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NON-CONFIDENTIAL

Attention: Ms Jaclyne Fisher

Panel Member
Anti-Dumping Review Panel
Department of Industry, Innovation and Science
10 Binara Street
CANBERRA CITY ACT 2601

By email: adrp@industry.gov.au

Dear Ms Fisher,

**Anti-Dumping Measures on Steel Pallet Racking exported from the People's Republic of China and Malaysia: Anti-Dumping Notice (ADN) No. 2019/45
Submissions to the Anti-Dumping Review Panel**

1. We refer to the Notice under s. 269ZZI of the *Customs Act 1901* (Cth) (the **Act**), dated 28 June 2019, published by the Anti-Dumping Review Panel (**ADRP**) advising of their intention to conduct a review of the decision made by the Minister for Industry, Science and Technology (the **Minister**) in respect of imposing anti-dumping measures on steel pallet racking exported from the People's Republic of China and Malaysia and contained within the Anti-Dumping Notice No. 2019/45 (the **Reviewable Decision**).
2. The Reviewable Decision is the outcome of Investigation number 441 (the **Investigation**) by the Anti-Dumping Commission, overseen by the Commissioner of the Anti-Dumping Commission (the **Commissioner**).
3. The purpose of this letter is to provide submissions to the ADRP for and on behalf of Paracella Pty Limited ACN 626 034 008, trading as 'Abbott Storage Systems' ABN 33 525 899 077 (**Abbott**), who is an interested party and an applicant for the review of the Reviewable Decision.

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Ground 1: The making of the Reviewable Decision was an improper exercise of power as the Minister erred in deciding there are goods or 'like goods' being dumped and causing material injury to the Australian industry. The goods the subject of the notice do not exist in the Australian market and are unable to be manufactured in Australia.

4. The goods the subject of the Investigation that is the basis for the Reviewable Decision are described as follows:

'Steel pallet racking, or parts thereof, assembled or unassembled, of dimensions that can be adjusted as required (with or without locking tabs and/or slots, and/or bolted or clamped connections), including any of the following - beams, uprights (up to 12m) and brace (with or without nuts and bolts).'

5. Goods of this description do not exist, in Australia or elsewhere. For this reason, the Investigation and consequent Reviewable Decision is fundamentally flawed.
6. The '*dimensions*' of any steel pallet racking system and its component parts (beams and uprights etc) are determined prior to manufacture and are unchangeable once manufactured, unless re-engineered. As acknowledged by the Minister in the Public Record Findings relating to the Investigation, '*adjustable racking is a structure typically made from cold-formed or hot rolled steel...*' and at page 17, '*It is apparent that individual solid steel components, once manufactured, cannot be adjusted*'. Whilst the as-built layout of some steel pallet racking systems can be adjusted to suit particular end user needs by moving beam levels upwards or downwards into pre-determined fixture points, subject to acceptable engineering and safety constraints, including as set out in Australian Standard AS 4084-2012, this is a very different matter to the '*dimensions*' of the pallet racking system itself being adjustable as required.
7. Whilst the Reviewable Decision specifically references that the Australian Standard AS 4084-2012 is the applicable Australian Standard for the 'goods' the subject of the Investigation and Reviewable Decision, the Reviewable Decision erroneously omits to observe the relevant sections of that Australian Standard that impose safety restrictions on the adjustable pallet racking system and prohibit the system from being '*adjusted as required*'. The AS 4084-2012 restriction imposing certain safety limitations on steel pallet racking systems directly contradicts and proves that goods of the kind described in the Investigation and Reviewable Decision do not exist.
8. The Commissioner's misdescriptions and misunderstanding of steel pallet racking systems continue throughout Final Report No. 441, dated 5 April 2019 (the **Final Report**). For example, at page 17 of the Final Report it states, '*the purpose of a steel pallet racking system is to assemble it in a multitude of configurations that can be adjusted as required*'. This is plainly incorrect; The purpose of steel pallet racking

systems that exist in Australia, both as the result of on-shore manufacture and importation, is to store palletised goods. The ability or otherwise to assemble the system into a multitude of pre-determined configurations is a design feature, not the purpose of the system.

9. Additionally, a proper exercise of power under Australian anti-dumping legislation requires that goods the subject of an anti-dumping investigation be goods actually being exported into Australia or be goods that may be exported into Australia as part of a consignment of goods. This is apparent from the reference to '*goods under consideration*' within the definition of '*like goods*' and also s.269TB(1) of the Act. The intention of the Act is not to permit an ambit claim to be made against a range of goods, which is what Dematic purported to claim in its application for the imposition of anti-dumping measures and unfortunately what the Commissioner accepted in the Investigation and Reviewable Decision.
10. The fundamental problems with the description of the goods subject of the Investigation and Reviewable Decision have a direct impact upon whether any '*like goods*' do or can exist.
11. The concept of '*like goods*' is central to the investigation the subject of the Reviewable Decision. As defined in s.269T of the Act, '*like goods*' means:

"like goods", in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.' (emphasis added)
12. The determination of '*like goods*' depends upon the consignment of goods referred to in paragraph (a) of s.269TB(1) of the Act and what the '*characteristics*' of the goods in that consignment are. Given Dematic's application for the imposition of anti-dumping measures makes no reference whatsoever to any particular consignment, it is impossible to proceed to the secondary question of whether '*like goods*' exist and, if they do exist, whether they are causing damage to Australian industry.
13. In what Abbott submits was an erroneous effort by the Commissioner to overcome the fundamental problems with the description of the goods the subject of the Investigation and Reviewable Decision, at page 17 of Final Report No. 441, dated 5 April 2019, (the **Final Report**) the Commissioner states:

'The requirement for the pallet racking to be adjustable as required does not necessitate the ability to infinitely position and reposition beams and braces at specific precise heights...'

14. Abbott respectively submits that having the ability to position and reposition the steel pallet racking system into an indefinite number of positions is precisely what would be required for a steel pallet racking system to be adjustable '*as required*'. The comment by the Commissioner on page 17 (extracted in paragraph 13 above) is without basis and factually incorrect.
15. In the Reviewable Decision, the Commissioner determined and the Minister accepted that there are '*like goods*' being dumped into and causing material injury to the Australian industry. For the reasons stated above, Abbott submits that both the acceptance of Dematic's ambit claim and the determination that '*like goods*' exist should be reversed on the basis that both decisions are wrong and are an improper exercise of power.

Ground 2: The goods supplied by Abbott do not fall within the description of like goods (in terms of characteristics and features of Abbott's goods: including whether the dimensions can be adjusted as required) and are not like goods as described in the section 269TG(1) and (2) notices signed by the Minister.

16. In arriving at the Reviewable Decision, the Commissioner assessed the products Abbott imports into Australia and concluded that Abbott's products are of the kind of '*goods*' or '*like goods*' that are being dumped into and are causing material injury to the Australian industry. Abbott submits that this determination by the Commissioner is flawed and incorrect.
17. Even if it were appropriate to find that '*like goods*' to those described in the Investigation and Reviewable Decision exist (Abbott says it is not appropriate to do so because the goods themselves do not exist, therefore nothing '*like*' them can exist), the goods Abbott imports do not fall within the scope of '*like goods*', having regard to s.269T of the Act.
18. In its application for the imposition of anti-dumping measures, Dematic asserted that its goods are '*like goods*' to those being imported into the Australian market by Abbott, amongst others, based on '*likeness*' (ie; physical, functional, commercial and/or production likeness). Erroneously, the Commissioner adopted this language as the relevant test for '*like goods*' in the Final Report and it is adopted by the Minister in the Reviewable Decision. '*Likeness*' is not the applicable test. As stipulated in s.269T of the Act, the test is whether the goods produced by the Australian industry are identical to or have characteristics closely resembling those of the goods the subject of a consignment imported into Australia. The application of a test outside the scope of intent of the legislation should not be permitted to stand.
19. The goods imported by Abbott meet the Australian Standards and, further, are adjustable within certain engineering limitations (rather than '*as required*'); they are not '*like goods*' to the goods the subject of the Reviewable Decision.

20. To be precise, Abbott's goods are best described as follows:
- (a) Steel pallet racking storage system comprising upright frames perpendicular to the aisles and independently adjustable, positive locking pallet beams parallel to the aisles, spanning between the upright frames, and designed to support unit load actions.
 - (b) The system and/or the parts of the system (whether assembled or unassembled) are not of dimensions that can be adjusted '*as required*'.
 - (c) Any adjustment capacity of the system is distinctly restricted from being adjusted '*as required*' by incremental limitation, engineering limitation, other physical limitation and/or applicable standards.
 - (d) Every required adjustment that does not exactly match the incremental limitation of the system and fall within the engineering and physical limitations of the system (and fall within the criteria of any applicable standard that may form part of the requirement) cannot be performed or cannot be performed without remanufacture.
21. At page 18 of the Final Report it states,
- 'The Commissioner notes that the import declaration process is a self-assessment process, where goods being imported meet the goods description for steel pallet racking, anti-dumping measures will apply. It is the responsibility of importers, or licensed customs brokers acting on their behalf, to assess whether the goods they are importing meet the goods description. The Commission provides guidance to importers through its website and the Dumping Commodity Register.'*
22. The Dumping Commodity Register or other ADC advice/guidelines do not contain a provision which would allow the importer to exclude a requirement for beams to be positioned/repositioned at specific precise heights in its self-assessment. Rather, the ADC guidelines and advice prohibit the importer's self-assessment from accommodating the proposal of the Final Report that certain specific precise requirements could be excluded from the self-assessment in attempt to make steel pallet racking able to be matched to the description of goods.
23. To exclude such requirement(s) from the self-assessment would necessitate removing the words '*as required*' from the description of goods or adding a clause to the description of goods which provides detailed exceptions to clarify what requirements may be excluded from the self-assessment.

24. Normally a required adjustment would include specification, though it may not necessarily be precise.
25. Notwithstanding the above, it is not of necessity that a required adjustment to the height of the beams or braces be specific or precise to be unable to be performed.
26. At Page 17 of the Final Report it states, '*All pallet racking systems observed by the Commission, including Abbott Storage's, feature evenly spaced slots along the upright upon which beams, and braces can be placed at the required height and adjusted to a different height as required*'.
27. In this statement, the Commissioner confirms the incremental limitation of the system i.e. '*...feature evenly spaced slots along the upright upon which beams, and braces can be placed...*', which applies to all pallet racking systems observed by the Commission.
28. It is misleading to suggest that the beams and braces can be placed at a required height without specifying that the required height must match the capability of the system, within the system's limitations. Further, it must be emphasised that all other required heights for the beams and braces are not possible to be achieved without remanufacture of the product.

Ground 3: The Minister erred in determining that any 'like goods' caused/cause material injury to the Australian steel pallet racking industry:

29. Abbott submits that because the goods defined in the Investigation and Reviewable Decision do not exist, and no 'like goods' exist, it is not possible to conclude that any goods considered as part of the Investigation and Reviewable Decision cause injury (material or otherwise) to Australian industry. The Commissioner's decision in this regard is flawed and misconceived, as is the Minister's adoption of the decision.

Concluding remarks:

30. In the circumstances set out above and to enable the prescribed importation process to be carried out in conformance with Australian Consumer Law (that is, to avoid misleading and deceptive conduct surrounding the characteristics and functionality of Abbott's goods, amongst other effected third parties), the preferential and correct decisions is that the Investigation should have been terminated altogether, or at least in so far as it relates to Abbott, and that the Minister should revoke any anti-dumping measures that may be perceived to apply to imports of steel pallet racking systems by Abbott.

Yours faithfully,
COLEMAN GREIG LAWYERS

A handwritten signature in black ink, appearing to read 'Emma Macfarlane', with a large, stylized loop at the end of the name.

Emma Macfarlane
Principal Lawyer
Accredited Specialist Commercial Litigation