at least nine strands. It is noted that the patent application does not include hoist rope use.*[57]

The Commission is incorrect in concluding that the patent application does not include hoist rope use.

The very first sentence of the patent specification states the following:

> *The present invention relates to a dragline rope i.e. a hoist, drag or dump rope*[58] [underlining supplied]

Additionally, all of the claims in the patent specification (the claims define the invention) recite a *"dragline rope"*.[59] In other words, the scope of the invention encompasses dragline ropes, that is, ropes used on dragline excavators (i.e. hoist, drag and dump ropes).

Again, we find that the Commission has not objectively considered the material before it. A reasonable bystander reading this submission would by now be seriously concerned about the errors in the SEF and their unidirectional nature, as are we. In this example, the Commission erroneously asserts that *"the patent application does not include hoist rope use"*[60] when in fact this is blatantly incorrect given that the very first sentence of the patent specification states the opposite.

H No justification for rejection of Commission-commissioned report

The Commission is not familiar with surface mining, much less wire rope. And, as is made clear by the foregoing, the Commission has not fully understood the material and facts before it.

In the SEF it is disclosed to interested parties that the Commission had reached out for assistance in understanding the engineering and performance of wire ropes.[61] Therein it is revealed that the Commission sought expert opinion from the Mining Electrical and Mining Mechanical Engineering Society ("MEMMES"). In particular, the Commission requested MEMMES *"provide a report on any*

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55 *Ibid.*
56 SEF, page 15, footnote 27 and page 17.
57 SEF, page 25.
58 EPR 006, page 1.
59 *Ibid*, page 8.
60 SEF, page 27.
61 *Ibid.*

differences between six, eight and nine strand wire ropes"[62] ("the Report"). The terms of reference were not provided to interested parties, and still have not been provided to interested parties.

In the SEF, the Commission completely rejects the Report:

> *The Commission considers that the report does not contain expert opinion regarding wire rope that is relevant to the inquiry. Accordingly the Commission placed no weight on the report.*[63]

It seems extremely doubtful that the Report, commissioned by the Commission to investigate *"differences between six, eight and nine strand wire ropes"*,[64] would be irrelevant to the present inquiry so as to be given zero weight. Moreover, given the Commission's demonstrated failure to understand basic wire rope technology, it is highly incongruous for the Commission to insinuate it has the technical competence and industry knowledge to doubt the relevance of the Report which to our mind, and to that of the applicant, has been prepared by a person who has expertise in the subject matter and who demonstrates his high level of knowledge in the Report.

The Report is referred to in the SEF as a confidential attachment. It was not placed on the EPR, and still has not been placed on the EPR.[65]

On 12 February 2019, we sent an email to the Commission requesting a copy of the Report. On 15 February 2019, the Commission sent a holding response to us. On 19 February 2019, we received an email from the Commission, apparently also sent to BBRG, with a copy of the Report attached. In the email, the Commission offered these further excuses to justify its rejection of the Report:[66]

> *Further to the statement made in the SEF that this report does not contain expert opinion, the Commission notes that:*
>
> - *conclusions outlined in the report concern goods which are not the subject of this inquiry;*
> - *the report largely refers to the views of other parties, without stating which parties have contributed to which views, nor their precise experience/expertise in relation to wire ropes; and*
> - *the Commission was not made aware of the process that would be followed in gathering information for this report, the nature of any interactions with other interested parties and any conflicts of interest that those parties may have.*

We have reviewed the Report. We disagree with the Commission's views regarding the Report, and think that any right-minded person would also disagree.

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62 *Ibid.*
63 *Ibid.*
64 SEF, page 7.
65 *Ibid*, footnote 15.
66 Email from the Commission to Moulis' Legal dated 19 February 2019.

We note that the Report still has not been placed on the EPR. We have attached the Report to this submission so that it can be placed on the EPR.[67]

It is abundantly clear that:

- the Report was commissioned specifically to respond to the question whether nine strand wire rope constitutes a slight modification of lesser stranded ropes;[68]
- the Report contains independent expert opinion on wire ropes;[69]
- the Report is incontrovertibly relevant to the present inquiry;
- the Report explicitly considers slight modification factors under Regulation 48(3) of the Regulation; and
- the Report concludes that 9 strand is more than a slight modification of lesser stranded ropes.

The Report is manifestly relevant to the present slight modification inquiry. For the Commission to consider the Report irrelevant and to have placed no weight on it is profoundly disturbing. Even BBRG, in its submission of 4 March 2019, does not support the Commission's dismissal of the Report.

1 Qualifications of author of the Report

With respect to the claim that the Report does not contain expert opinion, we refer the Commission to pages 2 and 3 of the Report, where the author explains his qualifications, the process he adopted in compiling the Report, and the people that were involved in his inquiries both within MEMMES and in the industry.

We submit that on any view the author clearly IS an expert, and that he has engaged in a process of research and inquiry that in our opinion has been both legitimate and reasonable.

Moreover, we have no idea why the Commission believes that it can reject information without considering its relevance independently of any finding as to whether the author of the information is an expert having some lofty stature that only the inexpert Commission can determine. The Commission is meant to be conducting an administrative inquiry. It is not a judicial body of the Commonwealth. It is highly improper to "hide" the Report (by not disclosing the intention to obtain a report of this nature, nor its terms of reference, nor its receipt and contents) and to "reject" the views of a well-experienced and knowledgeable person in the field expert or not (by unrealistic and flimsy reasoning), all of which address the very issues that are here under consideration.

67 See Mining Electrical and Mechanical Engineering Society report prepared by Mr D Posavec, Senior Vice President of MEMMES dated October 2018 (Attachment 1).

68 Report, page 20.

69 Report, pages 1 and 2.

2 The Report does concern goods which are the subject of the inquiry

The Commission claims that conclusions outlined in the Report concern goods which are not the subject of this inquiry.[70]

We note that it was the Commission itself that commissioned the Report. It is clear from the Report that the Commission was interested in the view of an expert as to whether and to what extent nine strand wire rope is different from lesser stranded ropes. Consider the following excerpts and paraphrasing from the Report which evidence the Commission's involvement and instruction to the expert in the production of the Report:

- *"In response to the inquiry investigation 483 "Anti-Circumvention Inquiry into slight Modification of Goods" wire ropes exported to Australia from the Republic of South Africa...* [MEMMES] *...was asked to respond to some questions being posed as part of a public response."*[71]

- The questions posed by the author of the Report to mining personnel working with wire ropes *"were based on direct comparison between an 8 strand or lower compared to a 9 strand wire rope".*[72]

- *"As part of the scope of works requested, this* [R]*eport compares the circumvention good (9 strand wire rope) and the goods subject of the notice (wire rope less than 9 strands)."*[73]

Thus, it can be seen that the Commission asked MEMMES to consider goods that are the subject of the inquiry, and that the Report considers goods that are the subject of the inquiry.

It is unquestionable that the Report not only says that it compares nine strand wire rope with ropes having fewer than nine strands, it clearly does so.[74] The Report has considered a patent specification ("the Patent"), including the six figures (drawings) thereof which illustrate, respectively, six constructions of nine strand rope.[75] The Patent, we expect, was provided to MEMMES by the Commission itself.

[CONFIDENTIAL TEXT DELETED – sales information] Perhaps this is why the Commission believes the Report concerns goods that are not relevant to the present inquiry. However, is that enough of a reason for the Commission to reject the Report? Indeed, we find that the words and expressions used in the Commission's email are imprecise. The email only "notes" the three additional excuses. It says that *"conclusions"* outlined in the Report *"concern goods which are not the subject of this inquiry".* It does not say "the" conclusions, as in all of the conclusions. With respect to the goods the phrasing is such that the excuse does not exclude the proposition that the Report does reach conclusions that concern goods that are the subject of the inquiry.

Whatever the case, we submit that any belief that the Report does not concern goods that are the subject of this inquiry is incorrect, and is not supported by an objective reading of Report.

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70 Email from the Commission to Moulis Legal dated 19 February 2019.
71 Report, page 1.
72 Report, page 2.
73 Report, page 9.
74 Report, page 9.
75 EPR 006, Figures 1 to 6.

Figures 1 to 6 of the Patent illustrate six constructions of nine strand wire rope. The constructions are summarised in the following table:

Figure	No. of strands	Plastication	Wormings	Sold in Australia?
1	9	**[CONFIDENTIAL TEXT DELETED – product specifications and sales information]**		
2	9			
3	9			
4	9			
5	9			
6	9			

The nine strand ropes of Figures **[CONFIDENTIAL TEXT DELETED – numbers]** have not been sold in Australia. The ropes of Figures **[CONFIDENTIAL TEXT DELETED – numbers]** have been sold and continue to be sold in Australia. They are examples of **[CONFIDENTIAL TEXT DELETED – product models]**.

The Report does not draw conclusions about nine strand wire rope to the exclusion of the ropes shown in Figures **[CONFIDENTIAL TEXT DELETED – numbers]**. In fact, the Report does not consider each of the six rope constructions individually, and instead draws conclusions about how and why nine strand wire rope is generally different from lesser stranded ropes.[76]

Before any consideration of plastication, or of "wormings", the Report confirms that the very addition of an extra strand in and of itself (i.e. regardless of plastication or the addition of wormings) constitutes a significant difference in rope design and physical characteristics:

> *Physical characteristic differences of a 9 strand wire rope compared to 8 or lower strand wire rope is considerable. The size of the wire and the number of strands alters the characteristics of the wire rope in many ways and is a significant change. While the diameter is assumed to be the same, internal design of wires, core design, number of strands, outer wire diameter, crushing resistance and internal wear resistance as well as changes in design, are considerable*[77] [underlining supplied]
>
> *Firstly, if an additional strand is added to the design of the currently used 8 or lower strand rope, this will mean that the wire diameters internally need to be reduced to keep the same diameter of the rope. With the introduction of smaller wire diameters in the rope and strand,*

76 Report, pages 9 and 10.
77 *Ibid.*

> *the wire rope becomes more flexible which is a significant advantage*.[78] [underlining supplied]

It is evident MEMMES considers that the addition of a ninth strand significantly alters the design and physical characteristics of wire rope in and of itself. MEMMES' comments about changes to wire size, core design, outer wire diameter etc. are consistent with the information and material we have provided to the Commission.

The Report goes on to state:

> *Other advantages that are known with the 9 strand rope are that there is a lot of wire rope and strand support due to the compactness of the wires within the rope. Its ability to have a larger independent wire rope core and the addition of the plastics to support the strands and wires within the rope can cushion the forces on the crown wires and also reduce fatigue due to bending... The bending moments and fatigue fractures do reduce because the rope is more flexible.*[79]

The above excerpt from the Report is consistent with the material we have provided to the Commission, and is consistent with findings at mine sites. **[CONFIDENTIAL TEXT DELETED – performance characteristics]**.[80]

The present inquiry demands objectivity and a fact-based assessment from the Commission. An objective and unambiguous reading of the Report makes clear that it comes to conclusions about goods that are relevant to the present inquiry. The Report considers rope constructions that have been sold in Australia, and concludes that the addition of a ninth strand, in and of itself, is a *considerable* and *significant* change when compared with ropes with fewer strands.

The Report's conclusions about wormings (which the Report refers to as filler wires) are applicable to ropes that have been sold in Australia. The Report's conclusions thus concern goods that are relevant to the present inquiry.

Figure 1 of the Patent is reproduced below (with the red boxes added by ourselves at this time). Reference numerals 15 point to groups of three wires, each group positioned between two adjacent outer strands. The Report refers to these wires as *filler wires*.[81] The Report states the following:

> *The addition of filler wires (wormings) between the strands is a major factor in the increase of cross sectional area of steel in a 9 strand rope and therefore increases the breaking force of the rope [The more steel you have the greater the rope strength]*[82]

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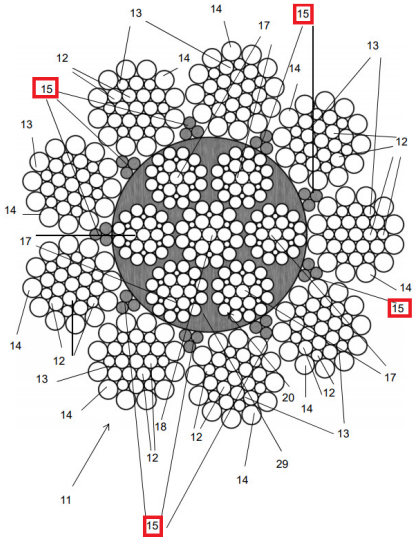
78 *Ibid.*

79 Report, page 11.

80 See email from Moulis Legal to the Commission dated 17 January 2019 and the accompanying confidential submission.

81 Report, page 10.

82 *Ibid.*



Evidently, the addition of filler wires is significant not because of their position or grouping, but because they increase the *"cross sectional area of steel in a 9 strand rope and therefore increases the breaking force of the rope"*. Indeed, the significance of any feature of wire rope is measured by its impact on rope performance. To emphasise this principle, imagine the same rope above but with its long filler wires replaced by long pieces of string. In this hypothetical rope, the addition of string is not significant even though the string is provided in exactly the same form and positions as the filler wires. The addition of string is not significant because it does not increase the *"cross sectional area of steel [so as to increase] the breaking force of the rope"*.[83]

The Report considers the filler wires to be significant not because of their grouping or positioning, but because they increase the *"cross sectional area of steel in a 9 strand rope and therefore increases the breaking force of the rope"*.[84] To underscore this point, the Report includes the comment that *"[t]he more steel you have the greater the rope strength"*.[85] The Report's conclusions about increased cross sectional area of steel and increased breaking force are relevant to nine strand ropes that have been sold in Australia. Thus, the Report's conclusions are relevant to the present inquiry. We have provided evidence to the Commission that the construction of our clients' nine strand ropes is such that it has a greater steel cross sectional area. As per the Report, this contributes to nine strand rope's increased strength. The increased strength of nine strand wire rope has been confirmed by third party-verified test certificates.[86]

3 Report's collaborative and inquisitive approach to be commended

The Commission also attempts to discredit the Report by saying that it:

> *…largely refers to the views of other parties, without stating which parties have contributed to which views, nor their precise experience/expertise in relation to wire ropes*[87]

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83 Report, page 10.

84 *Ibid.*

85 *Ibid.*

86 See also our confidential email of 19 November 2018 in which we provided the test certificates.

87 Email from the Commission to interested parties dated 19 February 2019.

In holding this view the Commission is "grasping at straws". Rather than condemning the Report, the Commission should commend the author and appreciate his efforts in providing relevant information and independent opinions.

The Commission assessed MEMMES and/or the author of the Report as being suitable parties or a suitable party to respond to the questions posed by the Commission. That is what the author has done. He has prepared the Report by using his expertise, consulting a number of persons involved in the mining industry, and applying his technical knowledge. It is conventional for subject matter experts to cite third party studies, field reports and/or company or public surveys in their opinions. Ultimately the Report is the result of the expert's own endeavours and views. It does not *"largely refer to the views of others"*. The expert has considered the views of those to whom he corresponded with in preparing the Report, and expressed his support and endorsement for them. If those views are in line with his own analysis and thinking, then his reporting of them is an entirely proper and understandable thing for him to do. Moreover the expert has provided the Commission with a list of the names, experience and companies of the people with whom he spoke in preparing his report.[88] Is it the Commission's position that the greater the number of persons expressing their views and supporting a particular conclusion – that the differences between eight strand wire rope and nine strand wire rope are *"significant"* and *"considerable"* – make that conclusion less likely to be accurate?

The last of the three excuses, or notations, offered in the Commission's email of 19 February 2019 is really no different to the second. The Commission says that:

> *…the Commission was not made aware of the process that would be followed in gathering information for this report, the nature of any interactions with other interested parties and any conflicts of interest that those parties may have.*[89]

This again appears to accuse the expert of some wrongdoing or of bias, in circumstances where the Commission has no proof of same. The Commission entrusted the expert with a task, which he then proceeded to discharge in an appropriate and unremarkable way and to the best of his ability. The Commission did not order the expert as to how he should conduct is investigations, and his part-empirical approach is to be commended.

I Consideration of the Regulation 48(3) factors

In a slight modification determination, the Commission may have regard to any factor that the Commissioner considers relevant. At the same time, a non-exclusive list of factors is included in Regulation 48(3).

1 General physical characteristics

The first-mentioned of these factors is *"each good's general physical characteristics"*.

The Commission considers that the general physical characteristics of wire rope to be considered include diameter, length, weight and appearance.[90] We suggest that the Commission's self-imposed

88 Report, page 2.
89 Email from the Commission to interested parties dated 19 February 2019.
90 SEF, page 15.

limitation of its consideration to these characteristics for the purposes of making its SEF finding lacks credibility and objectivity.

We submit that these characteristics as identified by the Commission are not the physical characteristics that customers consider when selecting between ropes, but instead are prerequisites of wire rope. The Commission's task is to identify and assess difference, and it does not succeed in that task by relegating its consideration to factors which it ultimately considers only establish sameness.

In the context of surface mining and wire ropes, physical characteristics such as diameter, length and weight are the basic prerequisites of wire rope. Rope appearance is not even considered. A mine site already has its fleet of machines and equipment worth tens if not hundreds of millions of dollars. These machines are purpose built. They work with ropes of certain weights and diameters. If a mine site has a dragline excavator that runs with 83mm diameter wire rope, the mine site does not contemplate purchasing or using a 12mm diameter wire rope. Similarly, if a mine site is looking to purchase a new hoist rope (i.e. the longest rope on a dragline excavator), the mine site does not contemplate purchasing a short rope that does not span the length required of a hoist rope. Indeed, the Commission itself acknowledged that *"wire ropes are sold and purchased as individual units by the length"* [sic].[91] In other words, when purchasing ropes mine sites specify the length of wire rope they need – length is not a physical characteristic that wire rope customers factor in when comparing and selecting between competing ropes.

The needs of wire rope customers are dictated by their machines and associated operating conditions. The need for their machines to use ropes of a certain length, diameter and weight to lift certain loads means wire rope customers implicitly do not consider using elevator wire ropes (very thin in diameter) as drag ropes, or using drag ropes (relatively short) as hoists rope (relatively long). The wire rope customer pays attention to differentiating physical characteristics like strength, flexibility and abrasion resistance. It is these physical characteristics that matter to wire rope customers, and it is based on these physical characteristics that wire rope customers choose between wire ropes.

The Commission asserts that our clients submitted that the comparison between physical characteristics *"should be at the level that BBRG uses when promoting the advantages of its own ropes over others"*.[92] The Commission is incorrect. Our clients' position is that the level of generality that is appropriate for assessing physical characteristics is from the perspective of *"users of wire rope"*.[93] BBRG's promotional material was simply submitted to evidence this point.

Working out what are the general physical characteristics of goods is not a difficult task. It is only made complex if the relevant parameters are worked out with blinkers on. Moreover, the test with respect to this alleged *"circumvention activity"* is whether or not the goods concerned have been *"slightly modified"*, and as we have stated the list of factors in the Regulation are not exclusive.

Even if the Commission intends to limit its consideration to *"general physical characteristics"*, it misinterprets the concept of generality in the relevant context. It makes no sense to speak of the specific characteristics of wire rope as opposed to its general characteristics. Diameter, length, weight, strength, flexibility and abrasion resistance – all of which go to performance – are all physical

91 SEF, page 32.
92 SEF, page 15.
93 EPR 005, page 14.

characteristics of wire rope. No one of these is more general or specific than the other. The word *"general"* in Regulation 48(3)(a) cannot exclude from the Commission's consideration differences that go to the question of whether the goods have been *"slightly modified"*. In that context the word *"general"* is here being used in the context of importance. Difference in a minor detail is less likely to establish a point of difference that is more than "slight". The Commission cannot shut its eyes to relevant differences in the products being compared, and does so at the risk of certain legal error.

The findings in the Report are apposite. The Report considers the perspectives of users of wire rope, as an indication of the degree to which the goods have been changed or modified.[94] Excerpts on general physical characteristics from the Report are reproduced below. The Commission will note that the Report, compiled by an expert in the field, focuses on physical characteristics that are relevant to the question of modification, and that matter to users:

> *Physical characteristic differences of a 9 strand wire rope compared to 8 or lower strand wire rope is considerable. The size of the wire and the number of strands alters the characteristics of the wire rope in many ways and is a significant change. While the diameter is assumed to be the same, internal design of wires, core design, number of strands, outer wire diameter, crushing resistance and internal wear resistance as well as changes in design, are considerable in both positive and negative ways as the below information will further explain.*
>
> *Firstly, if an additional strand is added to the design of the currently used 8 or lower strand rope, this will mean that the wire diameters internally need to be reduced to keep the same diameter of the rope. With the introduction of smaller wire diameters in the rope and strand, the wire rope becomes more flexible which is a significant advantage of this type of rope in majority of cases.*
>
> *Other advantages that are known with the 9 strand rope are that there is a lot of wire rope and strand support due to the compactness of the wires within the rope. Its ability to have a larger independent wire rope core and the addition of the plastics to support the strands and wires within the rope can cushion the forces on the crown wires and also reduce fatigue due to bending. The plastics retain lubrication within the rope and keep the rope uniform in shape and therefore reduce wear/abrasion in particular around sheaves and drums. The plastics also protect against strand to core contacts, support the outer strands better and increase strength and crush resistance. The bending moments and fatigue fractures do reduce because the rope is more flexible as it moves around and bends in different directions during use.*
>
> *The additional flexibility of the 9 strand rope does allow for better handling when it is being replaced but is not a major factor as the ropes are typically handled by large winder systems and cranes and therefore very little manual handling is involved.*
>
> *Claim about the longevity of the rope is unknown at this stage but, due to its greater flexibility, it is most likely to be more durable in some circumstances but many other factors as listed below need to be considered to prove this claim.*
>
> *Q1. The ropes' physical characteristics are significantly different changing from an 8 or lower strand to a 9 strand rope. The flexibility of the 9 strand rope does not improve and is in many*

94 Report, pages 1 and 2.

cases a positive for the rope. The longevity of the 9 strand rope is expected to be greater, due to the ability in the design to add additional steel internally which improves the breaking strength of the rope. The flexibility of the rope, the addition of filler wires to increase rope strength and the potential for a longer life is very important to the design of the rope. The issue here is that the wires need to be smaller in diameter which would cause them to wear quicker, flatten easier, and be more prone to corrosion and impact damage. Flexibility is important for hoist ropes but wear resistance is important for drag ropes for example. Each rope design has its own application and need to be individually considered for different applications.

Q4. The 9 strand wire rope is not a slight modification but a significant change to the design of the lesser 8 strand or lower rope. In many cases it is a positive design upgrade because of the additional flexibility, additional steel due to additional filler wires, increase in breaking strength, plastic filler design and better strand support. There may be issues as smaller diameter wires could be crushed, damaged and/or broken easier due to flattening of the wires in the strand during impact and rubbing. This is a concern which needs to be proven in the field. [underlining supplied]

The Report has been produced by an author who is himself an expert, or who at the very least is obviously well-experienced in the field, should the Commission continue to deny his expert status. The expert has consulted with other wire rope experts and/or users. Every one of these people has more knowledge and experience with respect to wire rope technology than the Commission. In comparing the physical characteristics of nine strand wire rope with lesser stranded ropes, the Report correctly adopts the perspective of both a mine engineering expert and of wire rope customers. Wire rope customers compare and select between ropes based on physical characteristics which relate to rope performance; they do not compare and select between ropes based on trivial physical characteristics such as rope length and appearance. Rope performance, better or worse, is obviously driven by changes to the physical characteristics of wire rope, and it is these changes that are at the base of any consideration of whether a modification has been slight or more than slight.

We respectfully request that the Commission adopt the correct lens for assessing general physical characteristics, and that it reconsiders the material and evidence before it through this lens. When wire rope experts have concluded that the addition of an extra strand, in and of itself, constitutes a significant change to the physical characteristics of wire rope, on what ground does the Commission assert the opposite?

On page 16 of the SEF, the Commission states the following:

A comparison of physical characteristics should not be made at a greater level of specificity than the description of the goods and the further information regarding the goods.

With respect, we submit that this is very serious wrong-thinking. In adopting such a position we believe that the Commission places itself in a position of legal peril.

We would also like to address the question of the greater strength of nine strand wire ropes, a proposition that the Commission attempts to downplay and ultimately rejects. On page 29 of the SEF, the Commission asserts:

> *Based on the evidence available, the Commission is not satisfied that Haggie Scaw's claim that the circumvention goods have a higher MBL is supported.*

The Commission is incorrect, contradicting both itself and the evidence before it.

On 19 November 2018, we provided the Commission with confidential third-party verified test certificates.[95] These certificates document the breaking force of 6, 8 and 9 strand ropes across different diameters. To dispel any doubt, the *higher* a rope's breaking force, the *higher* a rope's MBL. The certificates prove that nine strand wire rope has a *higher* breaking force (and thus MBL) than six and eight strand wire ropes *across all diameters*.

The superior MBL of nine strand wire rope is a fact.

The Commission acknowledges this fact on pages 20 and 21 of the SEF.[96]

For the Commission to doubt the higher MBL of nine strand wire rope requires the Commission to be objectively wrong and to contradict itself and the evidence before it.

Also on page 29 of the SEF, the Commission refers to a document that is referred to in the List of Attachments to the SEF as:

> *Confidential Attachment 5 - Commission's assessment of the evidence concerning the performance of the circumvention goods*[97]

Given its description, that is what the reader would expect it to contain.

On 26 February 2019 we requested Confidential Attachment 5 from the Commission, and the Commission then provided it to us on 6 March 2019.

On page 2 of Confidential Attachment 5, the Commission asserts the following:

> **[CONFIDENTIAL TEXT DELETED – arguments about performance characteristics]**

We submit these arguments are not in conflict with one another. The Commission has simply taken the arguments out of context.

Wire ropes are used in three main surface mining applications. They are used as (1) drag ropes, (2) dump ropes, and (3) hoist ropes. Nine strand wire rope has been designed and constructed so that it is stronger, more flexible and more abrasion resistant. **[CONFIDENTIAL TEXT DELETED – performance characteristics]**[98]

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95 See email from Moulis Legal to the Commission dated 19 November 2018.

96 See SEF, page 21, where the Commission acknowledges that *"Figure 2 shows an increase in the strength of the circumvention goods*".

97 SEF, page 44.

98 See, for example, EPR 021, Non Confidential version of Confidential Attachment 4 – SEF 483

As trials of nine strand wire rope were carried out, **[CONFIDENTIAL TEXT DELETED – product test results]**,[99] **[CONFIDENTIAL TEXT DELETED – product test results]**.[100] **[CONFIDENTIAL TEXT DELETED – product test results]**.[101] **[CONFIDENTIAL TEXT DELETED – product test results]**.

[CONFIDENTIAL TEXT DELETED – product test results] to an extent that demonstrates the difference between them, ie the modification, is beyond a slight modification.

[CONFIDENTIAL TEXT DELETED – opinions about product performance]:

> **[CONFIDENTIAL TEXT DELETED – opinions about product performance]**.[102]

With reference to Attachment 3 (which accompanies the present submission and which is discussed below with respect to interchangeability), the following charts are self-explanatory:

[CONFIDENTIAL CHART DELETED – evidence of product performance]

[CONFIDENTIAL CHART DELETED – evidence of product performance]

Contrary to the Commission's assertion in the final paragraph of Confidential Attachment 5, it is clear that performance differences between nine strand and lesser stranded ropes is not inconclusive. The performance differences are significant and unambiguous. These stark differences in performance are not explained by the Commission's self-selected and trivial physical characteristics of weight, diameter, appearance and length. The very fact that these physical characteristics offer no explanatory power for such drastic performance changes is itself evidence that these physical characteristics are not the relevant characteristics to be considered when comparing nine strand wire rope with lesser stranded ropes.

On page 2 of Confidential Attachment 5, the Commission returns to its mantra about the exclusiveness of the non-exclusive factors, and to its blinkered approach about the meaning and evaluation of slight modification, saying:

> *The Commission also notes that there are different performance capabilities between wire ropes of different strands that meet the definition of 'the goods' (i.e. six strand wire rope performs differently to eight strand wire rope), and that performance is not a criteria in the goods description, nor is it a factor explicitly specified in subsection 48(3).*

Again, the Commission's suggestion that performance is not a relevant consideration in the present slight modification inquiry, and cannot be, is mistaken. Regulation 48(3) lists the following factors as being factors that can be considered in a slight modification inquiry:

- general physical characteristics;
- end use;
- interchangeability;

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99 Confidential submission dated 1 October 2018, pages 4 to 6.
100 Confidential submission dated 16 January 2019.
101 Confidential submission dated 1 October 2018, page 5.
102 **[CONFIDENTIAL TEXT DELETED – source of opinion about product performance]**.

- customer preferences and expectations.

Considerations of the above four factors are intrinsically considerations of performance. Any differences between goods that fall under the above four factors is directly tied to performance. What sense would it make to compare physical characteristics that are independent of performance, or to ignore performance because of a belief that it could not be factually related to physical characteristics?

Customer preferences and expectations directly relate to performance. A customer would have no qualms paying twice as much for a rope if it lasts twice as long than other ropes. The same cannot be said for a customer who is paying twice as much for half the performance. Customers seek value, and their preferences and expectations about a product relate directly to the performance of the product.

Performance is integral to a slight modification inquiry. When asked to consider if there are any differences between nine strand and lesser stranded ropes, the MEMMES Report immediately turns to questions of performance. Even BBRG has not denied the relevance of rope performance throughout the present inquiry, and has instead made multiple submissions regarding rope performance.

Also on page 2 of Confidential Attachment 5, the Commission notes that *"performance is not a criteria in the goods description*". It is unclear what the Commission intends to suggest. The Commission will note that *weight* is also "*not a criteria in the goods description*", and yet in the SEF the Commission has considered weight to be the sole indicator of whether nine strand rope is *"mechanically interchangeable"*.[103]

Returning to the evaluation of *"general physical characteristics"* we respectfully and forcefully submit that the nature and degree of the performance differences should cause the Commission, acting objectively, to consider that the differences between nine strand wire ropes on the one hand and six and eight strand wire ropes on the other are more than slight, and that this has been confirmed by third parties consulted by the Commission, by our clients in their own evidence, and by industry experts.

2 Each good's end use

The second of the specifically mentioned Regulation 48(3) factors is *"each good's end use"*. In this aspect the Commission states that:

> *Haggie Reid's sales data indicates that the circumvention goods directly replaced the goods for identical end uses and Haggie Scaw did not refute the applicant's claims that each good's end uses are identical to each other.*[104]

It is interesting here to observe the Commission's take on the burden of proof in this inquiry, an aspect which infects the SEF extensively. It appears to us that the applicant merely needs to assert that something is the case, and then it is a matter for our clients to refute it. We remind that the Commission is meant to be a fact finder itself, is required to look at the information presented and to

103 SEF, pages 19 and 20.
104 SEF, page 18.

evaluate the merits in an administrative sense and not in a court-like evidentiary sense, and is meant to arrive at decisions that correctly meet the applicable legal tests and standards.

Here, the test to be applied is whether the goods have been slightly modified, under Regulation 48(2)(b). *"Slightly modified"* goods are likely always to have the same end use at the level of generality that the Commission seems to think is appropriate. To give meaning to this factor in the Regulation requires the Commission to return to the test, which is whether the goods are *"slightly modified"*. The factors in Regulation 48(3) allow the Commission to consider the extent of the modification. Obviously the goods do the same thing in a broad sense. One could leave things there and conclude that this factor was not very helpful in assisting the Commission to come to a conclusion about the degree to which the goods were modified.

Alternatively, one could ask whether there are different kinds of end uses to which the goods are suited because of their different physical and performance characteristics. Accepting *"that each good's end uses are identical to each other"*, when we have provided evidence of **[CONFIDENTIAL TEXT DELETED –product performance]**. Or, if we are wrong on this, and the Commission's level of generality is an acceptable way of going about assessing slight modification, then the Commission's finding only establishes that the Regulation 48(3)(b) factor is not useful in answering the question of whether the goods are slightly modified, and not that the question is to be answered in the affirmative.

3 Interchangeability

This is the third of the factors expressly set out in Regulation 48(3).

[CONFIDENTIAL TEXT DELETED – product performance]:[105]

- **[CONFIDENTIAL TEXT DELETED – product performance]**[106]

[CONFIDENTIAL TEXT DELETED – product performance]:

- **[CONFIDENTIAL TEXT DELETED – evidence of product performance]**.[107]
- **[CONFIDENTIAL TEXT DELETED – evidence of product performance]**.[108]

The information in Confidential Attachment 3 has been generated using Haggie Reid's proprietary rope tracking software called "Ropes Optimiser". Ropes Optimiser is used by Haggie Reid to track the performance of its ropes. The key columns to take note of are "BCM" and "Days On".

[CONFIDENTIAL TEXT DELETED –product performance]:

- **[CONFIDENTIAL TEXT DELETED – evidence of product performance]**
- **[CONFIDENTIAL TEXT DELETED – evidence of product performance]**.

[CONFIDENTIAL TEXT DELETED – product performance].

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105 SEF, page 37
106 Confidential submission accompanying our email of 17 January 2019:
107 Attachment 2 **[CONFIDENTIAL ATTACHMENT]**.
108 Attachment 3 **[CONFIDENTIAL ATTACHMENT]**.

[CONFIDENTIAL TEXT DELETED –product performance]:

- **[CONFIDENTIAL TEXT DELETED –product performance]**;
- **[CONFIDENTIAL TEXT DELETED –product performance]**.

[CONFIDENTIAL TEXT DELETED –product performance].

In the Commission's discussion of interchangeability, the Commission states that:

> *The Commission considers that a modification to the goods at a rate greater than 'slight' would affect essential characteristics of the rope and consequently, the fitness of the modified goods to the designated machines.*[109]

Here, the Commission appears to be using interchangeability, in the sense of whether a rope actually fits on to a machine, as a direct and singular test of slight modification. In so doing we submit that the Commission again strays from the test provided for under Regulation 48.

[CONFIDENTIAL TEXT DELETED – product performance]. The Commission seems not to have considered this evidence. The Commission is requested to consider this evidence and explain why it does not prove that the characteristics of the six and eight strand wire ropes, whether essential or otherwise, have been modified more than "slightly".

[CONFIDENTIAL TEXT DELETED – product performance]. The extreme difficulty and costs associated with having mine sites try a new and untested product is confirmed by the Report, as reproduced below:

> *The major concern for end users of the 9 strand rope design is that it needs to be proven in the field... Finding a window of opportunity for plant and equipment that runs at 98% availability to trial the rope,* [sic] *is a major issue*[110]
>
> 7. *Switching ropes will not be a trivial matter for the end user. This decision would have to involve all personnel as well as all aspects of the business including the following:*
>
> - *Performance and feasibility has to be validated.*
> - *Change management process takes time – many people would need to sign off on the change including the Mine Manager.*
> - *Trialling and comparing ropes to confirm suitability in different mines would take time. This is because mines, even within the same company have different applications and requirements as no mines are the same.*
> - *Additional labour input and additional hours will be required for closer monitoring during the trials thus reducing production times.*
> - *Possible additional downtime if the 9 strand rope fails earlier than expected.*

109 SEF, page 19.
110 the Report, page 12

- *Accounts department needs to be involved due to budgeting (additional initial costs against these codes).*
- *Supplier detail would need to be changed on the company computer system.*
- *Production personnel would need to be informed of the change.*
- *Mine Managers approval with a possible Board approval will be required.*
- *Mechanical Engineers approval and review of positives and negatives.*
- *Maintenance personnel would have to be informed and trained as they need to know what to look for during visual inspections such as different characteristics of the rope and strand.*
- *Costs involved in training of personnel.*
- *Lubrication standard would have to be changed dependent on the inner rope design.*
- *Possible different lubricant to be used as recommended by the manufacturer of the rope which means possible different supplier of oils and lubricants. These lubricants need to have the capability of penetrating into the core and strands.*
- *Tool Box Talks need to be conducted and information to personnel need to be conveyed advising them that different ropes are being used.*
- *Possible different equipment to be utilised to change the rope due to the additional weight of the rope.*
- *Rope end attachments may have to be changed to suit the additional strand in the rope. Is it going to take longer to install? This typically would not be a factor but it could be dependent on the design.*
- *Additional costs to suppliers if the manufacturers are from overseas e.g. flights, accommodation for technical/engineering/design staff if issues occur.*
- *Additional involvement by mine site personnel if issues arise.*
- *Possible need to re-design the ropes to ensure they are fit for purpose.*
- *Possible reporting to senior staff explaining why the rope failed or why the end result was not achieved. However, if it is achieved, the end result will be favourable and extremely cost effective for the mine if there is a 30% increase in life of the rope.*
- *Additional support costs (e.g. visits to mine sites) by suppliers of ropes will be needed initially.*
- *Additional contractor training/inductions will be required for suppliers by the mines.*

- *Resistance by mine operators of known previous issues of other imported goods as the mining industry may be reluctant to change unless guarantees are set in place due to the high risks in loss of production.*

- *Availability of rope product in an emergency is a major concern for the industry.*

- *The additional weight of the wire rope could have an effect on the plants' ability to lift or carry a load. This means less over burden removal, less carrying capacity by the plant which could have an effect on production of raw materials in some cases.*

- *Additional weight of the 9 strand rope in some cases could mean additional wear on plant components (e.g. support rollers and bearings). Additionally structure would have to be reassessed for the additional weight as this could lead to additional structure/weld failure and who would pay for this longer term.*

- *What would be the legality if a failure occurred and a Design Risk Assessment had not been done prior to rope replacement? Would the Original Equipment Manufacturer (OEM), the wire rope manufacturer or the mine site be liable? Typically the mine site is responsible as the PCBU, so the decision is crucial. These are some of the questions that would need to be considered during the Risk assessment as part of the change.*

- *Whether the OEM of the equipment would approve the use of a different rope on their equipment as they have already obtained compliance approval for their existing design. The original design would have a design Risk Assessment so therefore it would have included the type of rope, the weight of the rope, the type of attachments. Their original FEA would have taken into account load stresses on ropes as well as structure and end connections.*

- *Decision for the cost of the change would most likely be back to the supplier of the new rope design. This would include redesign of the equipment to suit the new rope design, initial supply and fitment of any parts that had to be changed, new design risk assessment, obtaining all new approvals, guarantees of stock supply including emergency supply, all onsite trials and all documentation changes such as maintenance and parts manuals.*

8. *Acceptance by mine site personnel, particularly for a change in the industry, is difficult and slow. All those that were contacted and those who assisted in the compilation of this report, preferred others to trial the 9 strand rope first, due to such high risks to the business in the event that the rope is unsuccessful.*[111] [underlining supplied]

Users of wire rope would readily recognise whether one rope was a slight modification of another. If nine strand wire rope was indeed a slight modification of lesser stranded ropes, wire rope users would have no problem switching to it because they would expect it to perform virtually identically to lesser stranded ropes. Instead, the Report found that all those contacted *"preferred others to trial the 9 strand rope first, due to such high risks to the business in the event that the rope is unsuccessful."*[112] Clearly, wire rope users recognise that nine strand wire rope is a new and untested

111 Report, pages 14-16.
112 Report, page 16.

product, the performance of which they hope and expect will meet the performance claimed, but which they cannot be sure of without taking on the risk of trialling the rope themselves.

Again, it is undeniable that the design and construction of nine strand wire rope is unlike that of lesser stranded ropes. **[CONFIDENTIAL TEXT DELETED – product performance]**. It is evidence that goes to the proposition that the nine strand wire ropes have been more than slightly modified. If they had been only slightly modified, one would expect their performance to have been only slightly different. **[CONFIDENTIAL TEXT DELETED – product performance]**. The blanket statement that our clients' nine strand wire ropes are interchangeable with lesser stranded ropes is therefore incorrect.

[CONFIDENTIAL TEXT DELETED – sales information]:

> **[CONFIDENTIAL TEXT DELETED – sales information]**.[113]

This confirms exactly what we have been saying on our clients' behalf.

4 Production process

In the SEF, the Commission has oversimplified changes to the production process required for our clients to manufacture nine strand wire rope.

Our clients advise that the Report is an independent and accurate account of the significant changes involved in manufacturing nine strand wire rope as compared to the pre-existing machinery for six and eight strand wire rope. Significant retooling and re-engineering of the production machinery and processes was required to produce nine strand wire rope. The Report refers to these changes in the following extracts:[114]

- *Going from a 8 or lower strand rope to a 9 strand rope is a major design modification and changes the characteristics of the rope which would require additional engineering work.*

  …

- *Tooling for set up needs to be reconfigured to suit the 9 strand wire rope in lieu of the current 6 or 8 strand ropes as it is more time consuming.*

- *Additional maintenance costs of wire rope machines are inevitable. This is as a result of increased wear components on the machines e.g. rollers and wire dies as longer wires are required for the production of the rope.*

- *While the manufacturing processes are similar, the complexities of production are altogether quite different. Specific tooling and equipment would be required. Different production run times would change as the set-up is different and machines are not utilised fully during the changing process of the extra bobbins.*

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113 **[CONFIDENTIAL TEXT DELETED – source of sales information and identification of customers]**.

114 Report, pages 13 and 14.

- *Additional manufacturing time would result in added cost because the price of wire production increases as there are a larger number of smaller wires being manufactured for the rope.*

- *Additional pre forming as well as the closing of the rope is required for a 9 strand rope in comparison to an 8 or lower strand rope.*

  …

- *Additional steel and grease is required if there is an increase in the number of strands in a rope, as more steel can be fitted in the cross section of the rope...* [underlining supplied]

It is unclear how the Commission can dismiss the above conclusions of the Report as irrelevant to the present inquiry.

Also in the SEF, the Commission asserts that:

> *…evidence to confirm that the pre-former head is registered on Scaw's asset register was not provided when requested.*[115]

In the SEF's rush to discredit our clients' case, logic has gone missing.

We are not sure what the Commission's assertion is meant to establish. We provided photographic evidence of Scaw's custom pre-former head.[116] We also provided the Commission with invoices relating to the pre-former head.[117] Is the Commission suggesting that none of this evidence is sufficient to prove that Scaw owns a custom-made pre-former head?

The Commission also states that although Scaw provided invoices, Scaw did not provide "*proof of payment*"[118] of those invoices. Is the Commission doubting that Scaw pays for its expenses? Is an invoice of an expense insufficient proof that Scaw incurs expenses? And in any event it is not the payment for the custom made pre-former head that is the issue. The issue is whether the goods are only "slightly modified". If it is necessary to use different manufacturing equipment, then that would confirm that the goods are modified to a degree. The question then comes back to the magnitude of that degree which, as we continue to maintain, is not only slight, for all of the reasons having to do with the physical characteristics of the goods and everything that flows from those differences.

5 Cost to produce

The fifth Regulation 48(3) factor is *"differences in the cost to produce each good"*. The Commission's finding in the SEF is that *"there is no significant difference in the cost to produce the goods and the circumvention goods"*.[119]

In that part of the SEF in which the Commission deals with this factor, the Commission first refers to the opinion of the applicant, instead of our clients' own evidence, as follows:

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115 SEF, page 26.

116 See confidential attachment accompanying email from Moulis Legal to the Commission dated 13 September 2018 (see page 29).

117 See email from Moulis Legal to the Commission dated 16 November 2018.

118 SEF, page 26.

119 SEF, page 14.

> *The applicant argues that the circumvention goods cost slightly more to produce (by less than 5%) than the eight strand wire rope, and that the applicant considers this to be minor.*[73].

[73] *EPR 483, document 14 at page 2.*

The applicant *"argues"* this to be the case, and considers this to be minor with, so far as we can tell, absolutely no backing in terms of evidence provided to the Commission. In fairness to BBRG, how could it provide such evidence, when it does not itself manufacture nine strand wire ropes? In contrast, the Commission refers to our clients' evidence, and its statements about what is to be drawn from that evidence, as merely being "claims":

> *Scaw claimed that it cost significantly more to produce the circumvention goods than it does to produce the goods. Scaw provided information that showed increased costs to produce nine strand wire rope in Q4/2017.* [footnote omitted]

With respect, we find the SEF to be confused and misguided on this topic. The SEF:

- states that there is *"no significant difference"* when comparing the cost to produce the alleged circumvention goods and the goods subject to the notice;
- states that the applicant itself believes *"the circumvention goods cost slightly more to produce (by less than 5%)"*;
- claims that CTMS data provided by our clients indicates it is cheaper to produce the alleged circumvention goods and the goods subject to the notice *"when comparing the information in the fourth quarter of 2017 and second quarter of 2018"*;
- includes a chart which shows the alleged circumvention goods were not cheaper to produce when comparing information for the goods subject to the notice in the third quarter of 2017 and information for the alleged circumvention goods in the fourth quarter of 2017;
- does not include on that chart any information about the cost of the goods subject to the notice in the fourth quarter of 2017 nor any cost information about any goods at all in the second quarter of 2018;
- acknowledges that our clients *"provided information that showed increased costs to produce nine strand wire rope in Q4/2017"*; and
- undermines its finding that there is *"no significant difference"* by saying:

> *…directly comparative evidence between the goods and the circumvention goods during the same period is not available as Scaw ceased producing the goods in Q3/2017.*[120]

Thus, despite a positive finding of *"no significant difference"*, the SEF also tells the reader that it was felt by the Commission that there was no directly comparative evidence to actually make that finding.

[120] SEF, page 25. The statement that *"Scaw ceased producing the goods in Q3/2017"* is only correct in the context of *"the goods"* referring to goods *exported to Australia*. Scaw continued to *produce* six and eight strand goods, and it is the *production* costs of the goods that this factor intends to consider. We would think that whether they are exported or not is irrelevant to that consideration.

Worse still, the SEF makes an absolute finding that the alleged circumvention goods were *cheaper* when comparing different quarters, but then says it cannot make a finding that they were *more expensive* when comparing other quarters.

Lastly, before we turn to the facts, we note the following passage from the SEF:

> *The Commission's analysis of CTMS data showed that the cost of materials decreased for the circumvention goods being exported to Australia compared to the circumvention goods produced for domestic consumption. The incremental rise of material costs over the relevant periods largely reflects the changing price of wire rod.* [footnotes omitted]

What a comparison between the cost of the circumvention goods produced for export to Australia compared to the cost of the circumvention goods produced for domestic consumption has to do with the required comparison between the cost of the goods subject to the notice and the alleged circumvention goods escapes us.

Our rebuttal of the Commission's opinion in this regard starts with this simple proposition - is it not reasonable to accept that the obvious and uncontested differences in the production of the goods the subject of the notice and the alleged circumvention goods would result in a higher cost of production of the latter? Indeed, these are set out in the SEF:

> *These differences require the manufacturing of nine strand wire rope to:*
>
> - *use more and thinner wire to produce the core which must be relatively larger (this requires more raw material, bobbins and time);*
> - *use different tooling (closers and pre-former heads);*
> - *have more occasions to change tooling resulting in more down-time in production;*
> - *have significantly greater production costs due to the use of more steel, more grease, reduced throughput, longer winding and closer loading times, more scrap and other processes.* [footnotes omitted]

Turning now to the facts, we request the Commission to professionally and objectively reconsider what it requested from our client, and what was provided in response thereto. In particular, please refer to our emails dated 21 and 24 November 2018, which include a large amount of cost data and explanations of same.[121]

[CONFIDENTIAL TEXT DELETED – production information]. We do wish to point out that there was comparative data available for the cost to make and sell ("CTM") of domestic sales of the six and eight strand wire ropes (the goods subject to the notice, if exported to Australia) and the nine strand wire ropes (the alleged circumvention goods, if exported to Australia) in that quarter.

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[121] The SEF refers to the Commission's analysis of *"Scaw's cost to produce six, eight and nine strand wire ropes domestically"*, pursuant to which it was *"found that the cost to make and sell data provided did not support Haggie Scaw's argument that the circumvention goods are more expensive to make than the goods"*. In that regard we note, for the record, that there was a double-counting of raw material costs in each quarter in the spreadsheet attached to the 21 November email. In the absence of any verification or inquiry of cost data by the Commission we assume this was picked up in the Commission's analysis.

Our analysis of the data in our 21 November email demonstrates that the per metre cost to make (or "CTM") of nine strand wire rope was higher than the per metre CTM of six and eight strand wire rope in that quarter, whether destined to same end-market or different end-markets:

Goods compared	Higher CTM of 9 strand (%)
[CONFIDENTIAL TEXT DELETED – goods description]	**[CONFIDENTIAL TEXT DELETED – two digit whole number]**%
[CONFIDENTIAL TEXT DELETED – goods description]	**[CONFIDENTIAL TEXT DELETED – two digit whole number]**%

Scaw CTM of wire ropes per metre in Q3/2017

We further draw the Commission's attention to the cost per metre and cost per tonne information presented in the tables and charts in the spreadsheet attached to our email dated 24 November 2018, on a diameter basis. In the same spreadsheet an explanation was provided with respect to data for one of the diameters (**[CONFIDENTIAL TEXT DELETED – number]**mm) which showed a lower CTM for nine strand wire rope. This was counter-intuitive in light of the other information also presented. That clarification was in two parts, as follows:

Note on cost/ton and cost/m calc

[CONFIDENTIAL TEXT DELETED – number]***mm 8 strand and 9 strand***

Relating to [CONFIDENTIAL TEXT DELETED – period]

8 strand includes **[CONFIDENTIAL TEXT DELETED – number]** *plasticated ropes.*
9 Strand has **[CONFIDENTIAL TEXT DELETED – number]** *plasticated ropes*
The effect on cost per ton of 8 strand by eliminating the plasticated ropes would be:

	Cost/ton	*Cost/meter*
6 strand		
8 strand	**[CONFIDENTIAL TEXT DELETED – numbers]**	
9 strand		

Note on cost/ton and cost/m calc

[CONFIDENTIAL TEXT DELETED – number]***mm 8 strand and 9 strand***

Relating to [CONFIDENTIAL TEXT DELETED – period]

*1. The bulk of the 8 strand rope was made and sold at a much higher raw rod price (approx R***[CONFIDENTIAL TEXT DELETED – number]***/ton more expensive than the third quarter).*
2. **[CONFIDENTIAL TEXT DELETED – number]** *tons of 8 strand rope was plasticated. This accounts for a further differential of about R***[CONFIDENTIAL TEXT DELETED – number]***/ton.*
3. In addition, fixed costs applicable to the **[CONFIDENTIAL TEXT DELETED – period]** *was based on a total volume for the plant of* **[CONFIDENTIAL TEXT DELETED – number]** *tons, whilst the* **[CONFIDENTIAL TEXT DELETED – period]** *was based on* **[CONFIDENTIAL TEXT DELETED – number]** *tons.* **[CONFIDENTIAL TEXT DELETED – period]** *was based on* **[CONFIDENTIAL TEXT DELETED – number]** *tons. This under recovery of costs in*

[CONFIDENTIAL TEXT DELETED – period] *is the additional reason for the 8 strand cost/ton to be higher than the 9 strand cost/ton for the whole year.*

Factually, and intuitively, there are cost differences between six and eight strand wire ropes and those of nine strand wire ropes, with nine strand wire rope costs being higher. That difference is large and significant, whether considered on a cohort basis or on a model-by-model basis. We submit that this is naturally going to be the case in light of everything that the Commission has been told about the engineering and technological differences inherent in nine strand wire ropes, and the physical differences occasioned thereby, and that the Commission should cease its resistance to that proposition.

6 Costs of modification

The Commission's finding in the SEF with respect to this factor is that *"the cost of modification is not significant"*.[122]

We find this section of the SEF to be particularly distressing in its dismissal of our client's information.

- It refers to our client as already having required equipment on hand, without also reporting that our clients informed the Commission that the previous nine strand wire rope was an elevator rope, that the machinery was in disuse, and that the bobbin head needed larger bobbins for the purposes of making a much-larger nine strand wire rope for mining purposes.

- It criticises our client for not providing historical proof of payment for various costs, even though invoices were provided.[123] Even if they were not paid, what impact would that have on the consideration of whether the goods were slightly modified or not?

- It finds that Scaw's costs of manufacturing a pre-former head, and of research and development, were not substantial in comparison to the total value of export of the circumvention goods to Australia. Seriously, a comparison with the total value of exports is a relevant measure of substantiality? Further, the Commission appears to reject part of our client's evidence about research and development costs, saying that it only considered "verifiable" research and development costs.

The factors in the Regulations go towards a consideration of whether the goods were slightly modified or not. The use of the Regulation 48(3) factors in "mechanical" and "pointless" ways does not advance the consideration of the key question at all, being whether the goods were only slightly modified or more than slightly modified. This is typified by the following extract:

> *The Commission understands that an immediate expensing occurs when the benefit of the individual amount of costs applicable to the future cannot be measured with any high degree of precision and any future benefits would be received is considered as doubtful.*

Where this takes the exploration of "slight modification" is not at all clear to us.

The uncontroverted facts are that Scaw incurred research and development costs in developing the Inno9 product; that additional machinery and retooling was required; that the additional machinery

122 SEF, page 25.
123 See I.4, above.

required money to be spent, whether that cost was incurred in the past or the present, internally or externally, and whether capitalised or expensed; and that Scaw has incurred and continues to incur the added costs of applying for patent protection.

7 Customer preferences and expectations

Regulation 48(3)(g) refers to *"customer preferences and expectations"* as being a possible indicator of the degree of modification inherent in the expression *"slightly modified"*.

We have provided the Commission with numerous candid customer responses and surveys regarding their impressions of nine strand wire rope. It is unclear on what ground the Commission asserts that *"the evidence concerning customer preferences and expectations relating to the goods and the circumvention goods was inconclusive"*.[124]

Throughout the present inquiry, the Commission has not indicated that there might be any issue with the information about customer preferences and expectations we have provided. If there are issues with this information, the Commission is requested to make those issues known to us so we can rectify them. As per our confidential email to the Commission on 23 November 2018:

> *A basic premise of fairness in any administrative inquiry, and especially one of this nature, is that if evidence or information is not accepted, the person who submitted that information should be promptly told why it is not accepted and have an opportunity to provide further explanation within a reasonable period.*

The SEF's Confidential Attachment 4, for example, provided to us after we requested it, is clear evidence of *"customer preferences and expectations"*. The confidential product performance information provided both in this submission and before now is also evidence of *"customer preferences and expectations"* based on their usages and experiences of nine strand wire ropes.

We disagree that the Commission can deny that there is a factual basis for the *"customer preferences and expectations"* in light of all of the product performance data we have provided. If any of it was doubted, the Commission has had the option to interrogate that information.

Here, and in numerous other places, the SEF indicates that the Commission has ignored and misconstrued large slabs of evidence we have presented throughout the inquiry. The Commission has not informed us why our evidence has been ignored, or given our clients a chance to provide further or alternate evidence that would be deemed acceptable.

8 Marketing

On page 21 of the SEF, the Commission asserts that:

> *Haggie Scaw did not establish a logical link between interchangeability and the need for extensive marketing.*

It is not clear why the Commission believes there must be a logical link between interchangeability and extensive marketing. Regulation 48(3) of the Regulations treats interchangeability and marketing

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124 SEF, page 27.

as two separate slight modification factors. There is no requirement that interchangeability be linked with marketing.

The Commission then states the following:

> *Promotional material provided to the Commission by Haggie Scaw indicated that the marketing activity concerned the product being new, not because it was nine strand per se*[125]

The Commission reiterates this point, stating that Haggie Reid's marketing efforts were aimed at introducing nine strand wire rope to customers because of "*the untested nature of the circumvention goods"*.[126]

These statements by the Commission are paradoxical. The fact that a product is *"new"* at least suggests that it is more than slightly modified from whatever preceded it. The fact that a product requires testing points to the conclusion that it is not considered to be a slight modification.

It is precisely because nine strand wire rope is a brand new and untested product that it was and needs to be marketed heavily, particularly given all the obstacles that wire rope customers must overcome before they can begin to trial, let alone adopt a new rope product. If nine strand wire rope was merely a slightly modified product which could effortlessly replace lesser stranded ropes, customers would be able to readily switch to nine strand with little trouble and no marketing would be necessary. This has evidently not been the case.

The Report's comments about market resistance are accurate:

> *…it is a new product and change or going from a known proven product to a new design is a major risk to the business and many people need to be involved before adaptation can occur. Cost of additional monitoring during the trial period could be a significant loss to the business as the number of inspection times would have to increase and therefore would affect production and maintenance time.*[127]

> *The issue will be which mine will want to take the risk to trial the new product as major analysis will be required to be completed. This would be a project on its own with staff involvement from many aspects of the business including contractors.*[128]

If nine strand wire rope was a mere slight modification, mine sites could easily adopt it as a replacement for lesser stranded ropes without engaging in trials, increased inspection times, increased staff involvement, and major rope analysis. The fact that these costly and time-consuming activities are required indicate that our clients' nine strand wire rope is not a mere slight modification.

The Commission must bear in mind that never before in the history of surface mining has nine strand wire rope been used on dragline excavators. The move to nine strand wire rope is unprecedented. To assert that nine strand is a slight modification requires the Commission to deny and/or misunderstand the facts and expert opinions before it.

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125 SEF, page 22.
126 SEF, page 29.
127 Report, page 18.
128 *Ibid.*

9 Channels/patterns of trade/distribution/export volumes

It is with respect to these factors that the Commission's findings most lose touch with the question at hand. The wording of the SEF replaces the legislative test of whether goods have been slightly modified with a test of whether a more nebulous *"circumvention activity"* has occurred. We have no doubt that underpinning Regulation 48 and its legislative cousins is a concern that the effectiveness of anti-dumping measures is not undone. They do that by each describing a set of circumstances. It is these defined "circumvention activities" that define those circumstances. The bounds of the circumvention activity referred to in the heading to Regulation 48(2) as the *"Slight modification of goods exported to Australia"* is exactly that – that the goods are "slightly modified" before export.[129] It is not that a "circumvention activity" of some unexplained nature and ambiguous notoriety has taken place.

Thus, the Commission trespasses into legal error when it makes findings such as these:

> *In particular the Commissioner found that patterns of trade, changes in export volumes and marketing by Scaw South Africa (Proprietary) Limited (Scaw) and Haggie Reid Pty Ltd (Haggie Reid) of interchangeable circumvention goods were, taken together, indicative of circumvention activity:*
>
> - *The exporter exported the goods (and none of the circumvention goods) up to and including the third quarter of 2017, the quarter in which measures took effect through a preliminary affirmative decision. See sections 5.4.11 and 5.4.13 below for the evidence supporting this finding;*
> - *The exporter exported the circumvention goods (and none of the goods) from the fourth quarter of 2017 onwards. See sections 5.4.11 and 5.4.13 below for the evidence supporting this finding; and*
> - *The importer marketed and sold the circumvention goods to the same customers and for use on the same mining machinery as it had for the goods. See sections 5.4.9 and 5.4.4 below for the evidence supporting this finding.*[130]
>
> *The Commission considers that these changes in export volumes of the goods and of the circumvention goods, and the fact that such changes closely coincide with the imposition of measures, are highly indicative of circumvention activity.* [131]
>
> *Patterns in trade are consistent with circumvention activity.*[132]

There is no escaping the observation that Scaw started exporting nine strand wire ropes to Australia at and about the time that anti-dumping measures were imposed on its six and eight strand wire ropes. However that does not create some presumption that the goods were "slightly modified" nor that the exporter should be penalised resultantly.

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129 We remind that nothing in this submission or in any other submissions made on our clients' behalf detracts from our client's position that no nine strand wire rope exported to Australia was previously a six or eight strand wire rope which was modified such that it then answered the description of a nine strand wire rope.

130 SEF page 2.

131 SEF, page 35.

132 SEF, page 37.

Our client created an innovation – in the form of its Inno9 product – in order to continue to provide some form of supply of wire ropes to its Australian customers. It did so with the motive of profit. To do so it:

- designed and engineered a new product;
- with different composition and material quantities;
- manufactured on retooled machinery;
- at a higher cost;
- **[CONFIDENTIAL TEXT DELETED – product performance]**;
- **[CONFIDENTIAL TEXT DELETED – product applications]**; and
- sold at a far higher price.

As it is, the ultimate patterns of trade and of distribution of the alleged circumvention goods are indeed different to before. **[CONFIDENTIAL TEXT DELETED – export and sales information]**.

The question in this inquiry is whether the goods were slightly modified or more than slightly modified. We unswervingly submit that the nine strand wire rope is more than slightly modified, and that the evidence proves that to be the case.

10 Changes in pricing

The Commission's finding that changes in the pricing of the so-called circumvention goods was not significant contradicts the data set provided to the Commission.

In order to consider *"changes in the pricing of each good"*, so as to inform the analysis as to whether the alleged modification is "slight" or not, it is necessary to compare products on a "like with like" basis. Thus, wire ropes having the same diameter and length sold to the same customer for use on like machines would be the correct and appropriate comparison. We expect this is unarguable however if the Commission has a different opinion we would be glad to have it explained to us.

Our client Haggie Reid dutifully presented its *"Part C – Sales"* spreadsheet as part of its Importer Questionnaire response in this matter. This was verified by the Commission. Attached to this submission is that verified *"Part C - Sales"* spreadsheet, with a number of other worksheets included with it.[133] The other worksheets classify and dissect that information into data that is suitable for the purposes of the exercise under Regulation 48(3)(k). This has been done by recreating Figures 5, 7 and 8 using that information, in a manner which we presume mirrors the intention of the Commission, going by the text of the SEF.

In doing this there are the following understandable exclusions:

- "compact" and/or "plasticated" ropes (also noted in the SEF as having been excluded);

[133] Attachment 4 **[CONFIDENTIAL ATTACHMENT]**.

- ropes without a comparison product; and
- sets of ropes, of which there were nine, processed as trial prices (trial rope prices are exactly that, are not ongoing and in no case are the new price.[134]

Our client Haggie Reid's reconstruction of the price charts in the SEF leads to the following outcomes:

Figure 5

[CONFIDENTIAL CHART DELETED – product pricing]

The price increase based on sales of like models to individual customers range from **[CONFIDENTIAL TEXT DELETED – number]**% to **[CONFIDENTIAL TEXT DELETED – number]**%. The simple average price increase is **[CONFIDENTIAL TEXT DELETED – number]**%, noting that the majority of the nine strand sales (**[CONFIDENTIAL TEXT DELETED – number]**%) are of Model 3, which demonstrates a **[CONFIDENTIAL TEXT DELETED – number]**% increase.

On this basis, the Commission's finding that changes in the pricing of the circumvention goods was not significant is unfounded.

Figure 6

Figure 6 in the SEF is a quarter-by-quarter comparison of the weighted average of all prices of six and eight strand wire rope on the one hand and of nine strand wire rope on the other hand. Figure 6 is not useful for the present exercise for two reasons. It ignores product mix and customer identity, thereby offending the "like with like" criteria that clearly must underpin such a comparison. **[CONFIDENTIAL TEXT DELETED – sales information]**.

On that basis it is not considered to be useful and is not replicated here.

Figure 7

[CONFIDENTIAL CHART DELETED – product pricing]

Figure 7 above, as correctly calculated and reformatted by our client, shows price increases between **[CONFIDENTIAL TEXT DELETED – number]**% and **[CONFIDENTIAL TEXT DELETED – number]**%. The overall increase is **[CONFIDENTIAL TEXT DELETED – number]**%, which mirrors the **[CONFIDENTIAL TEXT DELETED – number]**% in Figure 5 presented above.[135]

On this basis as well, the Commission's finding that changes in the pricing of the circumvention goods was not significant is unfounded.

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134 It is important to note that even if there were no exclusions the overall percentage price change is a significant increase of **[CONFIDENTIAL TEXT DELETED – number]**%.

135 Figure 7 in the SEF shows negative percentages. Our client considers this must be an error. **[CONFIDENTIAL TEXT DELETED – product pricing]**.

Figure 8

[CONFIDENTIAL CHART DELETED – product pricing]

Figure 8 shows increases between **[CONFIDENTIAL TEXT DELETED – number]**%, for a type that uses less rope compared to the other two types, and **[CONFIDENTIAL TEXT DELETED – number]**%. Again, the overall increase is **[CONFIDENTIAL TEXT DELETED – number]**% which further supports Figures 5 and 7.

On this basis as well, the Commission's finding that changes in the pricing of the circumvention goods was not significant is unfounded.

We ask the Commission to review and revise its understanding of the relevant price increases, to arrive at a true appreciation of the extent of the modification that underpins those price increases.

11 Tariff classification and statistical codes

The last of the non-exclusive factors referred to in Regulation 48(3) is the tariff classifications *and statistical codes* for the goods.

Within tariff item *"7312.10.00 – Stranded wire, ropes and cables"* steel wire ropes (other than brass coated or stainless steel) are broken down into four main categories for statistical code purposes.

We have highlighted each of those four different categories below:

7312	STRANDED WIRE, ROPES, CABLES, PLAITED BANDS, SLINGS AND THE LIKE, OF IRON OR STEEL, NOT ELECTRICALLY INSULATED:	
7312.10.00	- Stranded wire, ropes and cables	5%
75 kg	*Brass coated steel cordage for reinforcing rubber tyres*	
	Other	
76 kg	*.Of stainless steel*	
	.Other	
	..Stress-relived steel wire strand (for example prestressed concrete strand or low-relaxation strand), of alloy or non-alloy steel	
80 kg	*...Of a diameter not exceeding 18 mm, containing not more than seven strands*	
81 kg	*...Other*	
	..Ropes and cables, containing not more than eight strands, of alloy or non-alloy steel	
90 kg	*...Of a diameter not exceeding 50 mm*	
91 kg	*...Of a diameter exceeding 50 mm but not exceeding 100 mm*	
92 kg	*...Of a diameter exceeding 100 mm*	
93 kg	*.. Ropes and cables containing more than eight strands, of alloy or non-alloy steel*	
94 kg	*..Other*	

In this regard, the Commission makes this finding:

> *There is no difference in the tariff classification for the goods and the circumvention goods. The Regulation provides that the Commissioner may have regard to the tariff classification and statistical code for each good when comparing the circumvention goods and the goods (subsection 48(3)(m)).*
>
> *The Commission found that imports of circumvention goods are classified under the same tariff subheading with a different statistical code due to the slight modification; the slight modification being the additional strand in the circumvention goods.*[136]

The different *statistical codes* can be indicative of a difference in the goods. This is what Regulation 48(3)(m) states. The Commission fails to include the words *"statistical codes"* in the heading to this part of the SEF.

The Commission explanation that the different statistical codes is based on the fact that one of the goods is a slightly modified version of the other is to put the cart well before the horse. Even our clients could have "agreed to disagree" with the Commission if it had acknowledged in the SEF that the goods have different statistical codes, but this was not thought to be determinative of the question before the Commission. The conclusion that the different statistical code is *"due to the slight modification"* is illogical and, to put it mildly, lacks objectivity. The Commission has not inquired as to *why* nine strand wire rope has this different statistical code, and what that signifies.

In Regulation 48(3)(m) the legislature directs the Commission's attention to a difference in the statistical codes as being a potential factor for consideration. It does this for a reason, because if there is a different statistical code it will have relevance to the question at hand. That relevance is the fact that persons who are learned in the industry perceive there to be a difference of such an extent that a different tariff classification or statistical code is needed to record and monitor the goods.

We submit that the glib treatment of this factor in the SEF indicates a closed mind to the significance of the fact that the alleged circumvention goods do have a different statistical code to the goods that are the subject of the notice.

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J Conclusion

> *[T]he question of whether goods have been slightly modified requires a factual assessment...The Commission must assess whether the circumvention goods are slightly modified on the facts before it.*[137]

Of the above statement, we are in agreement. But there is a difference between *knowing* what must be done, and *doing* what must be done. The Commission knows it must assess the facts before it, but in our opinion the Commission has failed to do so.

136 SEF, page 35.
137 SEF, page 37.

"Slight" means *"small in amount or degree"*,[138] *"small in degree; inconsiderable"*.[139] For an article to be slightly modified from another the modification must only be small or inconsiderable. If the modification is more than small or inconsiderable, it is not slight.

Nine strand wire rope is significantly different from lesser stranded wire rope. This is confirmed by:

- wire rope theory;
- the evidence we have provided on behalf of our clients to the Commission; and
- an independent third party expert body.

We respectfully submit that for the Commission to assert otherwise is to maintain a factually incorrect position in the face of overwhelming evidence, wire rope authority and reason.

We respectfully request that the Commission:

- consider the material and facts before it, and reappraise its findings, both as to the acceptance of information we have supported and endorsed in this submission and with respect to the conclusions to be drawn therefrom, from an objective standpoint;
- on the basis of that reappraisal, accept that it cannot maintain the position it has adopted in the SEF and reverse the conclusions stated therein;
- failing such reappraisal and reversal of the conclusions in the SEF, explain why evidence supporting our clients' position has not been accepted, and provide us with opportunities to further support that evidence or to submit evidence that the Commission would consider acceptable.

We trust that the Commission, acting objectively and earnestly in the present matter, will recognise that nine strand wire rope constitutes more than only a slight modification of the lesser stranded ropes subject to the relevant notice, and will report to the Minister accordingly.

Yours sincerely

Daniel Moulis
Partner Director

Encs.

138 https://dictionary.cambridge.org/dictionary/english/slight
139 https://en.oxforddictionaries.com/definition/slight