



Australian Government
**Department of Industry,
Innovation and Science**

**Anti-Dumping
Commission**

CUSTOMS ACT 1901 - PART XV B

REPORT NO 483

**ANTI-CIRCUMVENTION INQUIRY
SLIGHT MODIFICATION OF GOODS**

**WIRE ROPE EXPORTED TO AUSTRALIA
FROM THE REPUBLIC OF SOUTH AFRICA**

21 June 2019

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PUBLIC RECORD

ABBREVIATIONS	
ABF	Australian Border Force
the Act	<i>Customs Act 1901</i>
ADN	Anti-Dumping Notice
the applicant or BBRG	Bekaert Wire Ropes Pty Ltd trading as BBRG Australia
the circumvention goods	the goods described in section 3.2
the Commission	Anti-Dumping Commission
the Commissioner	Commissioner of the Anti-Dumping Commission
CON 483	<i>Anti-Dumping Commission Consideration Report No. 483</i>
CTMS	cost to make and sell
the Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
EPR	Electronic public record for Inquiry 483 available at www.industry.gov.au
the goods	the goods the subject of the notice as described in section 3.1
Haggie Reid	Haggie Reid Pty Ltd
Haggie Scaw	Haggie Reid Pty Ltd and Scaw South Africa (Proprietary) Limited together
IDD	interim dumping duty
inquiry period	from 1 January 2016
IWRC	independent wire rope cores
the Manual	<i>Anti-Dumping Commission Dumping and Subsidy Manual</i>
MBF/MBL	Minimum Breaking Force / Minimum Breaking Load
MEMMES	the Mining Electrical and Mining Mechanical Engineering Society
the MEMMES report	report provided by MEMMES
the Minister	Minister for Industry, Science and Technology
the notice	Anti-Dumping Notice No. 2017/172
PAD	preliminary affirmative determination
the Regulation	<i>Customs (International Obligations) Regulation 2015</i>
REP 401	<i>Anti-Dumping Commission Report No. 401</i>
REQ	Response to the exporter questionnaire
RIQ	Response to the importer questionnaire
Scaw	Scaw South Africa (Proprietary) Limited

PUBLIC RECORD

SEF	statement of essential facts
South Africa	Republic of South Africa

1. SUMMARY AND RECOMMENDATIONS

1.1 Introduction

This report concerns an inquiry by the Commissioner of the Anti-Dumping Commission (the Commissioner) into whether a circumvention activity has occurred in relation to Anti-Dumping Notice (ADN) No. 2017/172 (the notice).¹ The notice was published under subsections 269TG(1) and (2) of the *Customs Act 1901* (the Act)² and concerns certain wire rope exported to Australia from the Republic of South Africa (South Africa).

The anti-circumvention inquiry followed an application by Bekaert Wire Ropes Pty Ltd trading as BBRG Australia (BBRG). BBRG alleged that a circumvention activity in relation to the notice occurred under subsection 269ZDBB(6) in the circumstances prescribed by section 48 of the *Customs (International Obligations) Regulation 2015* (the Regulation). Section 48 states a circumstance in which a circumvention activity occurs pursuant to subsection 269ZDBB(6), namely through the slight modification of goods (the goods are described in section 3.1) exported to Australia.

1.2 Legislative framework

Division 5A of Part XVB of the Act sets out the procedures to be followed and the matters to be considered by the Commissioner in conducting an anti-circumvention inquiry. In particular:

- Section 269ZDBB sets out when a circumvention activity occurs in relation to a notice published under subsections 269TG(2) or 269TJ(2).
- Subsection 269ZDBB(6) provides that a circumvention activity occurs in relation to the notice in the circumstances prescribed by the Regulation for the purposes of that subsection.
- Section 48 of the Regulation prescribes the slight modification of goods exported to Australia as a circumvention activity for the purposes of subsection 269ZDBB(6).
- Subsection 269ZDBF requires that the Commissioner place a statement of essential facts (SEF) on the public record within 110 days after publication of the notice initiating the anti-circumvention inquiry (or such longer period as allowed). The SEF states the facts on which the Commissioner proposes to base a recommendation to the Minister for Industry, Science and Technology (the Minister).
- Subsection 269ZDBG requires, for current purposes,³ that the Commissioner give the Minister a recommendation within 155 days after publication of the notice

¹ The original notice is ADN No. 2017/172, a notice under subsection 269TG(2) of the *Customs Act 1901* that was published on 18 December 2017 following consideration of *Anti-Dumping Commission Report No. 401* (REP 401) by the then Assistant Minister for Industry, Innovation, and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science. REP 401 is available on the electronic public record (EPR).

² References in this report to a section or subsection are references to a section or subsection of the Act unless the context provides otherwise.

³ See subsection 269ZDBG(1)(a); subsection 269ZDBG(1)(b) provides for a different period for the circumvention activity described in subsection 269ZDBB(5A).

initiating the anti-circumvention inquiry (or such longer period as allowed). In making his recommendation to the Minister the Commissioner must, for current purposes,⁴ have regard to the application, the SEF and submissions received prior to and following the SEF (subsection 269ZDBG(2)(a)).

- Subsection 269ZDBH(1) provides that, after considering the Commissioner's report and any other information that the Minister considers relevant the Minister must declare that:
 - the original notice is to remain unaltered; or
 - the alterations specified in the declaration are taken to have been made to the original notice, with effect on and after a day specified in the declaration.

1.3 Findings

For the reasons set out in chapter 5 of this report, the Commissioner has found that:

- the circumvention goods (as described in section 3.2) are exported to Australia from a foreign country in respect of which the notice applies, namely South Africa (subsection 48(2)(a) of the Regulation), see section 5.3 below;
- before that export, the circumvention goods were slightly modified (subsection 48(2)(b) of the Regulation), by adding an extra strand to what would otherwise be the goods during production of the circumvention goods, see section 5.4 below;
- the use or purpose of the circumvention goods is the same before, and after, they are slightly modified (subsection 48(2)(c) of the Regulation), see section 5.5 below;
- had the circumvention goods not been slightly modified, they would have been subject to the notice (subsection 48(2)(d) of the Regulation), see section 5.6 below; and
- section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) does not apply to the export of the circumvention goods to Australia (subsection 48(2)(e) of the Regulation), see section 5.7 below.

Accordingly the Commissioner finds that a circumvention activity has occurred in relation to the notice under subsection 269ZDBB(6).

1.4 Recommendation

Based on the findings set out above the Commissioner recommends to the Minister that:

- the notice be altered because the Commissioner is satisfied that circumvention activity in relation to the notice has occurred;
- the notice be altered by amending the description of the goods subject to the notice to include wire ropes with no more than nine strands; and
- the alteration to the notice take effect on and after the date of publication of the SEF for this inquiry, being 11 February 2019.

⁴ See subsection 269ZDBG(2)(a); subsection 269ZDBG(2)(b) provides for the Commissioner to have regard to different matters for the circumvention activity described in subsection 269ZDBB(5A).

2. BACKGROUND

2.1 Application

BBRG lodged an application on 7 June 2018 requesting an inquiry into an alleged circumvention activity occurring in relation to the notice. BBRG is the sole member of the Australian industry that manufactures like goods.⁵ BBRG claimed that the notice should be altered because a circumvention activity has occurred, namely slight modification of the goods (under subsection 269ZDBB(6) of the Act and section 48 of the Regulation).

The notice applies to the goods, namely wire rope of no more than eight strands (and as otherwise described in section 3.1), and to like goods.⁶ BBRG claims that the exporter of the goods from South Africa, Scaw, has slightly modified the goods and exported the resulting circumvention goods to avoid the original anti-dumping measures.

The Commissioner was satisfied of the matters in subsection 269ZDBE(2) and accordingly did not reject the application (see *Anti-Dumping Commission Consideration Report No. 483* (CON 483)).

2.2 Initiation of the inquiry

The Commissioner initiated this inquiry on 6 July 2018 (see ADN No. 2018/105). CON 483 provides further details relating to the initiation of the inquiry and is available on the electronic public record (EPR).

The inquiry period was set to take account of exportations by Scaw that occurred in the period before and after the time when the slight modification is alleged to have occurred and starts from 1 January 2016.⁷

2.3 ADRP review

On 5 February 2018 the Anti-Dumping Review Panel (ADRP) initiated a review of the then Assistant Minister's decision to publish the notice. Following its review the ADRP recommended to the Minister that the fixed component of IDD as it relates to goods exported by Scaw be changed to 27.2 per cent.

The Minister accepted the ADRP's recommendation and published a notice to that effect on 5 October 2018.⁸

2.4 Conduct of this inquiry

2.4.1 Initial submissions, questionnaires, importer and industry visits

The Anti-Dumping Commission (the Commission) sought initial submissions from interested parties (ADN No. 2018/105). Non-confidential versions of submissions received by the Commission have been published on the EPR.

⁵ BBRG has been confirmed to be the Australian industry in this inquiry and in investigation 401. Refer to the Australian industry verification visit report – EPR document 7.

⁶ See subsection 269TG(2), the notice and the definition of "like goods" in section 269T.

⁷ EPR document 3 at page 5.

⁸ Notice under subsection 269ZZM(4) available from the ADRP at www.industry.gov.au.

Haggie Reid and Scaw provided responses to the Commission’s questionnaires. Non-confidential versions of these responses have been published on the EPR.⁹

The Commission made verification visits to BBRG on 14 August 2018 and to Haggie Reid on 12 September 2018. Non-confidential versions of the verification reports were published on the EPR.¹⁰

2.4.2 Statement of essential facts

The SEF was published on 11 February 2019.¹¹ A number of attachments to the SEF were published subsequently with the final attachment published on 19 March 2019.¹²

The SEF stated the facts on which the Commissioner proposed to base his findings and recommendation to the Minister.

2.4.3 Final report

The date for the Commissioner to provide this report and his recommendations to the Minister was extended to 31 May 2019 under section 269ZHI.¹³ This due date was then further extended to **21 June 2019** under section 269ZHI.¹⁴

2.5 Submissions received from interested parties

The Commission received submissions from a number of interested parties during the course of this inquiry (listed in the table below) and has had regard to those submissions in formulating this report (subsection 269ZDBG(2)). Non-confidential versions of these submissions are available on the EPR.

EPR document	Party	Date published on EPR
5	Haggie Reid and Scaw (together, Haggie Scaw) ¹⁵	18 September 2018
6	Haggie Reid	1 October 2018
8	Haggie Reid	8 October 2018
9	BBRG	12 October 2018
10	Haggie Scaw	24 October 2018
12	Haggie Scaw	9 November 2018
13	BBRG	12 November 2018
14	BBRG	6 December 2018
18	Haggie Scaw	18 January 2019
19	BBRG	4 February 2019

⁹ EPR documents 4 (Scaw) and 16 (Haggie Reid).

¹⁰ EPR documents 7 (BBRG) and 17 (Haggie Reid).

¹¹ ADN Nos. 2018/161 and 2018/188.

¹² The final attachment was a separate attachment to the MEMMES Report that stated the qualifications of the author and the methodologies used in the MEMMES Report. This separate attachment was provided to the Commission in final (non-confidential) form on 18 March 2019.

¹³ ADN No. 2019/66.

¹⁴ ADN No. 2019/72.

¹⁵ Haggie Reid is a subsidiary of Scaw (see Haggie Reid company profile at www.haggie.com).

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EPR document	Party	Date published on EPR
20	Haggie Scaw	8 February 2019
22	BBRG	5 March 2019
24	Haggie Scaw	18 March 2019
26	Haggie Scaw	9 April 2019
27	BBRG	9 April 2019
28	Haggie Scaw	15 April 2019

Table 1 – Submissions by interested parties on the EPR

The substantive matters raised in these submissions and the Commission’s response to those matters are set out in chapter 5.

2.6 Other information

2.6.1 Mining companies

The Commission sought information from a number of mining companies in respect of their wire rope selection and usage. Three mining companies responded:

- A mining company that uses wire rope provided information to the Commission on its use of the circumvention goods. That mining company has claimed confidentiality over its identity and the information it provided.¹⁶ The Commission agrees with the claims of confidentiality made by this mining company and considers that the information provided is correct. Accordingly the Commission has had regard to that information (subsection 269ZJ(6)).
- The operator of a second mine provided confidential information to the Commission concerning its purchase of the circumvention goods. This information has not been considered by the Commission as the information provided did not contain sufficient detail.
- A manager from a mining company provided information to the Commission concerning its purchase of wire rope. Following the SEF this person provided a non-confidential version of this information and this has been placed on the public record.¹⁷

2.6.2 Manufacturers of dragline and shovel excavator machinery

The Commission sought comments from manufacturers of machinery in which wire rope is used. No responses were provided to the Commission by such manufacturers.

¹⁶ Confidential Attachment 1.

¹⁷ EPR document 21 – Non Confidential version of Confidential Attachment 4.

3. THE GOODS AND THE CIRCUMVENTION GOODS

3.1 The goods

3.1.1 Description

The goods the subject of the notice (the goods) are:

Stranded wire rope, alloy or non-alloy steel, whether or not coated or impregnated, having both of the following:

- *Not greater than 8 strands;*
- *Diameter not less than 58mm and not greater than 200mm, with or without attachments.*

Further information regarding the goods:

- Stranded steel wire rope is rope and strand made of high carbon wire (whether or not containing alloys);*
- The strand or rope can also be sheathed or impregnated and sheathed respectively in plastic or composites;*
- The wires can be layered-up in various configurations in order to give the strand or rope the desired physical properties;*
- Variances can include:*
 - *strand diameter;*
 - *number of wires;*
 - *wire finish (e.g. typically black but may be galvanised);*
 - *wire tensile grade;*
 - *type of lubricant;*
 - *strand or rope length; and*
 - *whether or not an attachment is included (but not limited to ferrules and/or beackets).*
- Cores may be made of:*
 - *natural or synthetic fibre; or*
 - *Independent Wire Rope Cores (“IWRC”), which may or may not be sheathed or impregnated in plastic.*

Typical uses include applications such as dragline hoist, drag and dump ropes, and shovel hoist, crowd and retract ropes.

Goods excluded from the measures are:

- *stranded wire rope that is stainless steel as defined under Note (e) “Stainless steel” to the Tariff;*
- *stranded wire rope with more than 8 strands, regardless of diameter; and*
- *stranded wire rope less than 58mm or greater than 200mm in diameter, regardless of the number of strands.*

3.1.2 Tariff classification

The goods are currently generally, but not exclusively, classified to the tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995* (Customs Tariff) specified below.

Tariff subheading	Statistical code	Description	Unit
7312.10.00: Stranded wire, ropes and cables ...Ropes and cables, containing not more than eight strands, of alloy or non-alloy steel	91	...Of a diameter exceeding 50 mm but not exceeding 100 mm	Kilograms (kg)
	92	...Of a diameter exceeding 100 mm	Kilograms (kg)

Table 2 – Tariff classification of the goods

3.2 The circumvention goods

3.2.1 Description

The goods the subject of the application are wire ropes consisting of nine strands but would otherwise have the same essential characteristics as the goods.¹⁸ The nine strand wire ropes are marketed by Haggie Scaw as *Inno 9*.¹⁹ The circumvention goods are designed for use in the same applications as the goods.²⁰

3.2.2 Tariff classification

The circumvention goods are generally, but not exclusively, classified to tariff subheading 7312.10.00 (statistical code 93) of Schedule 3 to the *Customs Tariff Act 1995*.

Tariff subheading	Statistical code	Description	Unit
7312.10.00: Stranded wire, ropes, cables, plaited bands, slings and the like, of iron or steel, not electrically insulated	93	Ropes and cables containing more than eight strands, of alloy or non-alloy steel	Kilograms (kg)

Table 3 – Tariff subheading statistical code description of the circumvention goods

The tariff subheading under which imports of the circumvention goods are classified includes other wire rope products that are not the goods. All wire rope products other than the circumvention goods are not within the scope of this inquiry, i.e. cables and wire ropes that are captured by exceptions.

¹⁸ EPR document 1 at page 7.

¹⁹ EPR document 4 at page 26.

²⁰ EPR document 6.

4. CONSIDERATION OF THE MEMMES REPORT

Prior to publication of the SEF the Commission retained the Mining Electrical and Mining Mechanical Engineering Society (MEMMES) to provide a report on any differences between six, eight and nine strand wire ropes (the MEMMES report).²¹ The Commission aimed to obtain expert opinion from MEMMES that could potentially inform its views on the matters before it.

In the SEF the Commission stated that it considered that the MEMMES report did not contain expert opinion regarding wire rope that was relevant to the inquiry.²² While the MEMMES report was part of the inquiry process undertaken by the Commission during the investigation, the Commission took the view that the MEMMES report was not probative for the purposes of informing the Commissioner's recommendations. As the MEMMES report did not inform the Commissioner's recommendations in the SEF, the Commission did not publish the report on the EPR.

Following publication of the SEF, Haggie Scaw requested and was provided a copy of the MEMMES report. Haggie Scaw disagreed with the Commission concerning the evidential value of the MEMMES report.²³

To facilitate interested parties making submissions on the evidential value of the MEMMES report the Commission published the MEMMES report and a separate attachment setting out the methodology used in the MEMMES report and the qualifications of the author.²⁴ The Commission allowed further time for interested parties to make submissions following the MEMMES report being published.²⁵

4.1 Submissions on the MEMMES report

Haggie Scaw raised a number of points in relation to the MEMMES report:

- a. the Commission cannot reject the MEMMES report without considering the relevance of the MEMMES report independently of whether the author is an expert;²⁶
- b. the anti-circumvention inquiry is administrative in nature, not judicial, and therefore it is improper for the Commission to reject the views contained in the MEMMES report whether or not the author is an expert, provided the author addresses the issues under consideration;²⁷ and
- c. the author of the MEMMES report is "on any view" an expert and the research and inquiry undertaken by the author is legitimate and reasonable.²⁸ Haggie Scaw

²¹ Non-Confidential Attachment 1 – report from Mining Electrical and Mining Mechanical Engineering Society.

²² SEF at section 2.7.1.

²³ EPR document 24 at section H.

²⁴ EPR document 21, Attachments 1 and 1a.

²⁵ ADN No. 2019/40.

²⁶ EPR document 24 at page 19.

²⁷ EPR document 24 at page 20; EPR document 26 at page 4.

²⁸ EPR document 24 at page 19; EPR document 26 at page 4.

refers to the author's description of his qualifications, the process he adopted and the people involved in his inquiries.²⁹

BBRG raised concerns with the MEMMES report including questioning the expertise of the author. BBRG noted what it believed to be inaccuracies within the MEMMES report.³⁰

4.2 The Commission's assessment

As the MEMMES report has now been published on the EPR and submissions have been received in relation to the report, the Commissioner considers it appropriate to provide further explanation about his view that the MEMMES report is not probative for the purposes of this inquiry.

Expertise of lead author

The key author summarised his qualifications and experience in the MEMMES report and outlined his methodology.³¹ Further details of his qualifications and experience are contained in a separate attachment.³² The author also states that others were involved in the report review.

The author's experience in mining engineering stems from his fitter and turner apprenticeship (1978 to 1982) and subsequent work as a tradesman fitter (1982 to 1992). Following that work he held a number of engineering related supervisory and management roles (1992 to 2005). The author then held management positions in a mining services and equipment provider (which did not provide wire ropes) before forming his own consultancy in 2013.³³

The Commissioner considers that these roles were not specifically concerned with wire ropes and any involvement of the author with the goods appeared incidental or peripheral. It's also not evident to the Commission that the author has had experience in the design, production or technical study of the goods nor experience of any kind with the circumvention goods.

The Commission understands that the training undertaken by the author that specifically concerned wire ropes was attending a course in winder rope inspection and testing in 1999.³⁴ The Commission considers that such training likely does not amount to knowledge of the goods because winder ropes are not the goods.³⁵ The Commission also observes

²⁹ EPR document 24 at page 19.

³⁰ EPR document 27 at page 3.

³¹ MEMMES report at pages 1 and 2.

³² MEMMES report, separate attachment at pages 2 to 5.

³³ EPR document 21 – attachment 1a.

³⁴ MEMMES report at page 1; separate attachment to MEMMES report at page 3; the Commission understands that the training was a 3 day maintenance-oriented training course.

³⁵ NSW Department of Planning and Environment, Division of Resources and Geoscience document Guideline for Design, Commissioning and Maintenance of Drum Winders: MDG 33, clause 2.3 states "winding ropes are classified as those ropes supporting the conveyance and directly carrying the man and/or materials load"; the guideline uses the terms "winding rope" and "winder rope" interchangeably. All examples in the appendices of NSW Department of Planning and Environment, Division of Resources and Geoscience 1999 document Guidelines for examination, testing and discard of mine winder ropes - For use in coal mines: MDG 26 relate only to diameters of less than 40mm, i.e. less than the smallest diameter defining the goods.

that the MEMMES report relies on reference material relating to winder ropes.³⁶ The Commission agrees with Haggie Scaw's argument that conclusions about the goods and the circumvention goods cannot be drawn from information about another rope type.³⁷

Approach and methodology

Given the above observations, the Commission has considered whether the approach and methodology used by the author to investigate the goods and circumvention goods was adequate to provide confidence that the report was probative for the purposes of this inquiry.

The MEMMES report relies in large part on statements and opinions of people other than the key author.³⁸ The Commission is not aware of the background and qualifications of these people and the veracity of their statements was not tested. This is particularly important given these people were, in the main, employees of mining companies which may have a vested interest in the outcome of this inquiry.

It appears that the author was aware of underlying weaknesses affecting the MEMMES report. For example, the author acknowledges that the "best neutral position" would rather have been obtained from contacting manufacturers of the goods directly.³⁹

In addition, the author asked the Commission a number of questions concerning the goods and the circumvention goods.⁴⁰ Those questions were, in essence, questions that the Commission had expected the author to answer.

Commissioner's consideration

For the reasons outlined above, the Commissioner is of the view that the MEMMES report has no probative value for the purposes of this inquiry.

Therefore, the Commissioner has not relied on the information contained within the MEMMES report for the purpose of making a recommendation to the Minister.

³⁶ MEMMES report at page 20.

³⁷ See EPR document 24 at section entitled "Elevator ropes are not dragline ropes" at pages 13 to 16.

³⁸ MEMMES report at page 2; attachment to the MEMMES report concerning methodology at pages 1 to 2.

³⁹ MEMMES report at page 2.

⁴⁰ Confidential email from the author to the Commission, dated 12 September 2018 with the subject: *FW: Anti-Circumvention Inquiry No. 483 into certain wire rope exported from South Africa*.

5. HAS A CIRCUMVENTION ACTIVITY OCCURRED?

5.1 Finding

The Commissioner finds that a circumvention activity has occurred under subsection 269ZDBB(6) in relation to the notice as all of the criteria in subsection 48(2) of the Regulation apply, namely:

- a) the circumvention goods were exported to Australia from a foreign country in respect of which the notice applies (see the Commission's reasons in section 5.3 below);
- b) the circumvention goods were slightly modified before export (see the Commission's reasons in section 5.4 below);
- c) the use and purpose of the circumvention goods was the same before and after they were slightly modified (see the Commission's reasons in section 5.5 below);
- d) had the circumvention goods not been slightly modified they would have been subject to the notice (see the Commission's reasons in section 5.6 below); and
- e) section 8 of the Dumping Duty Act does not apply to the export of the circumvention goods to Australia (see the Commission's reasons in section 5.7 below).

5.2 Legislative framework

Subsection 269ZDBB(6) provides that a circumvention activity involving the slight modification of goods occurs in the circumstance in which all of the following criteria apply (subsection 48(2) of the Regulation):

- a) the circumvention goods are exported to Australia from a foreign country in respect of which the notice applies (subsection 48(2)(a) of the Regulation);
- b) before that export, the circumvention goods are slightly modified (subsection 48(2)(b) of the Regulation);
- c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified (subsection 48(2)(c) of the Regulation);
- d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice (subsection 48(2)(d) of the Regulation);
- e) section 8 or 10 of the Dumping Duty Act, as the case requires, does not apply to the export of the circumvention goods to Australia (subsection 48(2)(e) of the Regulation).

Subsection 48(3) provides that, for the purpose of determining whether a circumvention good is slightly modified the Commissioner must compare the circumvention goods and the goods having regard to any factor that the Commissioner considers relevant, including any of the following factors:

- a) each good's general physical characteristics;
- b) each good's end use;
- c) the interchangeability of each good;

- d) differences in the processes used to produce each good;
- e) differences in the cost to produce each good;
- f) the cost of modification;
- g) customer preferences and expectations relating to each good;
- h) the way in which each good is marketed;
- i) channels of trade and distribution for each good;
- j) patterns of trade for each good;
- k) changes in the pricing of each good;
- l) changes in the export volumes for each good; and
- m) tariff classifications and statistical codes for each good.

5.3 Circumvention goods are exported to Australia from a foreign country in respect of which the notice applies

5.3.1 The Commission's finding

The criterion in subsection 48(2)(a) of the Regulation is that the circumvention goods are exported to Australia from a foreign country in respect of which the notice applies.

The Commission has found that the circumvention goods are exported to Australia from a foreign country in respect of which the notice applies. In particular, the notice applies to South Africa and the circumvention goods were exported to Australia from South Africa.

5.3.2 ABF import database

The Commission found that the circumvention goods were exported to Australia from South Africa by examining records of importations in the Australian Border Force (ABF) import database.

Records of importations in the ABF import database showed that importations declared under tariff subheading 7312.10.00 had goods descriptions that were consistent with the circumvention goods. These goods descriptions contained sufficient detail to confirm that the goods were wire rope with more than eight strands.

5.3.3 Responses to questionnaires

Information provided by both Scaw and Haggie Reid confirmed that the circumvention goods were exported from South Africa.

5.4 The circumvention goods were slightly modified before export

5.4.1 The Commission's findings

In section 5.3 (above) the Commission established that circumvention goods are exported to Australia from South Africa. However, under subsection 48(3) of the Regulation, it is necessary to determine whether, before that export, the circumvention goods were slightly modified for the purposes of subsection 48(2)(b) of the Regulation. In doing so, the Commissioner must compare the circumvention goods and the goods the subject of the

notice, having regard to any factor that the Commissioner considers relevant, which may include the 13 factors listed in subsection 48(3) of the Regulation.

In evaluating whether the circumvention goods are slightly modified when compared to the goods the subject of the notice, the Commission's assessment has had regard to the following factors listed in subsection 48(3) of the Regulation. The Commission notes that the assessment of whether there has been a slight modification of goods is based on an assessment of all factors; the Commission does not need to be satisfied that all factors are indicative of slight modification.

5.4.2 Each good's general physical characteristics

The Regulation provides that the Commissioner may have regard to general physical characteristics when comparing the circumvention goods and the goods (Regulation subsection 48(3)(a)).

BBRG submitted that the goods and the circumvention goods have the same general physical characteristics, with the only difference being the circumvention goods have an extra strand.

Haggie Scaw provided multiple submissions regarding the general physical characteristics of the goods and the circumvention goods. These submissions raised the following points:

- a. physical similarity depends on the level of generality at which a comparison is made, and Haggie Scaw considers that BBRG's comparison of the goods and the circumvention goods was at an artificially high level of generality;⁴¹ and
- b. there are a number of characteristics of wire rope that the industry would consider important factors, and it is at this level of detail that six, eight and nine strand wire ropes should be assessed.⁴²

In making the second point noted above, Haggie Scaw points to some of BBRG's promotional material in which it states the distinct advantages of its own ropes and compares its ropes to those of its competitors.⁴³ It appears to be on that basis that Haggie Scaw proceeds to state the differences in physical characteristics in terms of specific differences in *performance* between the goods and the circumvention goods.⁴⁴ Haggie Scaw submitted that the circumvention goods are stronger, more flexible, have increased abrasion resistance and increased fatigue resistance.⁴⁵

Following the SEF Haggie Scaw further submitted that:

- a. the Commission ought to assess the general physical characteristics of wire rope as characteristics that are other than prerequisites required by customers of wire ropes, and that the general physical characteristics considered by the Commission are trivial;

⁴¹ EPR document 5.

⁴² Ibid.

⁴³ Ibid at page 16.

⁴⁴ Ibid at pages 18–22.

⁴⁵ Ibid at pages 18-21. This claim was reiterated in EPR document 24.

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- b. the Commission does not succeed in its task of identifying and assessing difference by relegating its consideration to factors that it ultimately considers establish sameness;
- c. it makes no sense to speak of specific characteristics of wire rope as opposed to general characteristics and considers that all physical characteristics that go to performance are no more general or specific than each other; and
- d. there are “stark” differences in performance between the goods and the circumvention goods.⁴⁶

Haggie Scaw placed heavy reliance on the MEMMES report for its views on general physical characteristics.

The Commission refers to the words of the Regulation to determine the level of generality in comparing physical characteristics of the goods and the circumvention goods. The Regulation states that the Commission may have regard to each good’s *general* physical characteristics (subsection 48(3)(a)).

The Cambridge Dictionary defines general as “involving or relating to most or all people, things, or places, especially when these are considered as a unit”.⁴⁷ The Commission considers the general physical characteristics of wire rope to include the general composition, diameter, length, weight and appearance. In contrast, Haggie Scaw’s preferred level of generality in comparing the goods and the circumvention goods concerns highly specific measures of performance (i.e. strength, flexibility, abrasion resistance and fatigue resistance).

The Commission considers that the goods and the circumvention goods have the same general physical characteristics including that both:

- comprise a core and a number of strands made up of wound steel wire;⁴⁸
- are made to the same diameter and length for a given application (drag, dump or hoist applications in mining operations);⁴⁹
- have very similar appearances;⁵⁰ and
- have similar per metre weights for a given diameter.⁵¹

The Commission understands that there are not substantial differences in the views of the parties concerning these general physical characteristics.

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 (see section 3.1 above). For example, the further information regarding the goods states that the goods are made up of high carbon wire, may be sheathed, impregnated and may be layered-up in various configurations in order to give the rope the desired

⁴⁶ EPR document 24.

⁴⁷ See <https://dictionary.cambridge.org/dictionary/english/general>.

⁴⁸ EPR document 9 at page 4-6; EPR document 5 at page 3.

⁴⁹ Haggie Reid’s RIQ, part C sales; BBRG application at attachment 3.

⁵⁰ EPR document 1 (BBRG application) at page 9; EPR document 5 at page 17; EPR document 17 at page 8.

⁵¹ Haggie Reid’s RIQ, part C sales; EPR document 1 (BBRG application), at attachment 3; see the Manual at section 2.3 concerning physical likeness.

physical properties. The Commission observes that, but for the additional strand in the circumvention goods, the circumvention goods would come within the description of the goods (including the further information regarding the goods).

The Commission considers that the above supports the claim that there was a slight modification of goods.

5.4.2.1 Non-rotation properties

Haggie Scaw provided a submission⁵² outlining a description of wire ropes, their construction and the claimed key differences between the goods and the circumvention goods.

Under the heading “Rope differences”⁵³ the submission describes claimed differences in general physical characteristics between the goods and the circumvention goods in the following terms:

- “This brings us to the actual physical characteristics of Scaw’s 9 strand wire rope”;⁵⁴
- “The 9 strand wire rope exported by Scaw provides various advantages over Scaw’s 6 and 8 strand ropes”;⁵⁵ and
- “...the below outlines advantages of Scaw’s 9 strand wire rope over Scaw’s 6 and 8 strand wire ropes”.⁵⁶

Directly following those statements, the Haggie Scaw primary submission described the “actual physical characteristics” of the circumvention goods under five headings.⁵⁷ The fourth heading, “Non-rotation properties”, described and illustrated a method of rope construction in which the rope’s core is wound in the opposite direction to the outer strands (see ‘Figure 20’), indicating that non-rotation properties were actual physical characteristics of nine strand wire rope.⁵⁸ Haggie Scaw’s submission concluded:

“With ropes having no more than 8 strands, the cross-sectional area of the core is typically not large enough, relative to the cross-sectional area of the strands, to generate any meaningful counteracting torque. However, with ropes having 9 or more strands, torque generated in the core can begin to have significant rotation-resistant effects”.⁵⁹

A BBRG submission subsequently addressed claims made in the Haggie Scaw primary submission.⁶⁰ The BBRG submission provided evidence demonstrating that the

⁵² EPR document 5.

⁵³ EPR document 5 at page 12.

⁵⁴ EPR document 5 at page 17.

⁵⁵ EPR document 5.

⁵⁶ EPR document 5 at page 18.

⁵⁷ EPR document 5 at page 18-22.

⁵⁸ EPR document 5 at page 20 and the illustration at Figure 20.

⁵⁹ EPR document 5 at page 20-21.

⁶⁰ EPR document 9.

circumvention goods were not constructed with non-rotation properties; rather the circumvention goods were constructed in the same manner as the goods.⁶¹

Haggie Scaw made the following defence in response to BBRG's submission:

*"BBRG says that it has deconstructed one of our clients' 9 strand wire ropes, and observes that it is not laid as per Figure 20 in our clients' submission. Any sensible reader would understand that Figure 20 was used illustratively to explain rotation-resistant rope properties. Our clients have never claimed that their 9 strand wire rope is laid as per Figure 20, and to say otherwise is a misrepresentation".*⁶²

Following the SEF Haggie Scaw reiterated its claims regarding the above point.⁶³

Given the above, the Commission considers that the circumvention goods were not constructed with non-rotation properties.

5.4.3 Each good's end use

The Regulation provides that the Commissioner may have regard to each good's end use when comparing the circumvention goods and the goods (subsection 48(3)(b)).

The goods and the circumvention goods are used (and specifically designed to be so used) in dragline excavators and shovels in open cut mining applications.⁶⁴ These applications are drag, dump and hoist applications.

It is not disputed that the goods and the circumvention goods are capable of being fitted to dragline excavators and shovels in open cut mining operations.

Haggie Scaw accepts that the circumvention goods and the goods do the same thing in a "broad sense" but argues that this factor should be considered at a level of granularity "suited to the exercise".⁶⁵ Haggie Scaw refers to field tests and customer usage which suggests that the circumvention goods have different performance capabilities.⁶⁶

The Commission has considered the evidence provided by Haggie Scaw as it relates to the performance of the goods and the circumvention goods. Haggie Scaw outlines a number of attributes which impact on the *performance* of the goods – including strength and flexibility. However, on the evidence provided these attributes do not ultimately change the end use of the wire rope, which is in drag, dump and hoist applications. End-user feedback provided to the Commission indicated that the nine-strand wire rope had the same use or purpose as the six and/or eight strand wire rope (use on draglines).⁶⁷

The evidence provided indicates that there is no difference in each good's end use. This supports the claim that there is a slight modification of goods.

⁶¹ EPR document 9 at page 9.

⁶² EPR document 12 at page 3.

⁶³ EPR document 24 at page 16.

⁶⁴ Confidential Attachment 2; patent application for the circumvention goods at EPR document 6; the goods description at chapter 3.

⁶⁵ EPR document 10 at page 2.

⁶⁶ EPR document 10 at page 2 and repeated in EPR document 24 at page 31.

⁶⁷ EPR document 21 – refer to non-confidential version of confidential attachment 4.

The Commission has considered the evidence provided by Haggie Scaw, as it relates to the performance of the goods, below in section 5.4.8 (regarding customer preferences and expectations).

5.4.4 The interchangeability of each good

The Regulation provides that the Commissioner may have regard to the interchangeability of each good when comparing the circumvention goods and the goods (subsection 48(3)(c)).

In its application BBRG stated that the circumvention goods and the goods can be used interchangeably.

Haggie Scaw claimed:

- the goods and the circumvention goods are not readily interchangeable as switching to a new product requires a significant amount of re-engineering, education, and training of staff;⁶⁸ and
- the interchangeability of six and eight strand wire rope and nine strand wire rope is poor, and that this is evident from the extensive marketing campaign that had been conducted by Haggie Reid to market the circumvention goods due to their customers' reluctance to switch to the new product.⁶⁹

In response to the SEF Haggie Scaw reiterated the two points above, provided further information in support of their claims and also referred to the MEMMES report.⁷⁰

The Commission has considered the information provided by Haggie Scaw following the SEF. This consideration is contained in **Confidential Attachment 3 - interchangeability**.

In the SEF the Commission considered two aspects of interchangeability (mechanical interchangeability and functional interchangeability) in order to best understand and determine the level of difficulty an end user would experience in switching between different wire ropes. The Commission maintains that this approach is suitable.

5.4.4.1 Mechanical interchangeability

The wire rope considered in this inquiry is not a stand-alone product that can be used for other purposes. It is designed and produced with particular specifications to fit specific machines.⁷¹

Haggie Scaw stated that a wire rope cannot be offered in the market to replace the goods unless it is "somewhat" interchangeable.⁷² Haggie Scaw argued that the circumvention goods have different performance characteristics to the goods but did not detail how this affects interchangeability.⁷³

⁶⁸ EPR document 5 at page 30.

⁶⁹ EPR document 5 at page 30.

⁷⁰ EPR document 24.

⁷¹ Namely open cut mining machines, see REP 401 at page 17 and elsewhere.

⁷² EPR document 4 at page 30.

⁷³ EPR document 4.

The Commission considers that mechanical interchangeability follows from the physical characteristics of wire rope that are required to fit the rope to specific mining machinery including the specific diameter, length, weight, and type of attachments.⁷⁴ These characteristics determine whether two given ropes are interchangeable.

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

The Commission understands that the weight of the wire rope is one of a number of considerations for interchangeability.⁷⁵

The Commission considered the models of nine strand wire rope sold to the Australian market, and compared the weight of each model with a comparable six or eight strand model. This analysis is based on the sales data provided by Haggie Reid in its response to the importer questionnaire. Figure 1 below shows the change in weight per meter of comparable wire ropes sold by the importer to the Australian market, as well as the proportion of the total volume of nine strand wire rope exported to Australia that each model represents.

This analysis reveals that there are some changes in the average weight per meter between the goods and the circumvention goods.⁷⁶

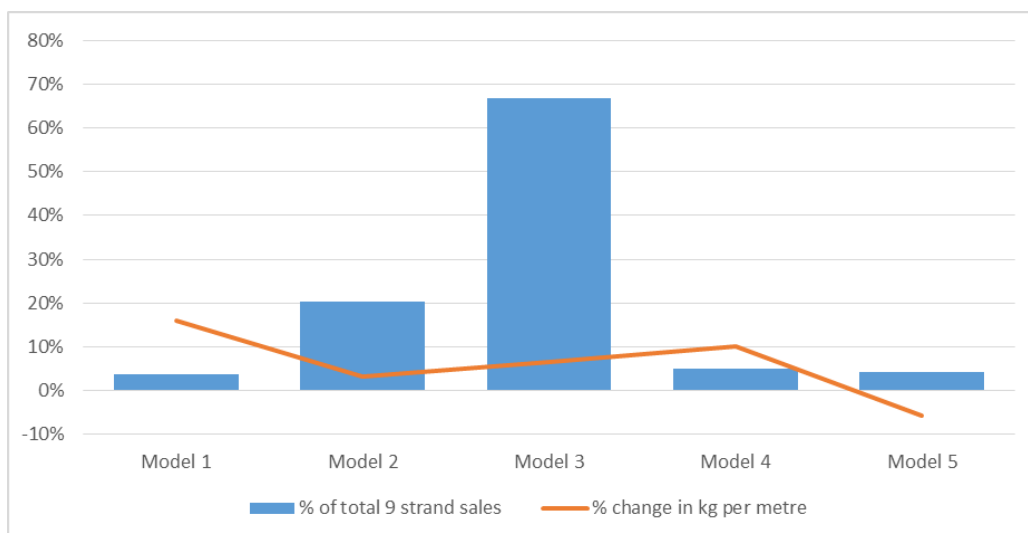


Figure 1: Change in weight per metre by comparable model and volume of sales

Overall, these changes in weight are small and have a negligible impact on the mechanical interchangeability because, despite the changes in weight, the circumvention goods can still be fitted to and used on the same machines as the goods. Other physical characteristics of the circumvention goods that are required for them to fit the same machines are the same as for the goods.

⁷⁴ EPR document 4 at page 30.

⁷⁵ Confidential Attachment 1.

⁷⁶ Confidential Attachment 4.

Further, the Commission observes that the circumvention goods are very likely mechanically interchangeable by design.⁷⁷ Some mines have fitted the circumvention goods to the same machines as are used for the goods, demonstrating that they have been interchanged.⁷⁸

Accordingly, the Commission concludes that the circumvention goods are mechanically interchangeable.

5.4.4.2 Functional interchangeability

Another aspect of interchangeability concerns whether the circumvention goods are interchangeable in the sense that they function in the same way as the goods.

A mine site which purchased wire rope from Haggie Reid confirmed that the strength of a wire rope is important in functional interchangeability. Each good's load capacity must meet the required minimum breaking force (MBF) to ensure the safe operation of the machine on which the rope is fitted. However the Commission understands that the end user of the wire rope must ensure that the rope's MBF rating is adequate before purchase regardless of the number of strands in the wire rope.

Haggie Scaw provided third party test results of wire ropes of different diameters to support its claim that the circumvention goods have superior strength.⁷⁹ Figure 2 illustrates the change in strength between the goods and the circumvention goods based on those test results. For example, with regard to diameter 1, in moving from the six strand wire rope to the nine strand wire rope, there was a three per cent change in strength, whereas in moving from eight strand wire rope to nine strand wire rope, there was a two per cent change in strength.

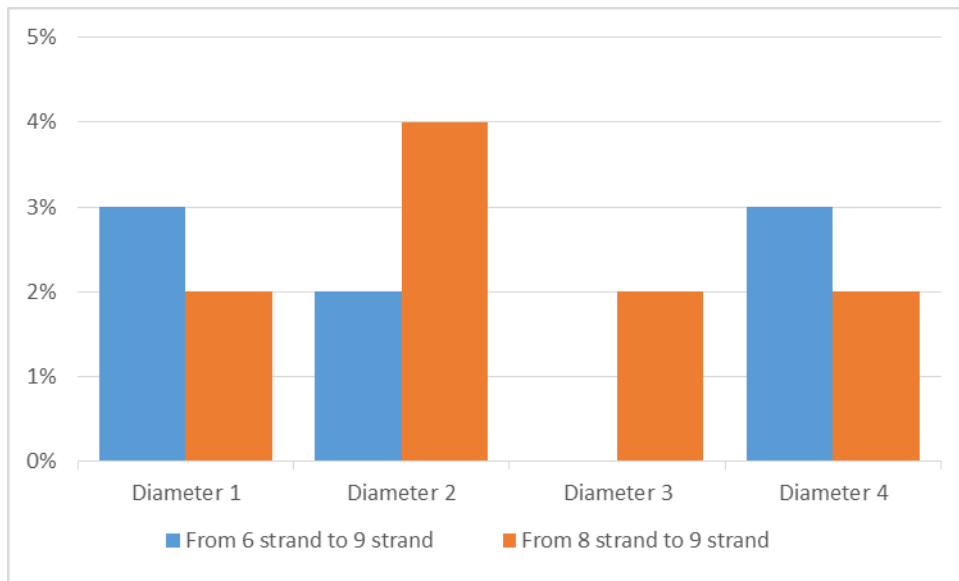


Figure 2: Change to wire rope strength from the goods to the circumvention goods by diameter

⁷⁷ See Haggie Scaw statements about its intentions in EPR document 26 at page 27.

⁷⁸ Confidential Attachment 1.

⁷⁹ Confidential Attachment 5.

Figure 2 illustrates only small differences in the strength of the goods to the circumvention goods by rope diameter. The Commission does not consider these differences to impact on the functional interchangeability of the goods.

In response to the SEF, Haggie Scaw queried the omission of data relating to one of the rope diameters.⁸⁰ The Commission did not include one diameter of wire rope in the figure because the goods and the circumvention goods of that diameter were not considered to be reliably comparable. This is due to the following:

- the sales data provided by Haggie Scaw was inaccurate for this diameter of the goods and was subsequently revised;
- neither of the two models of the goods in the revised sales data reliably matched the model construction descriptions in the performance test documents; and
- the sales for this particular diameter of the circumvention goods represented an insignificant number of sales (less than 4 per cent) of the circumvention goods.

The Commission notes that even if the analysis included the omitted diameter, the weighted average increase in strength in moving from the goods to the circumvention goods is three per cent. The Commission maintains that this does not impact on the functional interchangeability of the goods.

Based on the information outlined above, and the further analysis contained in **Confidential Attachment 3**, the Commission considers the goods to be interchangeable.

5.4.4.3 Extensive marketing effort

Haggie Scaw claims that the interchangeability of the goods and the circumvention goods is poor and that this was evident from the extensive marketing campaign conducted by Haggie Reid for *Inno9* and its customers' reluctance to switch to the new product.⁸¹

The Commission considers that additional marketing on the INNO9 focused on the various attributes of nine strand rope, which were positioned as improvements or new features. The Commission considers that marketing was, at least in part, intended to assure potential customers that the circumvention goods were interchangeable with the goods that Haggie Scaw previously provided. This is discussed below at section 5.4.9.

5.4.4.4 Patterns of trade

The Commission considers that the patterns of trade, being the changes in export volume of the goods and the circumvention goods to Australia, supports a degree of interchangeability which is indicative of a slight modification of the goods. Further analysis of this is contained in section 5.4.11, below.

5.4.5 Differences in the processes used to produce each good

The Regulation provides that the Commissioner may have regard to the differences in the processes used to produce each good when comparing the circumvention goods and the goods (subsection 48(3)(d)).

⁸⁰ EPR document 24 at page 11.

⁸¹ EPR document 4 at page 28.

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BBRG claims that “*the goods and the circumvention goods are produced in similar manners*”.⁸²

Haggie Scaw stated the following in its primary submission:

- The time taken to change tooling from producing six to eight strand wire rope, or vice versa, is similar to the time taken for changing to nine strand production.⁸³
- The introduction of the *Inno9* product has resulted in more instances of production and tooling changes for Scaw because there is a greater variety of products being made.⁸⁴
- That when considered in general terms, the processes of producing wire rope of different strands appears to be similar because they fit into “*the same family category*”.⁸⁵

Haggie Reid did not dispute that that the goods and circumvention goods are produced on the same production line in a similar manner.

Scaw outlined the differences in production between the goods and the circumvention goods.⁸⁶ Based on these differences the production sequence and processes of the circumvention goods closely resembles that of the goods, other than the requirement for additional bobbins and a different pre-former head.

The differences between eight and nine strand wire rope indicated in the production diagram⁸⁷ are that the circumvention goods require a different number of wires per strand and an additional bobbin to close the nine strand wire rope, hence the tooling adjustment.⁸⁸ This tooling adjustment is not a unique requirement to produce a nine strand wire rope, as switching production from six strand to eight strand wire rope would require a very similar production tooling adjustment.⁸⁹

Following the SEF Haggie Scaw reiterated the above points and referred to the MEMMES report in support of their claims.⁹⁰

From the information available, the Commission considers that nine strand wire rope is manufactured in the same premises as six and eight strand wire rope, using similar materials, with identical processes using the same machinery, although adjustments of tooling would be required when switching production to a wire rope with a different number of strands.

⁸² EPR document 14 at page 2.

⁸³ EPR document 5 at page 28.

⁸⁴ EPR document 5.

⁸⁵ EPR document 5 at page 22.

⁸⁶ Confidential Attachment 6.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ EPR document 24 at pages 32 to 35. As noted in chapter 4, the Commission has relied upon the direct evidence provided by BBRG and Haggie Scaw, rather than the views expressed in the MEMMES report.

Accordingly, given Haggie Scaw's statements and the limited production differences, the Commission is of the view that this supports the claim that there has been a slight modification of goods..

5.4.6 Differences in the cost to produce each good

The Regulation provides that the Commissioner may have regard to differences in the cost to produce each good when comparing the circumvention goods and the goods (subsection 48(3)(e)).

BBRG states that the circumvention goods cost slightly more to produce (by less than 5%) than the eight strand wire rope, and considers this to be minor.⁹¹

Haggie Reid asserted that Scaw was already able to manufacture nine strand wire rope in a smaller diameter, and in order to manufacture the circumvention goods, Scaw undertook research and development and invested in new tooling.⁹² Haggie Scaw argued that nine strand wire rope costs significantly more to produce, mainly due to material costs such as steel and grease, as well as more processing time.⁹³

Haggie Scaw described the process of manufacturing nine strand wire rope.⁹⁴ Haggie Scaw states that there are differences that result in relatively higher complexity, time and financial costs for the production of nine strand wire rope compared to the goods.⁹⁵ These differences are said to derive from:

- the use of more and thinner wire to produce the core, which must be relatively larger (this requires more raw material, bobbins and time);⁹⁶
- the use of different tooling (closers and pre-former heads);⁹⁷
- the requirement to change tooling more often resulting in more down-time in production;⁹⁸
- the use of more steel, more grease and increased costs due to reduced throughput, longer winding and closer loading times, more scrap and other processes.⁹⁹

The Commission sought and Scaw provided quarterly cost to make and sell (CTMS) information for both domestic and Australian sales.¹⁰⁰

The Commission has analysed the data provided by Scaw in figure 3a below, which illustrates the CTMS of six, eight and nine strand wire rope for the period from Q3/2017. The Commission found that the data did not support Haggie Scaw's claim that the circumvention goods are more expensive to make than the goods.

⁹¹ EPR document 14 at page 2.

⁹² EPR document 17 at page 11.

⁹³ EPR document 5 at page 16.

⁹⁴ EPR document 5 at pages 22-28.

⁹⁵ EPR document 5 at pages 22-28.

⁹⁶ EPR document 5 at page 24.

⁹⁷ EPR document 5 at page 25.

⁹⁸ EPR document 5 at page 28.

⁹⁹ EPR document 5.

¹⁰⁰ Confidential Attachment 7.

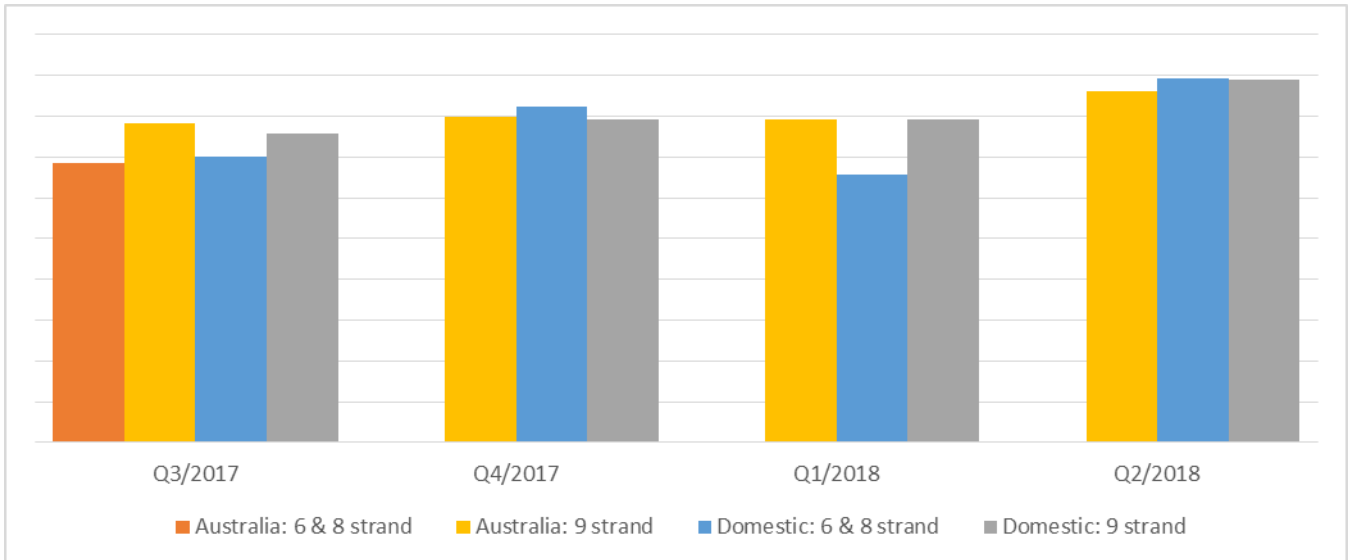


Figure 3a: Cost to make and sell (CTMS) per rope metre

Figure 3a shows that it was cheaper to produce the circumvention goods for both domestic sales and Australian exports in the fourth quarter of 2017 and the second quarter of 2018.

There is a slight increase in CTMS for the circumvention goods in the third quarter of 2017, which is the only period where both the goods and the circumvention goods were produced for export to Australia.

Scaw also 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 Q4/2017.¹⁰¹

Figure 3b shows increased material costs, comparing the production costs per metre for goods exported to Australia by diameter.¹⁰²

¹⁰¹ Confidential Attachment 7.

¹⁰² Figure 3b has been updated as the Commission unintentionally omitted one diameter in the corresponding figure in the SEF (Figure 3), shown here as Diameter 3. The Commission did not include one diameter of wire rope in the figure because that diameter represented a negligible number of sales of the circumvention goods (less than 4 per cent).

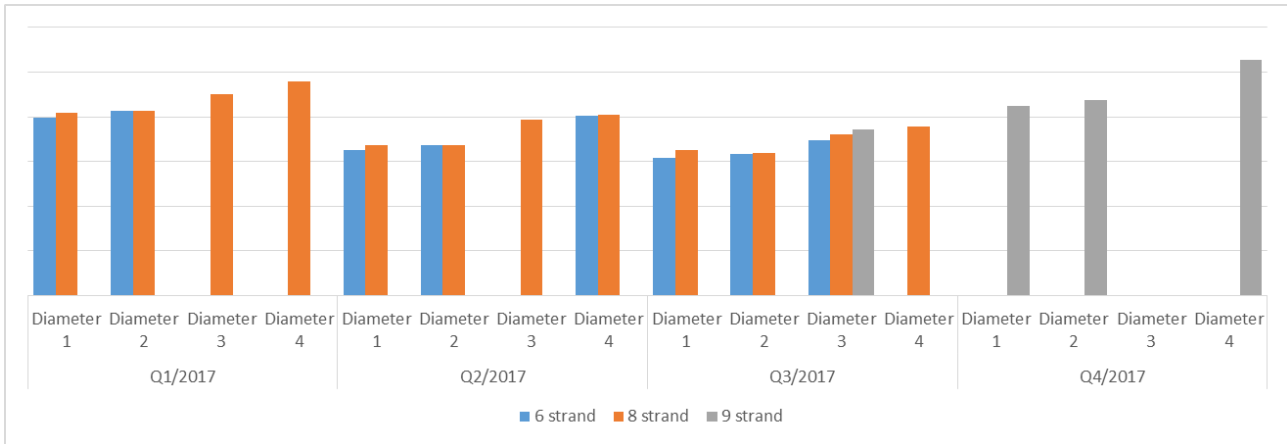


Figure 3b: Cost to make (CTM) per rope metre for wire rope exported to Australia

Directly comparable data between the goods and the circumvention goods for export to Australia is only available in Q3/2017 as Scaw ceased producing the goods in that period. For diameter 3 in Q3/2017, when there is directly comparable data, the Commission considers the cost to make the circumvention goods is not significantly more than that for the goods.

In response to the SEF, Haggie Scaw argued that their analysis¹⁰³ showed the cost difference between the production of the goods and circumvention goods was large and significant.¹⁰⁴

The Commission has revised the analysis in section 5.4.6 following the SEF after considering Haggie Scaw’s submission,¹⁰⁵ reflecting that Scaw produced both the goods and the circumvention goods in Q3/2017 before ceasing to produce the goods for export to Australia immediately afterwards.

The Commission considers that Haggie Scaw’s analysis is based on a comparison of all diameters of the goods with the circumvention goods. However, because the CTM data indicates that only one diameter of the circumvention goods was produced in Q3/2017, the Commission considers that it is more accurate to compare this diameter of nine strand wire rope with the same diameter of six and eight strand wire rope. Taking this view, the Commission considers the difference in CTM is small.

Based on the above analysis and the small difference in the cost to produce each good, this supports the claim that there is a slight modification of goods.

5.4.7 The cost of modification

The Regulation provides that the Commissioner may have regard to the cost of modification when comparing the circumvention goods and the goods (subsection 48(3)(f)).

¹⁰³ EPR document 24 at page 39.

¹⁰⁴ EPR document 24 at page 40.

¹⁰⁵ EPR document 21 at page 25. “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.”

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During the course of the inquiry the following claims were made in relation to the cost of modification:

- in their application BBRG claimed that the cost of modification for the circumvention goods when contrasted with the goods is not significant.¹⁰⁶
- Haggie Reid advised that Scaw was already able to manufacture nine strand wire rope, but in order to manufacture the *Inno9* product, Scaw undertook research and development and invested in new tooling, and that Scaw had a patent application pending on its nine strand wire rope;¹⁰⁷ and
- although Scaw was able to make nine strand wire rope (in different diameters) prior to its exports to Australia, Scaw submitted that the bobbin head needed larger bobbins for the purposes of making the nine strand wire rope for mining purposes.¹⁰⁸

Scaw provided the Commission with data outlining its research and development costs. In the SEF the Commission had compared the total value of these expenses with the total value of exports of the circumvention goods to Australia. The Commission also queried the inclusion of certain expenses that had not been verified. In response to the SEF, Haggie Scaw queried whether a comparison with the total export value of the circumvention goods was a relevant measure for the substantiality of the expenses, as well as the Commission's insistence on verifying certain costs of modification.¹⁰⁹

The Commission has revised its approach following the submissions in response to the SEF. The Commission has now considered the substantiality of these expenses by comparing them to the total cost to make and sell nine strand wire rope to the Australian market. The Commission considers this appropriate given the expenses are specifically in relation to the production of nine strand wire rope for the Australian market. This analysis is contained in **Confidential Attachment 7 – costs of modification**. The analysis shows that the research and development costs outlined by Scaw represent only a small percentage of the total cost to make and sell the circumvention goods during the inquiry period.¹¹⁰ In completing this analysis, the Commission has had regard to all expenses claimed by Scaw in the information provided, including the cost of the innovation patent. The Commission notes that this approach considers the costs to make and sell the circumvention goods during the inquiry period only; the research and development costs, however, may provide a benefit for a much longer period. In effect, the research and development costs will represent an even lower percentage of the total costs to make and sell than that calculated by the Commission.

Based on the above analysis the Commission finds that the cost of modification is quite small.

¹⁰⁶ EPR document 1 at page 8.

¹⁰⁷ EPR document 17 at page 11.

¹⁰⁸ EPR document 24 at page 40.

¹⁰⁹ EPR document 24 at page 40.

¹¹⁰ The Commission acknowledges that the research and development costs are fixed costs but considers this measure of substantiality useful for these purposes.

5.4.8 Customer preferences and expectations relating to each good

The Regulation provides that the Commissioner may have regard to customer preferences and expectations relating to each good when comparing the circumvention goods and the goods (subsection 48(3)(g)).

BBRG stated that the customer preferences and expectations relating to the circumvention goods and the goods the subject of the notice are the same.¹¹¹

5.4.8.1 Performance – claimed longer service life

Haggie Scaw claimed that the circumvention goods should have a longer service life due to improved resistance against abrasion and bending fatigue.¹¹² Haggie Scaw provided information and evidence regarding a number of factors and characteristics of the circumvention goods in support of this claim. Specifically in relation to the claim of a longer service life, Haggie Scaw provided contrasting evidence. On the one hand, the evidence provided by Haggie Scaw indicates that customers are well aware of the circumvention goods delivering a longer rope life.¹¹³ On the other hand, the evidence summarised in **Confidential Attachment 3** indicates otherwise.

Based on the contrasting pieces of evidence, the Commission considers that it is inconclusive as to whether the circumvention goods have a longer service life.

5.4.8.2 Performance – claimed loading capacity

Haggie Scaw claimed that the circumvention goods have a higher minimum breaking load (MBL) because of a greater fill factor than the goods.¹¹⁴

At the time of the SEF it appeared to the Commission that Haggie Scaw claimed a greater fill factor because of the presence of filler wires in three of six models of its *Inno9* product. The Commission queried that as a basis for Haggie Scaw's claim because it was not clear that Haggie Scaw imported those models with filler wires to Australia.¹¹⁵ The Commission understands that filler wires may provide support to the strands rather than directly contributing to strength.¹¹⁶

BBRG stated that there is very little difference in the fill factors of the circumvention goods and the eight strand wire rope imported by Haggie Scaw prior to measures being imposed.¹¹⁷ On that basis, and on the basis of Haggie Scaw's stated relationship between fill factor and MBL, BBRG asserted there would be little if any difference in breaking force.¹¹⁸

¹¹¹ EPR document 1 at page 8.

¹¹² EPR document 5 at page 33-34.

¹¹³ EPR document 5 at page 30.

¹¹⁴ EPR document 5 at page 18.

¹¹⁵ See SEF 483 at 5.4.8; see EPR document 22 at page 3 confirming this.

¹¹⁶ EPR document 24 at page 6.

¹¹⁷ EPR document 22 at page 3.

¹¹⁸ EPR document 22 at page 3.

In the SEF the Commission noted an article published by Haggie Scaw that concerned the reduced strength of nine strand ropes compared to six strand rope.¹¹⁹ BBRG considered that this article was relevant to the circumvention goods.¹²⁰ In the SEF the Commission understood that Haggie Scaw's position was that the article, published in 2005, was no longer current because the circumvention goods improved on the ropes in the article.¹²¹ Following the SEF Haggie Scaw argued that the article wasn't relevant to the circumvention goods because it concerned elevator ropes, which typically have a number of differences to the circumvention goods.¹²²

The Commission's assessment of the evidence concerning the performance of the circumvention goods is contained at **Confidential Attachment 3**.

Based on the above analysis, and the assessment of information contained in **Confidential Attachment 3**, the Commission considers that the evidence does not support Haggie Scaw's claim that the circumvention goods have an increased service life due to a greater fill factor and accompanying higher MBL.¹²³

5.4.9 The way in which each good is marketed

The Regulation provides that the Commissioner may have regard to the way each good is marketed when comparing the circumvention goods and the goods (subsection 48(3)(h)).

Haggie Scaw did not dispute BBRG's view that the marketing and distribution practices are the same for both the goods and the circumvention goods¹²⁴ and stated they "*do not switch customers and/or industries rapidly, and it would be a rather strange marketing strategy to simply start marketing new goods and services in entirely different manners*".¹²⁵

In the SEF the Commission considered that Haggie Reid had marketed nine strand wire rope in a manner that has only a slight difference to that of the goods and that small difference is no greater that would be expected when introducing a variant of an existing highly technical product such as the goods.

In response to the SEF Haggie Scaw claimed that the Commission's references to the circumvention goods being a "new" product and untested in the field were at odds with the Commission's finding that the circumvention goods were slightly modified.¹²⁶

For the purposes of clarity, the Commission considers that the fact that a product is marketed as new, as is the case with nine strand wire rope, does not preclude that product from being slightly modified.

¹¹⁹ SEF at page 28.

¹²⁰ EPR document 1, Non-confidential Attachment 6 at page 1.

¹²¹ SEF at page 29.

¹²² EPR document 24 at pages 13 to 16.

¹²³ EPR document 5 at page 18.

¹²⁴ EPR document 7 at page 11.

¹²⁵ EPR document 5 at page 29.

¹²⁶ EPR document 24 at page 42.

5.4.10 Channels of trade and distribution for each good

The Regulation provides that the Commissioner may have regard to the channels of trade and distribution for each good when comparing the circumvention goods and the goods (subsection 48(3)(i)).

BBRG claims that the goods and the circumvention goods have the same distribution channels to market.¹²⁷ Haggie Scaw agreed that distribution practices were the same for the goods and the circumvention goods.¹²⁸

Accordingly the Commission considers that the goods and the circumvention goods have the same trade and distribution channels.

5.4.11 Patterns of trade for each good

The Regulation provides that the Commissioner may have regard to the patterns of trade for each good when comparing the circumvention goods and the goods (subsection 48(3)(j)).

In the SEF the Commission observed that changes in the patterns of trade, which was described as a change in export volume of the goods and circumvention goods, were consistent with circumvention activity.

Figure 4 below shows how sales of the goods by Scaw into Australia ceased, and were replaced by sales of the circumvention goods, shortly after the PAD was issued on 16 August 2017.

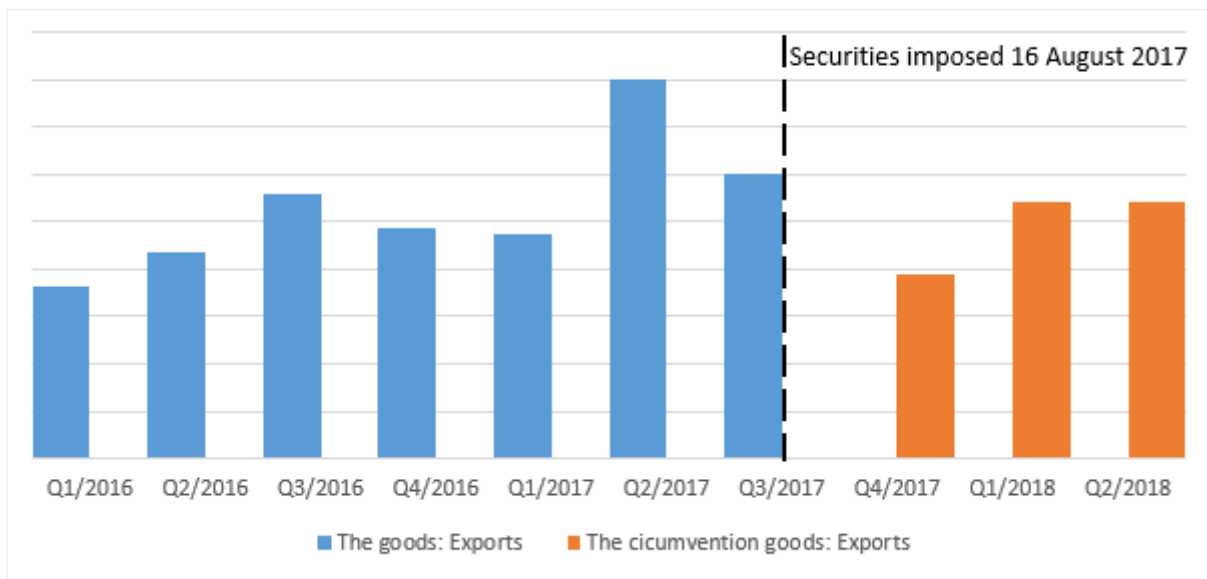


Figure 4: Scaw sales to Haggie Reid of the goods and the circumvention goods

Following the SEF Haggie Scaw submitted that it developed and exported the circumvention goods to Australia to overcome the challenge presented by the measures that were imposed on the goods in 2017.¹²⁹ It chose to attempt to introduce and market

¹²⁷ EPR document 1 at page 8.

¹²⁸ EPR document 17 at page 12.

¹²⁹ EPR document 26 at page 7.

the circumvention goods rather than attempt to sell the goods (which were required to be priced higher due to the dumping duties).¹³⁰

Haggie Scaw argued that it realised in developing the circumvention goods that the circumvention goods must be more than a slight modification of the goods.¹³¹ Haggie Scaw argued in any event that any intention to avoid dumping duties should not play any part in the inquiry; rather the assessment is confined to whether the circumvention goods are slightly modified. However Haggie Scaw accepted that the factors that the Commission may have regard to in subsection 48(3) of the Regulations are not exclusive.¹³² In a further submission in response to the SEF, Haggie Scaw argued that the Commission erred when it found that the patterns of trade and changes in export volumes and marketing were indicative of a circumvention activity.¹³³

The Commission considers that Figure 4 illustrates a sudden switch from exports of the goods to exports of the circumvention goods, which coincided with the imposition of measures on the goods, and this supports a degree of interchangeability between the goods and the circumvention goods which is indicative of a slight modification of the goods.

5.4.12 Changes in the pricing of each good

The Regulation provides that the Commissioner may have regard to changes in pricing for each good when comparing the circumvention goods and the goods (subsection 48(3)(k)).

During the course of the inquiry the following claims were made in relation to changes in the pricing of each good:

- BBRG claimed that the pricing of the circumvention goods is similar to that of the goods “*when taking into account raw material costs since January 2016 and the additional costs of manufacturing*” the circumvention goods;¹³⁴ and
- Haggie Reid claimed that the the circumvention goods cost significantly more to produce, thus are more expensive for end users to purchase, and that they anticipated higher product profitability on the basis of the *Inno9* being a unique product, not manufactured by Scaw’s competitors, and providing greater value through improved performance.¹³⁵

The Commission considered the data provided by both Scaw and Haggie Reid. Figure 5 demonstrates the price movements of the circumvention goods with a comparable six or eight strand model sold by Haggie Reid to Australian end users. The most sold nine strand model is Model 1. The price for this model has increased by 8.4%.

¹³⁰ EPR document 26 at page 7.

¹³¹ EPR document 26 at page 7.

¹³² EPR document 26 at page 9.

¹³³ EPR document 24 at page 43.

¹³⁴ EPR document 14 at page 2.

¹³⁵ See also EPR document 4 at pages 27-29.

PUBLIC RECORD

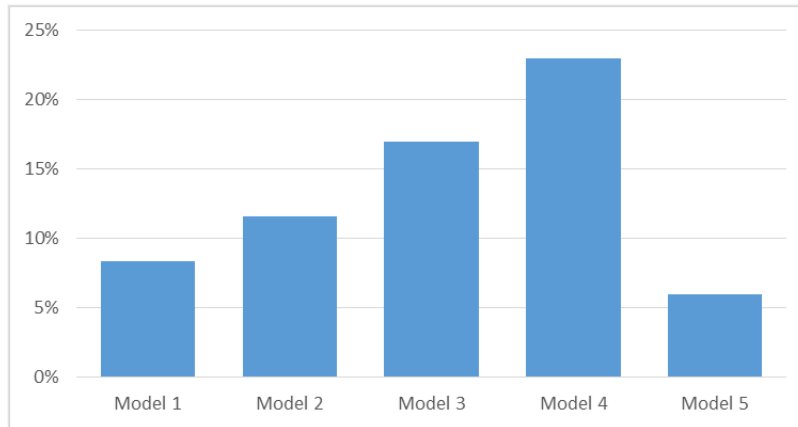


Figure 5: Price movements by comparable configuration sold to Australian end users by the metre

Following the SEF, Haggie Scaw recreated Figure 5 and submitted that the Commission's finding that changes in the pricing of the circumvention goods was not significant is unfounded. The Commission revisited the data and confirmed that for Model 1, which represented a significant proportion of the total volume of sales of nine strand wire rope by Haggie Reid to the Australian market, the change in price was 8.4%. Models 3 and 4, each of which had a higher change in price, represent approximately 10% of Haggie Reid's sales of nine strand wire rope to the Australian market.

The Commission has analysed purchase orders and invoices between Haggie Reid and Scaw. The Commission has also analysed purchase orders and invoices between Haggie Reid and its customers. Figure 6 below shows that the average selling price of the circumvention goods and the goods is similar. In order to compare like with like Figure 6 does not include prices of compacted and plastic coated wire ropes. In any event compacted and plastic coated wire ropes account for a small number of sales.

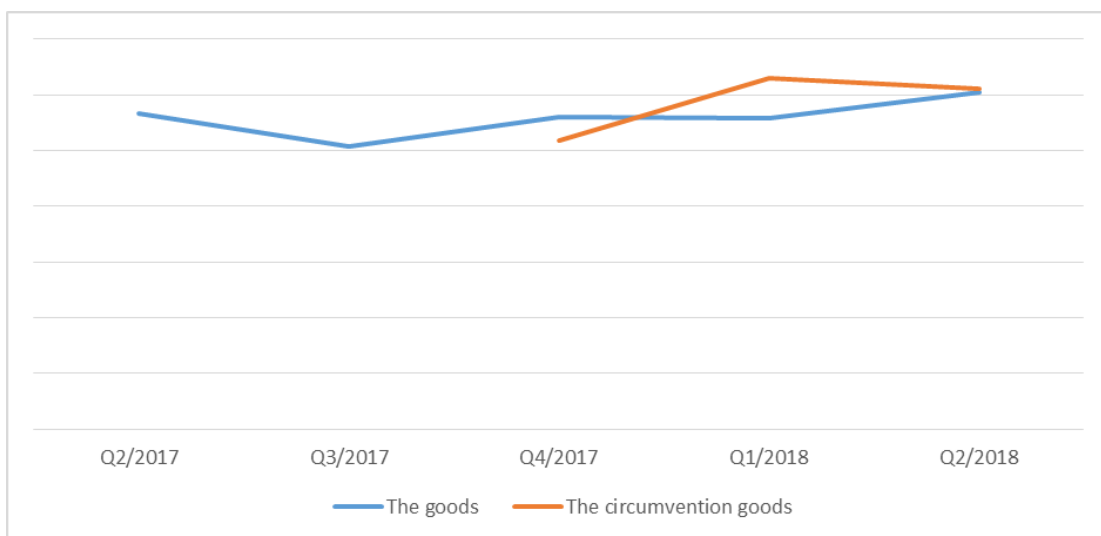


Figure 6: Weighted average selling price in Australia per metre

Following the SEF, Haggie Scaw queried the usefulness of Figure 6 for two reasons. The first reason related to whether the Commission had considered the "like for like" comparability of product mix and customer identity. The second is due to the low volume of sales of either the goods or the circumvention goods in certain periods. The Commission revisited the data underpinning Figure 6 and maintains that Figure 6 provides a useful comparison of the overall price of the goods when compared to the circumvention goods,

notwithstanding that the volume of sales of the goods and circumvention goods is low in some periods.

The Commission analysed Haggie Reid’s wire rope selling prices by the metre. Figure 7 compares the price movements from the goods to the circumvention goods by diameter (excluding prices of plastic coated and/or compacted wire ropes).¹³⁶ Figure 7 indicates that the circumvention goods are cheaper than the goods when comparing the most sold diameter (diameter 1) and diameter 4. There were small price increases across the other two diameters shown.

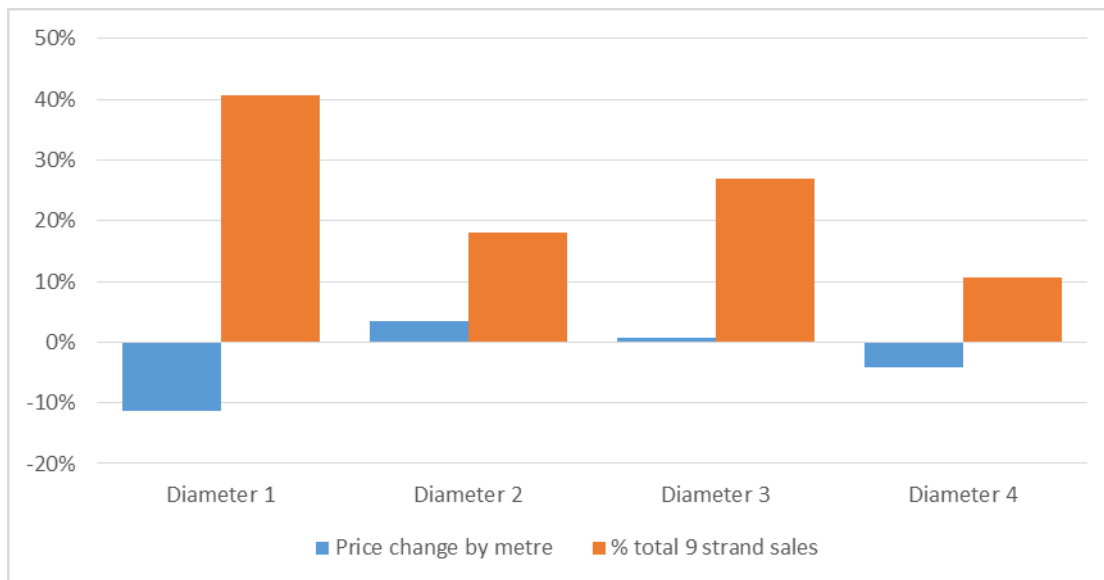


Figure 7: Price movements in Australia from the goods to the circumvention goods by metre

Following the SEF Haggie Scaw recreated Figure 7 and again stated that the Commission’s finding that changes in the pricing of the circumvention goods was not significant was unfounded. The Commission revisited its analysis and confirmed that in relation to diameters 1 and 4, the circumvention goods were cheaper. In relation to the other models, there were minimal price increases.

In the SEF the Commission included Figure 8, which sought to illustrate the changes in weighted average prices of the goods to the circumvention goods by rope type/usage. Haggie Scaw attempted to recreate this chart in response to the SEF, and stated that the Commission’s finding that changes in the pricing of the circumvention goods was not significant was unfounded. The Commission has reconsidered the approach in Figure 8 of the SEF and does not consider it useful for this comparative exercise. Figure 8 from the SEF did not take into account differences in the model or diameter of the rope, while Figure 7 specifically takes this into consideration. In the SEF the Commission noted that Figures 5, 6 and 7 were the most reliable metrics in determining the differences in the price of each good.

¹³⁶ This graph has been updated from the corresponding graph in the SEF(Figure 7). The graph now uses the most recent weighted average selling price per metre of six and eight strand wire ropes, and compares these prices against a weighted average selling price per metre of the nine strand wire ropes over the period. This method accounts for the change in the price of rod used in producing wire rope, which increased sharply from the beginning of the investigation period.

The above analysis indicates as follows:

- the average selling price of the goods and circumvention goods is similar;
- when considering specific models of the circumvention goods with a comparable model of the goods, there has been a moderate change in price (noting that for other models, which represent a minor portion of total exports of the circumvention goods, the change in price is higher); and
- when considering specific diameters of the goods and circumvention goods, the circumvention goods were either cheaper or had small price increases.

5.4.13 Changes in the export volumes for each good

The Commission has considered this factor in the discussion regarding patterns of trade for each good (refer to section 5.4.11 above).

5.4.14 Tariff classifications and statistical codes for each good

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)).

Haggie Scaw argues that different statistical codes can be indicative of a difference in the goods.¹³⁷

In the SEF, the Commission found that imports of circumvention goods are classified under the same tariff subheading with a different statistical code, due to the additional strand in the circumvention goods.

That finding was not made in isolation but was based on the broader finding in section 5.7 of the SEF (and affirmed in section 5.7 of this report) that the circumvention goods were not like goods only because of the additional strand. Accordingly the circumvention goods came within the different statistical code only because of the slight modification.

The Commission further notes that the tariff subheading is identical and the only difference is in the statistical codes; in light of the purpose of statistical codes that is indicative of a slight modification. The purpose of statistical codes is stated on the ABF website in the following terms to be for statistical requirements of users:¹³⁸

[...] These codes are not incorporated in the legal tariff but are introduced and maintained to meet the statistical requirements of users of import data.

5.4.15 Other factors

The Regulation provides that the Commissioner may have regard to any factor that the Commissioner considers relevant when comparing the circumvention goods and the goods (not only those factors in subsections 48(3)(a) to (m)).

¹³⁷ EPR document 24 at page 47.

¹³⁸ *Combined Australian Customs Tariff Nomenclature and Statistical Classification* at page 2 at www.abf.gov.au.

5.4.15.1 The circumvention goods need not have been modified after the goods were manufactured

Haggie Scaw argued that its nine strand wire rope was an entirely new product and an entirely new product could not be a slight modification of a product already subject to measures.¹³⁹ Haggie Scaw considers that it is only when a slight modification is made to the actual goods subject to measures that the modified product can be a circumvention good. On that basis, Haggie Scaw argues, the only basis for finding a slight modification of Haggie Scaw's eight strand wire rope was if something additional had been done to that wire rope to turn it into something different.

The Commission observes that the argument raised by Haggie Scaw was made to the ADRP during ADRP review 2016/38. The ADRP disagreed with that argument, relying instead on legal advice that took a different view of the meaning of section 48 of the Regulation.¹⁴⁰ That legal advice stated, among other things, that the argument now made by Haggie Scaw was artificial and would open up a gap in the anti-circumvention regime that could be exploited by someone seeking to circumvent the notice, which would be contrary to the purpose of the anti-circumvention provisions in the Act and the Regulation.¹⁴¹ The Commission disagrees with Haggie Scaw's argument in this case for the same reasons.

5.4.15.2 Relationship of wire rope strength and strand metallic area

In the REQ,¹⁴² Scaw asserted that the circumvention goods are constructed to meet and exceed the Australian Standard AS3569, the Australian standard for steel wire rope which is used for reference by various stakeholders to ensure the appropriate selection and application of wire ropes.¹⁴³

Haggie Scaw claimed that: its nine strand wire rope could bear higher loads because of its larger core which gives a higher ratio of metallic cross section; and the strand metallic area is not necessarily a determinative factor in strength because the core also contributes to strength.¹⁴⁴

In the SEF the Commission questioned Haggie Scaw's claim given that the strand metallic area also has an impact on strength and that the circumvention goods have less strand metallic area than the goods. The Commission sought to quantify its question by reference to the breaking force component test equation at section 7.4.4 in Australian Standard AS3569.

¹³⁹ EPR document 10 at page 1; EPR document 20 at pages 3 to 4.

¹⁴⁰ *ADRP Report No 38 – Zinc Coated (Galvanized) Steel exported from The Republic of Korea, Taiwan and The People's Republic of China* at [84] to [98].

¹⁴¹ The legal advice relied on by the ADRP is available on the ADRP website on the case page for ADRP review 2016/38.

¹⁴² EPR document 4 at page 30.

¹⁴³ Australian Standard AS3569 – 2010 Steel Wire Ropes, product specification.

¹⁴⁴ EPR document 17 at page 10.

Following the SEF Haggie Scaw disputed that the equation in AS3569 applied to the circumvention goods¹⁴⁵ and to the goods.¹⁴⁶ BBRG stated that the equation applies to the goods and the circumvention goods.¹⁴⁷

The Commission considers that it is not in dispute that both the core and strands of a wire rope contribute to its strength. The contribution of the core and strands will vary according to the respective strengths of the core and strands, notwithstanding that the parties might differ on how to calculate the precise relationship of respective strengths of core and strands to the overall strength of a rope.

The Commission considers that these differing views supports the Commission's conclusion that that the evidence concerning differing performance of the goods and the circumvention goods is inconclusive. The further evidence in relation to this point, and the Commission's assessment of that evidence, is discussed at section 5.4.8 above.

5.4.15.3 Claim of "administrative precedent" indicating that the circumvention goods are not slightly modified

Haggie Scaw claims that "administrative precedent" imports an evaluation that must be made as to whether goods are the "same", "almost the same" or more than "slightly different".¹⁴⁸ Haggie Scaw appears to claim that this was the Commission's approach in anti-circumvention inquiries 291, 290 and 298.¹⁴⁹

The Commission considers that the determination of whether goods have been slightly modified requires a factual assessment, pursuant to subsections 48(2) and 48(3) of the Regulation, based on the facts and evidence before it in any particular case. The Commission also considers it is not bound by findings made in the previous cases referred to by Haggie Scaw and notes that these cases concern completely different categories of goods.

For these reasons, the Commission does not consider that any administrative precedent supports a finding that the goods are not slightly modified.

5.4.16 Conclusion

The Commission has found, having considered the factors to which the Commission may have regard when assessing whether there has been a slight modification of the goods (subsection 48(3) of the Regulation):

- the goods have the same general physical characteristics;
- the goods have the same end use;
- the goods and circumvention goods are interchangeable;
- the process used to produce each good is similar;

¹⁴⁵ EPR document 24 at pages 9 to 11.

¹⁴⁶ EPR document 24 at footnote 28.

¹⁴⁷ EPR document 24 at page 10.

¹⁴⁸ EPR document 10 at page 3.

¹⁴⁹ EPR document 10 at page 4.

- the difference in the cost to produce each good is small;
- the channels of trade and distribution for each good are the same;
- the patterns of trade for each good illustrate a high degree of interchangeability; and
- following the imposition of measures on the goods in 2017, exports of the goods ceased and export volumes of the circumvention goods commenced.

Based on the overall assessment of the factors outlined in subsection 48(3) of the Regulation, as described above, the Commissioner considers that the circumvention goods have been slightly modified before exportation.

Accordingly, the requirements of subsection 48(2)(b) of the Regulation are satisfied.

5.5 The use or purpose of the circumvention goods was the same before and after they were slightly modified

5.5.1 The Commission's finding

The criterion in subsection 48(2)(c) of the Regulation is that the use or purpose of the circumvention goods is the same before and after they were slightly modified.

At section 5.4.3 the Commission assessed that there was no difference between the end use or purpose of the circumvention goods and the goods the subject of the notice. The Commission's assessment at section 5.4.4 also concluded that both the circumvention goods and the goods the subject of the notice were interchangeable. This was further supported by the finding on patterns of trade at section 5.4.11 where it is demonstrated that imports of the circumvention goods directly replaced the goods the subject of the notice.

The Commission considers that the end use or purpose of the circumvention goods are the same before and after the slight modification. Accordingly, the requirement of subsection 48(2)(c) of the Regulation is satisfied.

5.6 Had the circumvention goods not been slightly modified they would have been subject to the notice

5.6.1 The Commission's finding

The criterion in subsection 48(2)(d) of the Regulation is that had the circumvention goods not been slightly modified, they would have been the subject of the notice.

Based on the analysis in section 3.2 (above) the Commission has found that the circumvention goods would have been the subject of the notice if they weren't slightly modified during the production process.

The goods the subject of the notice are stranded wire rope not greater than eight strands, therefore the circumvention goods are specifically excluded from the current measures.

Accordingly, the Commission concludes that the requirement of subsection 48(2)(d) of the Regulation is satisfied.

5.7 Section 8 of the Dumping Duty Act does not apply to the circumvention goods

The criterion in subsection 48(2)(e) of the Regulation is, for current purposes, that section 8 of the Dumping Duty Act does not apply to the export of the circumvention goods to Australia.¹⁵⁰

The original dumping duty notice under subsection 269TG(2) declared that section 8 of the Dumping Duty Act applies to the export to Australia of the goods under consideration in the original investigation and to the export to Australia of like goods.¹⁵¹ Accordingly the Commission must assess whether the circumvention goods are like goods.

The Commission considers, on balance, that the circumvention goods are not like goods because of the additional strand and so are not subject to the original dumping duty notice under subsection 269TG(2). Accordingly, section 8 of the Dumping Duty Act does not apply to the export of the circumvention goods to Australia. On that basis the requirement of subsection 48(2)(e) of the Regulation is satisfied.

5.8 Submissions considered following the SEF

5.8.1 Fill factor and filler wires

Both BBRG and Haggie Scaw made submissions on the difference between the terms fill factor and filler wires.¹⁵² Haggie Scaw claims that the Commission had an incorrect understanding of these terms.

The Commission has reviewed its discussion of these terms in section 5.4.8 of the SEF and accepts Haggie Scaw's analysis of the difference between fill factor and filler wires. However, for the reasons set out in section 5.4.8 of this report the Commission remains of the view that the evidence concerning customer preferences and expectations relating to the goods and the circumvention goods is inconclusive.

5.8.2 Strand metallic area and strength

Haggie Scaw made submissions concerning the impact on rope strength of strand metallic area and the independent wire rope core.¹⁵³ These submissions were to the effect that the strands and core both contribute to rope strength and that their respective contributions will vary depending on their respective strengths. Haggie Scaw took exception to the use by the Commission and BBRG of an equation in AS3569 that quantifies the relationship between rope strength and the strengths of the strands and the core.¹⁵⁴ Haggie Scaw

¹⁵⁰ The criterion in subsection 48(2)(e) of the Regulation is that sections 8 (dumping duty) or 10 (countervailing duty) of the Dumping Duty Act does not apply, however section 10 does not apply as there are no countervailing duties on wire rope imported to Australia. The Commission has not considered section 10 further in relation to this case.

¹⁵¹ ADN No. 2012/172.

¹⁵² EPR documents 22 and 24.

¹⁵³ EPR document 24 at pages 7 to 11.

¹⁵⁴ EPR document 24 at page 10 and footnote 28.

considers that the equation should apply to neither the goods nor the circumvention goods.¹⁵⁵

The Commission’s discussion of strand metallic area and parties’ submissions is at section 5.4.15.2.

5.8.3 Graphs in the SEF omitted data

Haggie Scaw argued the Commission had been selective in choosing which diameters to present in certain graphs in the SEF.¹⁵⁶ Haggie Scaw claimed that this demonstrated lack of objectivity or coincidental error.

The Commission notes that for three of the graphs identified by Haggie Scaw the data was not shown in terms of diameters; that is clear from the labelling of those graphs. For the other graphs the Commission did not include one diameter of wire rope in the figure because the models of that diameter were not considered to be reliably comparable (refer to section 5.4.4.2 above) and represented a negligible number of sales of the circumvention goods (less than 4 per cent). The Commission inadvertently omitted data for one diameter in Figure 3 of the SEF, which has been corrected in this report (Figure 3b of this REP).

The Commission addresses the number of diameters shown in the graphs in the SEF in the table below. This corresponds to the table shown in Haggie Scaw’s submission.¹⁵⁷

Figure in the SEF	Haggie Scaw comment	Commission comment
Figure 1	Data relating to all five rope diameters are illustrated	Data is not shown in terms of diameters; see labelling of the graph
Figure 2	Data relating to only four rope diameters are illustrated	Data not included for one diameter because that diameter was considered unreliable for comparison and represented negligible sales of the circumvention goods
Figure 3	Data relating to only three rope diameters are illustrated	Data not included for one diameter because that diameter was considered unreliable for comparison and represented negligible sales of the circumvention goods; inadvertently omitted data for one other diameter – corrected in this report
Figure 5	Data relating to all five rope diameters are illustrated	Data is not shown in terms of diameters; see labelling of the graph
Figure 7	Data relating to only four rope diameters are illustrated	Data not included for one diameter because that diameter was considered unreliable for comparison and represented negligible sales of the circumvention goods
Figure 8	Data relating to only three rope diameters are illustrated	Data is not shown in terms of diameters; see labelling of the graph

Table 4 – Commission comments on Haggie Scaw claims regarding figures in SEF 483

¹⁵⁵ EPR document 24 at page 10 and footnote 28.

¹⁵⁶ EPR document 24 at page 12.

¹⁵⁷ EPR document 24 at pages 12 to 13.

5.8.4 Haggie Scaw article concerning nine strand ropes

Haggie Scaw disagreed with BBRG that statements concerning the strength of nine strand ropes in an article published by Haggie Scaw were relevant to the circumvention goods.¹⁵⁸ Haggie Scaw argued that its statements in the article did not apply because the article concerned elevator ropes, which Haggie Scaw argued typically have key differences to the circumvention goods.¹⁵⁹

The Commission considers that the extent to which learnings from one rope type can be carried to another may be a matter on which different rope makers, here BBRG and Haggie Scaw, may reasonably differ. The Commission considers that the evidence concerning differences in the performance of the goods and the circumvention goods is inconclusive for reasons discussed at section 5.4.8 of this report.

5.8.5 Patent application

Haggie Scaw observed that the Commission incorrectly stated in the SEF that its patent application did not include hoist rope use.¹⁶⁰ The Commission has reviewed the patent application and accepts Haggie Scaw's submission.

5.8.6 MEMMES report

Submissions concerning the MEMMES report are addressed in chapter 4 of this report.

5.8.7 Claim of apprehended bias

Haggie Scaw claims that there is an alternative explanation for the Commission's treatment of the MEMMES report.¹⁶¹ Haggie Scaw claims that the Commission's treatment of the MEMMES report and other evidence in the inquiry gives rise to an apprehension of bias.¹⁶²

Haggie Scaw relies for its claim of apprehended bias on a test stated by Kirby J in *Minister for Immigration v Jia Legeng* [2001] HCA 17.¹⁶³ On the basis of that test, and of evidence given by the Commissioner in 2014 in an inquiry by the Standing Committee on Agriculture and Industry (the Committee), Haggie Scaw claims that a reasonable person would apprehend that the Commissioner was biased.¹⁶⁴ Haggie Scaw takes issue with statements made by the Commissioner to the Committee concerning the Commissioner's views on the slight modification provisions in the regulation. Those statements included statements that circumvention was an insidious practice that the Commissioner was determined to stop, a paraphrase of the legislative test for slight modification and an opinion that the policy objective of the slight modification was clear.¹⁶⁵ Haggie Scaw was

¹⁵⁸ EPR document 24 at pages 13 to 16.

¹⁵⁹ See for example EPR document 24 at page 15.

¹⁶⁰ EPR document 24 at page 17.

¹⁶¹ EPR document 26 at page 6.

¹⁶² EPR document 26 at page 10.

¹⁶³ EPR document 26 at page 6.

¹⁶⁴ EPR document 26 at page 10.

¹⁶⁵ EPR document 26 at pages 8 to 9.

particularly concerned that certain statements made by the Commissioner included words and phrases that were not in the regulation.¹⁶⁶

Haggie Scaw also argues that apprehended bias emerges from the Commission preferring evidence other than that given by Haggie Scaw and other claimed failures by the Commission.¹⁶⁷

5.8.7.1 Commission's finding on apprehended bias

As required by subsection 269ZDBG(2), in making his recommendations to the Minister the Commissioner has had regard to the following:

- the application for the inquiry;
- any submissions received prior to and following the publication of the SEF; and
- the SEF.

The Commissioner has also had regard to other relevant information as outlined in this report.

The Commissioner rejects that his treatment of the MEMMES report was due to an apprehension of bias. The Commissioner's explanation for his treatment of the MEMMES report is discussed in chapter 4.

The Commissioner also rejects that any statement made by him up to five years ago in different forums, and for different purposes, influenced any findings he has made in this inquiry. The weight placed on any relevant factors by the Commissioner was informed only by the facts and evidence presented before him for the purposes of this inquiry.

¹⁶⁶ EPR document 26 at pages 8 to 9.

¹⁶⁷ EPR document 26 at page 10.

6. RECOMMENDED ALTERATIONS TO NOTICES

6.1 Legislative framework

Section 269ZDBH details the Minister's powers in relation to an anti-circumvention inquiry. Subsection 269ZDBH(1) provides that the Minister may declare alterations to the notice. Without limiting subsection 269ZDBH(1), subsection 269ZDBH(2) provides that the alterations may be of the following kind:

- a) the specification of different goods that are to be the subject of the original notice;
- b) the specification of different foreign countries that are to be the subject of the original notice;
- c) the specification of different exporters that are to be the subject of the original notice;
- d) in relation to existing exporters that are the subject of the original notice--the specification of different variable factors in respect of one or more of those exporters;
- e) in relation to exporters that are to be the subject of the original notice--the specification of variable factors in respect of those exporters.

6.2 BBRG's proposed alterations

BBRG's application proposed that the original notice be extended to cover the circumvention goods described in the following:

Stranded wire rope, alloy or non-alloy steel, whether or not impregnated, having both of the following:

- *No more than 10 strands;*
- *Diameter not less than 58mm and not greater than 200mm,*

with or without attachments.

6.3 Commissioner's recommendation

Based on the finding described in chapter 5 of this report, namely that a circumvention activity has occurred, the Commissioner recommends that the Minister alter the notice relating to wire rope from South Africa to include the circumvention goods, pursuant to subsection 269ZDBH(1).

The Commissioner recommends that the notice be altered to include measures at the rate applicable to Scaw and all other exporters¹⁶⁸ from South Africa on exports of nine strand wire rope.

¹⁶⁸ The Commission notes that during the original investigation period Scaw was the only South African exporter of the goods to Australia and during the inquiry period for this anti-circumvention inquiry, the only South African exporter of the circumvention goods to Australia.

6.3.1 Goods description

The Commission’s analysis of imports of the circumvention goods established that the majority of these goods were exported to Australia by Scaw from South Africa in diameters that are those already captured in the goods description. The only difference that allows the circumvention goods to fall outside the scope of the goods description is that the circumvention goods are produced with an additional strand.

The Commission recommends that the description of the goods subject to the notice, being the goods to which the Minister declared that section 8 of the Dumping Duty Act applies, be altered to include wire ropes with no more than nine strands. The Commission considers this is preferable on the basis that all of the evidence before the Commission applies to nine strand wire rope only.

As a result, the Commission recommends that the goods description in the notice made under subsection 269TG(2) be altered to read as follows:

Stranded wire rope, alloy or non-alloy steel, whether or not impregnated, having both of the following:

- *Not greater than 9 strands;*
- *Diameter not less than 58mm and not greater than 200mm,*

with or without attachments.

The goods excluded from the measures would consequently be amended to read as follows:

- *stranded wire rope that is stainless steel as defined under Note (e) “Stainless steel” to the Tariff;*
- *stranded wire rope with more than 9 strands, regardless of diameter; and*
- *stranded wire rope less than 58mm or greater than 200mm in diameter, regardless of the number of strands.*

Exports to Australia from South Africa that fall within the tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995* (Customs Tariff) specified below would be affected by the measures.

Tariff subheading	Statistical code	Description	Unit
7312.10.00: Stranded wire, ropes and cables	91	...Of a diameter exceeding 50 mm but not exceeding 100 mm	Kilograms (kg)
...Ropes and cables, containing not more than eight strands, of alloy or non-alloy steel	92	...Of a diameter exceeding 100 mm	Kilograms (kg)
7312.10.00: Stranded wire, ropes, cables, plaited bands, slings and the like, of iron or steel, not electrically insulated	93	Ropes and cables containing more than eight strands, of alloy or non-alloy steel	Kilograms (kg)

6.3.2 Form of measures

The form of anti-dumping measures imposed on wire ropes from South Africa on the notice is the combination duty method.

PUBLIC RECORD

The Commission's *Guideline on the Application of Forms of Dumping Duty* outlines that the combination duty method is suitable in situations to assure the effectiveness of the measures where there is a likelihood of price manipulation or circumvention and in the presence of complex company structures.¹⁶⁹

The Commission considers that circumvention activity engaged in by Scaw, as evidenced in this inquiry, heightens the risk of future anti-circumvention activities.

In addition, the Commission notes its findings in REP 401. In that report, the Commission found that Scaw's complex company structure and non-arms length dealings between the exporter and importer supported the imposition of the combination duty method. The Commission has not been given reason to depart from these findings and, as a result, considers they are relevant for the purposes of this inquiry.

For these reasons, the Commission recommends that the form of measures be unchanged from the combination duty method.

¹⁶⁹ Commissions Guideline on the Application of Forms of Dumping Duty at page 7, available at www.industry.gov.au.

7. DATE OF EFFECT

7.1 Legislative provisions

Subsection 269ZDBH(1)(b) requires that, when making a declaration that an original notice is to be altered, the Minister's declaration must specify the date from which those changes take effect.

Subsection 269ZDBH(8) provides that, when specifying a date in a declaration under (1)(b), the Minister is not able to specify a date earlier than the date of publication of the public notice of initiation of an anti-circumvention inquiry.

7.2 Recommended date of effect of changes to original notices

To ensure the alteration to the original notice provides an effective remedy to the injurious effects caused by the circumvention behaviour identified in this inquiry, it is necessary to alter the original notice in such a way that the changes are applied both retrospectively and prospectively.

The retrospective element of the recommended change to the notice in this case recognises that circumvention activity was found to have occurred since 2017.

The Commissioner recommends that for the purposes of the Act and Dumping Duty Act the alterations specified in the declaration be taken to have been made to the notice with effect on and after the date of the publication of the SEF, being 11 February 2019.

The Commission notes that the date of effect for the retrospective application of the alteration to the original notice has changed since SEF 483. In the SEF the Commission proposed the alteration to the original notice apply retrospectively from 6 July 2018 (the date of initiation of the inquiry). The Commission has since revised this date to the date of publication of the SEF.

Given the complexity of this inquiry and the highly contested nature of the claims of slight modification, the Commissioner considers that in this case it is appropriate to apply retrospective measures to the date of publication of the SEF. The publication of the SEF provided notice to interested parties of the Commissioner's preliminary views including the Commissioner's view that a circumvention activity had occurred and the potential for retrospective application of the notice.

8. ATTACHMENTS

Non-Confidential Attachment 1	Report from the Mining Electrical and Mining Mechanical Engineering Society (MEMMES)
Confidential Attachment 1	Response from mining company
Confidential Attachment 2	Haggie Scaw promotional material
Confidential Attachment 3	Interchangeability
Confidential Attachment 4	All data analysis
Confidential Attachment 5	Haggie Scaw's performance testing documents
Confidential Attachment 6	Scaw 8 and 9 strand production differences
Confidential Attachment 7	Raw CTMS data
Confidential Attachment 8	Costs of modification
Confidential Attachment 9	Haggie Reid sales data
Confidential Attachment 10	CRE data