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08 April 2019

Ms Carina Oh
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By email

Dear Carina

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

A Introduction

We refer to Anti-Dumping Notice No. 2019/40 in this inquiry.

The notice refers to certain attachments to the Statement of Essential Facts ("SEF") that were published on 18 and 19 March 2019, and allows interested parties to provide further submissions by today.

Those attachments are the following:

- Attachment 1 - Report from Mining Electrical and Mining Mechanical Engineering Society ("the MEMMES Report");
- Attachment 1a - Information on how the MEMMES report was completed ("Attachment 1a")

We note, for the record, that the MEMMES Report was signed by its author in October 2018, and therefore presumably provided to the Commission in that month as well. The Anti-Dumping Commission ("the Commission") did not at that time place a copy of the Report on the public record.

The existence of the MEMMES Report was disclosed in the SEF published on 11 February 2019. We asked for a copy of the MEMMES Report on the next day, 12 February 2019. We were then provided with a copy of the Report on 19 February 2019. The Commission did not at that time place a copy of the Report on the public record.

We then submitted the MEMMES report to the Commission on 12 March 2019, for it to be placed on the public record, as an attachment to the confidential version of our submission of the same date.[1] The Commission did not at that time place a copy of the Report on the public record.

We again submitted it to the Commission for that purpose under cover of email dated 15 March 2019, sent before the opening of business on that day. In so far as there had been any confusion in the Commission's mind as to whether it was or was not our wish that it be placed on the public record at the time of our 12 March 2019 letter, our 15 March email will have dispelled that confusion. The Commission did not at that time place a copy of the Report on the public record.

The Commission placed the MEMMES Report on the public record on 18 March 2019 as an Attachment to its own SEF. It placed the accompanying "Attachment 1a", a document which had not previously been provided to us, on the public record on the next day, 19 March 2019.

In light of the Commission's statement in the SEF that it has *"placed no weight"* on the MEMMES Report, and because the MEMMES Report has not been placed on the public record as a submission made by our clients, we wish to make clear that our client considers that it has submitted that report in this inquiry to the Commission as an interested party, and that accordingly Section 269TEA(3)(a)(iv) of the *Customs Act 1901* applies to that Report.

In our submission dated 12 March 2019, we said:

> *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;*
> - *the Report contains independent expert opinion on wire ropes;*
> - *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.* [footnotes omitted]

B Denial of natural justice

The Commission has done what it can, within the constraints of the statutory framework within which it operates, to repair the lack of procedural fairness that has been suffered by our client in this matter. For example, in addition to the announced extension for the Commission to finalise its report to the Minister,

[1] In that letter we stated *"We have attached the Report to this submission so that it can be placed on the EPR."* See letter from Moulis Legal to the Commission dated 12 March 2019, at page 19.

which gave the extension of time for the submission of these comments on the MEMMES Report and Attachment 1a, an extension of time to comment on the SEF including the MEMMES Report was notified by way of an earlier File Note placed on the public record on 5 March 2019.[2]

That said, the effect of the Commission's procedural shortcomings in this matter cannot be understated and cannot fully be repaired. Indeed the fact that the Commission had sought out the Mining Electrical and Mining Mechanical Engineering Society, a reputable organisation operating in the relevant field, to respond to terms of reference as requested by the Commission was unknown to interested parties. Even if it would have been prudent to keep the identity of the expert confidential at that time, interested parties should have been given an opportunity to comment on the questions that were asked of the expert, but were not afforded that opportunity. The Report itself is dated October 2018, which was four months before the date of publication of the SEF. Regardless of the Commission's advice in the SEF that it *"placed no weight"* on the MEMMES Report, the Report undoubtedly contains relevant information, which was not confidential, which had been under consideration within the Commission for months, but which had not been disclosed to interested parties. The opinions of interested parties as to whether the MEMMES Report should be given weight were not sought, and the Commission evidently resolved not to allow interested parties that opportunity in its decision not to publish the Report when it published the SEF.

These failures are deeply concerning. They have not come about because of secretarial error. Considered decisions have been made by the Commission not to disclose information relevant to the inquiry to interested parties, thereby denying them a full opportunity for the advancement or defence of their interests. Whether or not to give weight to relevant information obtained by the Commission for the purpose of its inquiry is something that attracts the due process rights of interested parties, which are rights that entitle them to consider and comment upon that information. The Commission cannot expunge that right nor sidestep its obligations by saying that the information is not being used or is to be given no weight, as it has done.

In this inquiry the Commission must determine whether our clients' 9 strand wire rope constitutes a slight modification of the 6 and 8 strand wire ropes to which the anti-dumping measures apply. It must do so objectively, based on the information that it obtains as part of its inquiry and that is given to it for the purposes of its inquiry. Moreover, as an administrative decision-making body, with statutory obligations to maintain a public record:

> *containing… a copy of all submissions from interested parties, the statement of essential facts compiled in respect of that investigation, review or inquiry, and a copy of all relevant correspondence between the Commissioner and other persons…*[3]

the Commission has an obligation to obtain, receive and disclose relevant and credible information, and to consider what interested parties have to say about it, in a timely way.

We believe our due process concerns are significant and well made out, and will not further belabour the point.

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[2] The extension of time with respect to comments on the MEMMES Report only applied to our clients and the applicant, but not any other interested parties, because the MEMMES Report was not placed on the public record until 18 or 19 March 2019.

[3] *Customs Act 1901*, Section 269ZJ(1)(a).

C No law or logic can deprive the MEMMES Report of weight

We have already addressed the justifications offered by the Commission for its decision to *"place[ ] no weight"* on the MEMMES Report.[4] We recommend the points we have already made to the Commission, and will not repeat them again here.

1 The Report is relevant and credible and its author is an expert

The Report's relevance is evidenced by its relationship to the Commission's key determination in this inquiry.[5] With respect, it is absurd to suggest that a report on the difference between 6 and 8 strand wire ropes and 9 strand wire ropes could be considered irrelevant to this inquiry. Attempting to dismiss the MEMMES Report as one that does not *"contain expert opinion"*,[6] apart from being wrong, misses the wider point.

The proposition that an administrative body is not bound by the rules of evidence is not a proposition that is intended to constrain that body's consideration of the information it obtains in the course of its inquiries. Were this not the case then the applicant in this inquiry must fail in its application, because we see no evidence in the application or in any of the applicant's submissions having the pristine level of veracity and reliability that the Commission appears to require, as evidenced by its rejection of the independent[7] and well-presented MEMMES Report. The Commission is not a court of law and in *"plac[ing] no weight"* on the MEMMES Report it falls into error.

Even then, we do not know how the Report's legal credibility could be denied by a court of law. It was independently commissioned.[8] It is authored by an expert in the area of *"wire rope products in open cut [mines] and underground operations"* who has *"personally been in the mining industry for over 40 years"*. Mr Posavec's expertise in the subject matter of wire ropes is the product of *"well over 28 years of experience dealing directly with wire ropes"*.[9] The Report is based on his own expertise and knowledge, and of those he consulted. A court would therefore be likely to conclude that the report he wrote on wire ropes can be relied upon, whether as an expert report or as relevant information to be given due weight in the administrative inquiry concerned.[10]

Further, the Commission's attempted dismissal of the Report because of the (wrongful) view that:

> *…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*[11]

reveals a double-standard. With regard to Confidential Attachment 4 to the SEF, the Commission erroneously believed the views therein were those of a mine company, only to learn after the publication

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4 Letter from Moulis Legal to the Commission dated 12 March 2019, pages 19-23.

5 *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313, 351.

6 SEF, at page 7.

7 So as to be clear, and because we do not know the precise ambit of the Commission's "process" concerns, no one at Haggie Reid (or Scaw Metals) had anything to do with the MEMMES Report's formulation or conclusions.

8 It is not clear to us that the Commission sought the advice of a particular individual on the basis of his or her expertise. The author of the Report, Dominic Povasec, states that it was the Society that was asked to respond to the Commission's inquiries, and that he was the key person drafting the report. If the Commission did not ask for an expert report then how can the Commission use the excuse that the report did not have that stature in order to reject it? It may well be that the Commission simply undertook inquiries, as it does every other day of the week, in order to inform itself of the matters placed before it.

9 MEMMES Report, at pages 1 and 2.

10 *R v Bonython* (1984) 38 SASR 45 at 46.

11 Email from Commission dated 19 February 2019.

of the SEF that they were the opinions of one person.[12] Despite this, the Commission went about collecting information in respect of this attachment, and did it in a way which did not make it clear *"which parties…contributed to which views"*, and yet still considered it as being relevant in the SEF.

This inconsistent approach in determining the relevance of certain pieces of evidence has directly disadvantaged our clients. It denies them the opportunity to rely upon and to reliably respond to the information before the Commission and is not in line with the kind of evidence-based and transparent process to which the Commission must aspire.

2 The Report cannot be excluded from consideration

A statutory decision maker is required to decide the question placed before it on the basis of material available to it at the time the decision is made[13] and must give realistic and genuine consideration[14] to the relevant issues raised in submissions.

The Report clearly and directly deals with relevant issues. The Commission is therefore required to take it into account as relevant information before it. This is particularly so in the present circumstance because it is readily available material required to be provided to the Commission in response to questions framed by the Commission itself. The MEMMES Report is centrally relevant to the decision to be made.[15]

Instead, the Commission has *"placed no weight"* on the MEMMES Report, and claims that it did not consider the Report when formulating the SEF. Australian courts have made clear on numerous occasions that ignoring relevant material is an error,[16] yet the Commission has done exactly that. The Commission is not an expert in wire ropes. That much is clear from the error corrections and clarifications we have had to provide to the Commission throughout the inquiry. This is not meant in a critical way. However it does expose a need on the Commission's part to seek expert opinion, to assist it to decide the matters placed before it. The Commission responded to that need appropriately, by making inquiries of a body in a field where it is not an expert. In response a report was prepared by someone who is an expert in the field, or at least much more experienced than the Commission, and who was independent of both parties.

With respect, rejecting the MEMMES Report ignores all indications of what is objectively "relevant" to this inquiry. We submit that there is no good reason for the Commission to ignore the evidence in the Report.[17]

D Failure to properly interpret and apply the law

Why would the Commission *"place[ ] no weight"* on a report that is so clearly relevant to the matters under consideration?

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12 Email from Commission to Moulis Legal dated 8 March 2019.

13 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 45 (Mason J).

14 *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 91 ALR 586, 597.

15 *Craig v South Australia*; (1995) 184 CLR 163 at 179; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549, 563 (Wilcox J).

16 *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [37].

17 *Nichols v Singleton Council (No 2)* [2011] NSWSC 1517.

To give weight to the MEMMES Report would require the Commission to consider these independent, knowledgeable and informed opinions, as are set out in that Report:

- *physical characteristics 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*
- *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*
- *[w]ith 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*
- *the more steel you have the greater the rope strength*
- *due to its greater flexibility, it is most likely to be more durable in some circumstances*
- *[g]oing from a 8 or lower strand rope to a 9 strand rope is a major design modification*
- *[w]hile the manufacturing processes are similar, the complexities of production are altogether different*
- *[t]he ropes' physical characteristics are significantly different changing from a 8 or lower strand to a 9 strand rope*
- *there is a significant difference in the manufacturing process changing from an 8 or lower strand to a 9 strand rope*
- *[t]he 9 strand wire rope is not a slight modification but a significant change to the design of the lesser 8 strand or lower rope*
- *[s]witching 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*
- *[a]ll 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*

The Commission might truly believe that the MEMMES Report is inadmissible as evidence. If that is the case then the Commission has fallen into error, as we have explained, and it should cure this failure in its foregoing actions in this inquiry.

There is an alternative explanation.

Like any administrative decision-maker, the Commission is required to be objective in its decision-making. It must not pre-judge the outcomes of its investigations and inquiries. It must not demonstrate bias. Bias will be found when a fair-minded lay-observer might reasonably apprehend that a decision

maker has not brought a reasonable mind to the decision.[18] The Commission must apply the law as stated in the legislative provision/s concerned. It must not bring to its consideration of the matter irrelevant considerations, or pursue an improper purpose.

On 18 December 2017 anti-dumping measures were imposed against wire ropes expressly described as being *"not greater than 8 strands"* exported from South Africa. This presented our clients with a challenge. Scaw Metals has made a substantial investment of time and money in the Australian market over many years. It has a customer network that it has served and nurtured over that time, through Haggie Reid, and that it wished to maintain. Its choices were to attempt to sell higher-priced 6 and 8 strand wire ropes, caused by a requirement to pay dumping duties at high rates[19] or to attempt to introduce and market a new product. That new product, it also realised, would need to be more than a slight modification of the products subject to dumping measures, failing which a circumvention activity of that description might be found to have occurred. Scaw Metals innovated by developing a 9 strand wire rope, which had never previously been used in the same applications, which was significantly different in its composition and technical performance than the pre-existing 6 and 8 strand wire ropes, that cost a lot more to make, and that therefore would need to be priced – and was priced - more expensively as well.

The circumvention activity under inquiry is whether the subject goods are a *"slight modification"* of goods that are subject to anti-dumping measures. It is not whether goods that are not subject to anti-dumping measures are being marketed and sold to customers that previously purchased the goods that are subject to anti-dumping measures. There would be no reason for a test of *"slight modification"* if the legislature's intention was to protect the Australian industry against any comparable product, or any product that could be used for the same purposes, that an exporter might introduce in its efforts to innovate and remain competitive in the Australian market. The law was designed to capture modifications that do not make much of a difference to the product (i.e. are only *"slight"*) such that the modified product might be easily and seamlessly substituted for the product found to have been dumped.

It is an objective test, involving a question of degree, being the degree that is inherent in the use of the word *"slight"*. However the degree, and therefore the extent of the Commission's discretion, is limited by the word itself:

> *"Slight" means "small in amount or degree", "small in degree; inconsiderable". 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.*[20]

There are of course cogent, legal reasons for this. According to the WTO Anti-Dumping Agreement:

> *No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.* [footnote omitted][21]

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18 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 (Kirby J).

19 The combination method applied also required Scaw Metals to export above a single ascertained export price which caused highly irregular distortions across its range of products.

20 Letter from Moulis Legal to the Commission dated 12 March 2019 at page 51.

21 WTO Anti-Dumping Agreement, Article 18.1.

A more than slightly modified product with markedly different costs and prices and characteristics that differentiate it from existing products ought to be subject to a separate investigation to establish whether it is dumped and causing or threatening injury thereby. Whether one takes the positon that Australia's anti-circumvention laws are WTO-compliant or not, no one could disagree with the proposition that they are non-compliant if the product under consideration is not within the scope of the products found to have been dumped and causing injury. The *"slight modification"* circumvention activity must be considered in that context.

Which brings us to the Commissioner's personal stance on the question of so-called "circumvention".

On 26 March 2015 the Commissioner was asked by the Chair of the House of Representatives Standing Committee on Agriculture and Industry about new developments in the area of anti-dumping that *"put[ ] [the Commissioner] in a better position to do [his] job than before"*. The Commissioner said the following:

> *Rather recently, in the last tranche of reforms from 2013, we have the anti-circumvention framework and the general power to conduct investigations into any circumvention - in an environment where, internationally, this is absolutely new ground. Many international jurisdictions are looking at us and saying, 'This is really interesting.' In fact, I am engaging with them in a dialogue in New Delhi, in a few weeks, on that with my counterparts and making a presentation on our experiences in this area. The first point to make is: we now have the anti-circumvention framework. We have had that now in place since June 2013. We have dealt with our first major matter. I described it as historic, and I think it is an historic one. The evidence of the decision supports that. We now have a much more prescribed approach to a key part of the circumvention behaviour, around the practice of slight modification of goods, through the regulation that becomes law on 1 April. This is a very powerful tool that we now have at our disposal. The parliamentary secretary can self-initiate, as I said, in any circumvention if certain activities are brought to her attention or an applicant can make an application. I expect that will get a lot of interest in this area. It means that Australia is well provisioned within the legislative framework to ensure that what I call this insidious practice of circumventing existing duties, that creates injurious effects on Australian industry, is stopped dead in its tracks. My base position on this is: we are well served now. Congratulations to government and the parliament for taking that through. It gives me the power to do these investigations, both in terms of nature and scope, in a very fulsome and effective way.*[22] [underlining supplied]

These are not the words of a statutory office holder obliged to apply the law in an objective manner, without bias or pre-judgement. The Commissioner looks upon the slight modification provisions as a *"powerful tool"* that he has *"at [his] disposal"*. The Commissioner refers to the *"circumventing [of] existing duties"* – which is not a phrase used anywhere in the legislation – as being an *"insidious practice"*. These are highly emotional statements.

The same sentiments are evident in the following testimony of the Commissioner:

> *I will make one additional comment there. In my view there is absolutely no room for people to be avoiding these duties once they have been established. It is outrageous behaviour. From a*

[22] Official Committee Hansard, House of Representatives Standing Committee on Agriculture and Industry, *Circumvention of antidumping laws*, Thursday 26 March 2015, pages 8 and 9. See https://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/f81ddd9e-bf9b-4aae-a94f-d93838508734/toc_pdf/Standing%20Committee%20on%20Agriculture%20and%20Industry_2015_03_26_3354_Official.pdf;fileType=application%2Fpdf

> *commissioner perspective, as an independent statutory officer, my view is that the government has given me this regulation and I intend to apply it properly. I have shown through the way we approached the first anti-circumvention activity that we absolutely mean business in this area*.[23] [underlining supplied]

Of equal concern and alarm is the way in which the Commissioner lists the factors that he says may establish a "slight modification" of goods:

> *The types of factors that may indicate a slight modification of goods to circumvent the payment of dumping or countervailing duties include: the general physical characteristics of the goods, commercial characteristics of the goods, function and/or purpose of the original goods and the slightly modified goods, production likeness, intention of the exporter-importer to circumvent, recent evidence of imports of the modified goods to Australia, cost of slight modification, and patterns of trade.*[24] [underlining supplied]

Regulation 48(3) of the *Customs (International Obligations) Regulation 2015* is a non-exclusive list of matters that may be taken into account in determining whether a circumvention good is slightly modified. We see nothing in that list which could possibly render the Commission's perception of what was "intended" by an exporter relevant to the question. And if the Commissioner considers other factors, which he may do, they must go to the proposition of whether the goods are only slightly modified or not, as is the test stated in the *chapeau* to Regulation 48(3), and not to considerations of intent and value judgements about a practice colloquially called "circumvention". Yet here we have the Commissioner pronouncing openly, in a public forum, that he has a power to act against the *"outrageous"* and *"insidious"* practice of exporters who intentionally *"circumvent"* anti-dumping duties.

A circumvention activity arises if goods are slightly modified from those subject to anti-dumping measures. This is the way in which the legislature has chosen to define and confine the ability of the Commissioner to extend the scope of an existing anti-dumping measure. "Intention" plays no part in this. A personal view about *"circumvention"* – that it is *"outrageous"* and *"insidious"* – should not play any part in this either.

The Commissioner was also asked about the inclusion of modified goods in the Regulations as a circumvention activity, and vouched the following with respect to that question:

> *I am quite confident that the nature and scope of the regulation as it is being prescribed is adequate to do the task at hand. I have no doubt that we will be involved in looking at that very closely very quickly, based on advice I have got from industry. I am looking forward to being able to apply that in real time and test it, but right now I would think it has been very well crafted by the department. The policy objective is clear. I think nature and scope of the regulation, as I say, is adequate*.[25] [underlining supplied]

The Commissioner's interpretation of the policy objective – that he can root out intentional circumvention of anti-dumping measures - is not what the law provides. The test is whether goods have been "slightly modified".[26]

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23 *Ibid*, pages 7 and 8.

24 *Ibid*, page 1.

25 *Ibid*, page 7.

26 Consistent with these strident views, the Commissioner has backdated the imposition of anti-dumping measures in all cases in which he has found there to be a slight modification of goods – indeed, in all cases in which

We submit that the Commissioner has expressed views that lack objectivity. We submit that those views are inconsistent with his statutory responsibilities. To come straight out with it, we submit that a reasonable person, considering the Commissioner's public statements on the subject matter, would apprehend that the Commissioner is biased. In light of those statements can the Commissioner maintain that he approaches determinations with an open mind that is free of prejudgment and political influence? What would a reasonable bystander apprehend in this regard?

The apprehension of bias in this inquiry also directly emerges from the numerous instances in which the Commission has prioritised and preferred the information and opinions of the Australian industry over those of our clients; the repeated failures of the Commission to inquire, to properly describe its requirements, and to provide our clients with the opportunity to respond to information;[27] the failure to disclose relevant information such as the MEMMES Report until pressed by us to do so; the suggestion that no weight at all would be given to that Report; and the dismissal of almost everything we have put forward on our clients' behalf (in respect of which our previous submissions refer).

The factors within Regulation 48(3) are non-exclusive, however this does not extend to considering any factor at all and especially not factors that are unconnected to the test of *"slight modification"*. The factors considered must still be relevant to the factual consideration. The Federal Court has ruled, as one would expect, that the objective of the anti-dumping provisions within the *Customs Act 1901* are not to protect Australian industry but to strike a balance between the interests of Australian industries, and those of other WTO members and their own domestic industries.[28]

The Commission is required to make an independent determination of the statutory question that is before it. We submit it has not done so. We hope that our concerns are received by the Commission in the objective, legal context in which they are made, and that they do not harden the Commission's position against our clients. We expect they might, but hope for the contrary.

Yours sincerely

Daniel Moulis
Partner Director
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he has found that a "circumvention activity" has occurred. On that question, and without detracting from our clients' implacable opposition to the finding that the goods are "slightly modified", we submit that the Commission must at least concede that the differences between 6 and 8 strand wire rope and 9 strand wire rope are significant and that a real question was raised under Regulation 48(3). In that context backdating any measures is not called for.

27 Email from Moulis Legal to the Commission dated 23 November 2018.

28 *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870, [148]