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7 March 2018

Ms L Blumberg
Panel Member
Anti-Dumping Review Panel
c/- Legal, Audit and Assurance Branch
Department of Industry, Innovation and Science
GPO Box 2013
Canberra City
Australian Capital Territory 2601

By email

Dear Member

# 2018/71 – Certain wire ropes exported from South Africa
# Interested party comments of Scaw South Africa and Haggie Reid

We refer to the Notice under Section 269ZZI of the *Customs Act* 1901 ("the Act") issued on 5 February 2018. This letter is an interested party submission on behalf of Scaw South Africa (Pty) Ltd ("Scaw") and Haggie Reid Pty Ltd ("Haggie Reid"), collectively the applicants for this review ("the Appellants"), as permitted under Section 269ZZJ of the Act.



## 1 First ground – the evidence did not establish, and it was unreasonable to conclude, that material injury was caused by exports from South Africa

We believe that the elucidation of the Appellants' concerns about the conclusion that material injury was caused by exports from South Africa in the application for review are clear and concise. The application dismantles the various claims that were made by the Australian industry (also referred to as "BBRG" in this submission) in an attempt to justify the proposition that it was caused material injury by Haggie Reid's sales of wire rope. Instead, the Review Panel is asked to recognise:

- that an exporter,

- that is found not to have suppressed the prices of the complainant Australian industry in an immediately prior period,
  - that then does not change anything it does in a subsequent period, in terms of its pricing or sales,
    - in circumstances where other things do change,
      - being things that cause material injury to the complainant Australian industry,
        - cannot be found to have caused material injury to the complainant industry concerned.

The injury must have been caused, by definition, by the things that did change.

There are two aspects of the argumentation concerning the first ground of the application for review that the Appellants wish to restate and to re-emphasise.

(a) The first is the insufficient attempt on the part of BBRG to rebut the Appellants' letter to the Commission dated 19 July 2017. The Appellants' letter was a complete, factual, detailed, and professional explanation of what occurred in the market during the relevant period. The Appellants waived any claim to commercial confidentiality in the information contained in the relevant table in that letter to allow BBRG to see exactly what was being said by the Appellants to the Commission, and to allow BBRG to address it. BBRG, in its letter dated 28 July 2017, was unable to rebut the Appellants' evidence and submissions. Every proposition advanced by BBRG in an attempt to nullify the force and cogency of the Appellants' explanation failed to achieve that purpose.

In this regard we refer the Review Panel to paragraphs (4) and (5) on pages 10 and 11 of the application for review.

(b) The second point we wish to re-emphasise, and indeed to state even more forcefully than before, is the conclusion that we respectfully submit must be drawn from the concordance of the estimates of the reduction in BBRG's sales volumes in the evidence and submissions provided by the Appellants and BBRG.

On page 14 of the application for review this is said:

> *Given that the Appellants and the Australian industry's assessments of the latter's sales volume reduction in the investigation period are said in the Report to be within* **[CONFIDENTIAL TEXT DELETED – number]** *% of each other, and given also that the Appellants only means of estimating that sales volume reduction was to calculate the usage of wire rope by the shut-down machines, the explanation offered by the Appellants with respect to the Australian industry's drop in sales is more likely to be correct, or at least should be preferred over that of the Australian industry.* [footnote omitted]

The point here is that the Appellants' detailed estimate, based on the information available to it, was that the total sales lost by BBRG was **[CONFIDENTIAL TEXT DELETED – number]**MT. This is set out on page 14 of the Appellants' letter dated 19 July 2017. The Commission came to the same conclusion, saying that it had *"calculated that BBRG Australia's sales volume was reduced by some 1,800 metric tonnes between the 2015 and 2016 calendar years"*. In their letter dated 19 July 2017, the Appellants accounted for every MT of the **[CONFIDENTIAL TEXT DELETED – number]**MT of reduced volume they correctly estimated that BBRG had suffered.

The Commission found that Haggie Reid's prices in 2015 did not suppress BBRG's prices.

Yet Haggie Reid did not change its prices from 2015 to 2016 – this is a matter of record – and on the evidence as we presented Haggie Reid did not win new business on the basis of price and did not supply any mine site under any new contracts in 2016. In that year BBRG was affected, in terms of its sales volumes, by factors that were not related to any action on the part of the Appellants. Moreover, it did not suffer reduced prices and continued to be profitable.

We ask the Review Panel to consider how likely it is that the Appellants' conclusion about the causes of the reduction in BBRG sales volumes are incorrect when the amount calculated by the Appellants was almost exactly the same as the conclusion reached by the Commission, and where the only information that the Appellants had available to them, in making their calculation, were their own factual observations of the changes that took place at the various mine sites supplied by BBRG, and their own direct sale experiences. All of these changes were carefully conveyed in the Appellants' letter dated 19 July 2017. No plausible rebuttal was offered in BBRG's letter dated 28 July 2017.

We respectfully request the Review Panel to recommend to the Minister that, in the circumstances of this case, the Australian industry was not caused material injury by dumped imports.[1] Rather, the Australian industry's sales were affected by a downturn in the coal mining industry which affected it quite severely. Its costs increased, associated with lower throughput. Its competitor Haggie Reid did not change the prices of the wire rope it imported from South Africa in 2016 from a level that the Commission found had not had any suppressant effect on the Australian industry in 2015. And, throughout all of the changes that harmed the industry it serviced, the Australian industry increased its prices mildly and remained profitable.

## 2 Second ground – the Minister failed to establish corresponding normal values for comparison with the export prices of the goods

The Appellant's application for review documents the wide cost differences in the PCN groups on the domestic and export sides of the margin calculation.[2] It is an accepted principle of anti-dumping margin calculation methodology (Article 2.4 of the WTO *Anti-Dumping Agreement* refers) that a fair comparison is required to be made between the domestic sales and the export sales, and this has been carried into the Australian implementing legislation. Section 269TACB(1) of the Act requires a comparison of export prices of goods exported to Australia with *corresponding* normal values in respect of like goods established under Section 269TAC.[3]

If the Review Panel agrees that the PCN methodology has not achieved a fair comparison, between prices for corresponding goods, then the correct or preferable decision is as set out on page 24 of the application for review, *viz*:

(a) normal value can and should be determined under Section 269TAC(1) for **[CONFIDENTIAL TEXT DELETED – product codes]**, being the only models for which there were domestic sales of corresponding like goods in the ordinary course of trade that are arm's length transactions in sufficient volumes;

(b) normal value for the other goods exported to Australia can and should be determined under Section 269TAC(2)(c) of the Act, using the export CTMS for each of the Scaw product codes, which has been provided to and accepted by the Commission, on the basis that there are no domestic sales of corresponding like goods for those goods and/or that there is an absence

[1] On one view, should the Review Panel agree with the Appellants on this ground, the other grounds of the application for review are not reached and, on the basis of decision-making economy, need not be decided. If the Minister intended to accept such a recommendation with respect to the first ground, our client would not object to such an approach.

[2] Please note the slight corrections to one of the tables that demonstrates these differences, in 6(c) below.

[3] The word *"corresponding"* is an adjective meaning *"analogous or equivalent in character, form, or function; comparable"*.

of sales of like goods in the market of the country of export that would be relevant for the purpose of determining a normal value under Section 269TAC(1); and

(c) the amount of profit for the purpose of Section 269TAC(2)(c) of the Act be determined in accordance with Regulation 45(3) of the *Customs (International Obligations) Regulation* 2015 ("Customs Regulation").

This correct or preferable decision, or set of decisions, with respect to the normal value of the goods, will then form one of the building blocks of a recalculation of the dumping margin, on a different basis, and with other differences as well. These "other differences" are the correct ascertainment of the export price, and the correction of the other adjustment and methodological errors to which we have drawn attention in the application for review.

We now recap on the nature of those other differences and, in 5 below, explain the recalculated dumping margin with those corrections made.

## 3 Third ground – adjustments were not made to the normal value so as to not affect the comparison, and to ensure a proper comparison, with the export price

(a) Incorrect application of "specification adjustment" for certain goods – the point made by the Appellants is that a difference in *export* price, whether between PCN groups or for actual models, is not appropriate for working out a normal value on the *domestic* market.

The implication of adopting the approach towards normal value advocated by the Appellants in their second ground of review is that this error falls away. The Section 269TAC(1) normal values are for identical goods, and constructed normal values require no such adjustment.

(b) Rejection of export rebate based adjustment – with respect to this ground, there is no doubt that the *policy* of the Commission, as set out in the Commission's Dumping and Subsidy Manual, is not to allow lower costs on the export side to "benefit" an exporter in the determination of a dumping margin. However, the problem with this *policy* position is that it runs directly counter to the words of Sections 269TAC(8)(c) and 269TAC(9) of the Act. In this case Scaw established that the price of steel that was incorporated into the downstream wire ropes product and then exported was reduced, or "rebated", by the supplier. That supplier was a private company, and not a government or a public body. The rebate was not a government program. Scaw accrued a commercial benefit by making the export sales concerned, which should be adjusted in its favour. In that way, the rebate modified the circumstances of the domestic and export sales. In a cost sense, the cost of manufacturing the exported wire rope was reduced by the rebate.

The implication of adopting the approach towards normal value advocated by the Appellants in their second ground of review with respect to this error is that the export rebate will be a negative adjustment with respect to the Section 269TAC(1) normal values, and will be taken up as a reduced cost/negative cost in the CTM of the export models used for the Section 269TAC(2)(c) normal values.

(c) Refusal to make domestic bad-debt related adjustment – the Appellants rely strongly on the facts as stated in the verification notes referred to in footnote 56 of the application for review.[4]

The implication of adopting the approach towards normal value advocated by the Appellants in their second ground of review with respect to this error is that both the Section 269TAC(1)

[4] If the Review Panel does not have any of the documents from the Commission to which we specifically refer in the application for review, or in this interested party submission, we are able to provide them.

and Section 269TAC(2)(c) normal values should be subject to a negative adjustment, the former under Section 269TAC(8)(c) and the latter as a domestic cost (the amount being the amount written off in Scaw's financial records in 2016 expressed as a percentage of sales revenue in that year).

(d) **Incorrect adjustment concerning reel returns** – the Appellants' considered position is that reel returns are simply not a relevant consideration when it comes to the price of wire ropes, in either market. We reiterate the arguments presented in the Appellants' application for review, and recommend them to the Review Panel.

The implication of adopting the approach towards normal value advocated by the Appellants in their second ground of review with respect to this error is that there would be no adjustments on either the domestic and export sides, regardless of the normal value basis involved (Section 269TAC(1) or Section 269TAC(2)(c)).

(e) **Failure to make exchange gain based adjustment** – the Commission's denial of the benefit of Scaw's actual export revenue whether by way of a negative adjustment to normal value in the amount of the exchange gain, or simply as a higher price received by Scaw for the exported goods, is a matter of serious concern to our clients, and we think rightly so. We respectfully submit that it is improper not to take this into account in the calculations.

The implication of adopting the approach towards normal value advocated by the Appellants in their second ground of review with respect to this error is as mentioned above, ie that a negative adjustment be made to the normal value in the amount of the exchange gain, or that Scaw's export prices should reflect the fact that the exchange gain delivered Scaw higher, actual revenue in the period of investigation.

## 4 Fourth ground – the export price was incorrectly ascertained

(a) **Lack of consideration of timing difference in working out export price** – the following graph, which was provided to the Commission during the investigation, demonstrates the depth of the problem.[5] This issue was recognised but was glossed over, and not resolved, by the Commission in its recommendations to the Minister:[6]

**[CONFIDENTIAL GRAPH DELETED – Haggie Reid sales data]**

A deductive export price works backwards from an importer's resales to independent parties. In the universe of Haggie Reid's sales in 2016, **[CONFIDENTIAL TEXT DELETED – number]**% were not exported from South Africa in that year.[7] Therefore, the export price worked out does not relate, either substantially or legally, to the exports under investigation, being wire ropes exported from South Africa in the period of investigation.

The implication of accepting that the importer Haggie Reid did not sell the goods in Australia at a loss (at to which, see (b) below) is that, consistently with the Act, the actual invoice prices of the exports that took place in the period of investigation are to be used for export price purposes.

(b) **Inappropriate deductions adopted in the work-back export price** – we refer the Review Panel to our submissions on this point, which we feel are clear and concise. In working out whether Haggie Reid's sales were not arm's length transactions, such that a deductive export price would be required, the Commission included major abnormal expenses which were not expenses arising in relation to the goods, and which were not incurred in the importation and sale of the goods exported from South Africa *in* the period of investigation and *after* their

5 See the Appellants' letter to the Commission dated 19 July 2017 at page 4.
6 See Report 401, at page 25.
7 *Ibid*, at page 5.

exportation.

The implication of accepting that the deductions should not have been made is that the actual invoice prices of the exports that took place in the period of investigation are to be used for export price purposes

## 5 Recalculated dumping margin

For the benefit of the Review Panel, we have provided with this letter a set of spreadsheets which clearly and carefully, and in a step-by-step manner, set out the calculations and the conclusions that the Review Panel would arrive at upon acceptance of the various grounds and error corrections advanced by the Appellants. These spreadsheets are based on those provided to us by the Commission with Report 401, ie they were the basis for the final calculations of the Commission to which this application for review relates.

We explain the spreadsheets and the calculations they contain as now follows:

(a) We provide an amended spreadsheet entitled *"Haggie Reid Recoverability Test sent to Haggie Reid"*. In 4(b) above, we have drawn the Review Panel's attention to what we submit have been errors in the Commission's determinations under Section 269TAA(2) and (3), and which resulted in the conclusion that the goods were sold by Haggie Reid at a loss. In summary, there was an incorrect inflation of Haggie Reid's SG&A by reason of the inclusion of a "settlement amount" and of certain "legal and professional fees".[8] This amended spreadsheet demonstrates that Haggie Reid's domestic sales were profitable, and were not loss-making, once those amounts are removed from the SG&A.[9]

It therefore follows that Scaw's actual invoice prices to Haggie Reid for goods exported in the period of investigation should have been accepted as the export price for dumping margin purposes under either Section 269TAB(1)(a) or (c). The final export prices, at FOB level, for the purposes of working out the dumping margin, appear in *"Confidential Appendix 5"*.

(b) The Appellants' second ground, as to which see 2(a) above, is as follows:

> *…normal value can and should be determined under Section 269TAC(1) for* **[CONFIDENTIAL TEXT DELETED – number]***, being the only models for which there were domestic sales of corresponding like goods in the ordinary course of trade that are arm's length transactions in sufficient volumes*

We now provide an edited version of the *"Confidential Appendix 3 – Domestic sales and OCOT"* spreadsheet, with these three models clearly identified as models *"identical to Australian sales models"* under new column AT of the *"Domestic Sales"* worksheet. The OCOT test outcomes for these three models are shown in the *"OCOT test"* worksheet. All changes from the versions originally provided to us by the Commission are highlighted in red.[10]

(c) For the three export models with matching domestic sales in the ordinary course of trade, we have then calculated the Section 269TAC(1) based normal value using the *"NV adjustments"* and *"NV summary"* worksheets in *"Confidential Appendix 4"*. We have removed the reel

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8 Application for review, at pages 34 and 35.

9 See the profitability test outcome at cell AW387.

10 It is also worth noting that the Commission's original OCOT test was also based on the CTMS for each of the product code models, as shown in columns AL to AO. This is consistent with Scaw's request that the correct approach is to accept that Scaw's product codes provide the most correct and relevant product identification method for dumping margin calculation purposes. Reliance on PCN groupings is inappropriate and unwarranted.

returns based adjustment, consistent with the Appellants' position in 3(d) above.

(d) As mentioned in 2(b) above, for the other models exported to Australia, given that they do not have matching domestic sales of like goods, we submit that the correct approach is to calculate normal value under Section 269TAC(2)(c) of the Act. This calculation is described further below, in relation to the new *"Confidential Appendix 5"*.

(e) Lastly, the dumping margin calculation spreadsheet in *"Confidential Appendix 5"* has been amended to reflect the Appellants' other contentions as set in the application for review. New columns have been created to demonstrate the effect of implementing the following changes:

(1) identification of Australian sales with matching domestic sales of identical models (product codes) – at new column BG;

(2) use of Scaw's actual FOB export prices as the basis for ascertained export price, based on original reporting under column AN, AP and AR, taking into account the additional revenue derived from exchange gain, at the new column BH;

(3) for each line of Australian sales the corresponding by-model CTMS information has been provided in the new column BI;

(4) new column BJ has been added to identify normal value:

- for Australian sales with matching domestic sales of like goods (matching product codes), domestic sales price based normal values as calculated in the amended *"Confidential Appendix 4"* have been used;

- for other sales, being Australian sales without domestic sales of matching product codes, normal value is reported on the basis of Section 269TAC(2)(c), using the CTMS and a profit;

(5) new column BK has been added to reflect the domestic bad-debt related adjustment, with the per unit amount of this adjustment having been derived from the *"Domestic Sales"* spreadsheet; and

(6) the revised dumping margin, based on the new export price, the new normal values, and the other corrections, is reported in new column BP.

(f) Within the same *"Confidential Appendix 5"* spreadsheet, the *"Summary NVs"* worksheet has been amended to include the product code based Section 269TAC(1) normal values, and the CTMS information for the purpose of constructing the Section 269TAC(2)(c) normal values. A new tab, entitled *"Australian CTMS"* has been added, using the Australian CTMS table contained in the *"CTMS per model"* worksheet within the *"Appendix 3 – Domestic sales and OCOT"* spreadsheet.

(g) In terms of the profit rate applied, please refer to footnote 52 of the application for review. This directs the Review Panel to pages 4 to 7 of the Scaw verification note 3, and the *"Domestic profitability –detail"* spreadsheet referred to therein, both of which we have attached to this submission for the Review Panel's consideration.

To restate the submissions in the Scaw verification note 3, the Appellants' position is that Regulation 45(2) is not applicable practically or factually, given the differences in the goods sold by Scaw in its domestic sales market, and the goods exported to Australia. This is highlighted by the fact that out of the 20 models of goods exported to Australia, and 29 models of goods sold in the domestic market, only three were sold in both markets. To band these sales together based on broader criteria or "brackets" disregards the multiple differences in the goods. Verification note 3 provided the Commission with a detailed analysis

of the reasons why the Appellants have submitted that Regulation 45(2) is not a suitable method for determining the amount of profit.

We submitted during the investigation, and now to the Review Panel, that the correct or preferable method for profit calculation is in accordance with the *"same general category"* method provided by Regulation 45(3)(a). This is the actual amount of profit realised by Scaw on all domestic sales of wire rope falling within the description of the goods under investigation, with the exception of the prefix "J" category product (or "W", based on end-use) which are triangular ropes or shaft winding ropes.[11]

As noted in Page 7 of the verification report, and the *"Domestic profitability –detail"* spreadsheet, Scaw then accounted for the product mix/weighting differences between the domestic sales and the Australian sales to arrive at a profit ratio of **[CONFIDENTIAL TEXT DELETED – number]**%. We note that, if this further weighting exercise is not conducted, the profit ratio of the actual amount of profit realised on domestic sales of goods in the *"same general category"* becomes **[CONFIDENTIAL TEXT DELETED – number]**%. We recognise that the **[CONFIDENTIAL TEXT DELETED – number]**% profit ratio would better reflect the *"actual amounts realised"* by Scaw from the domestic sales of the goods of the *"same general category"* in a strict application of Regulation 45(3)(a), which does not expressly contemplate adjustments for weighting/product mix differences, but submit that the weighting is required to ensure a proper comparison

(i) Further with respect to the bad debt adjustment, please refer to *"Appendix 3 - Domestic Sales"* worksheet, Column AZ (column AY in the Commission's original spreadsheet), where we have calculated a per tonne bad debt write-off of ZAR**[CONFIDENTIAL TEXT DELETED – number]**.

(j) Further, with respect to the reel buy back adjustment, we remind that this upward adjustment to normal value should not be maintained. This adjustment was applied by the Commission in the *"NV adjustments"* worksheet in the *"Confidential Appendix 4 – Normal Value"* spreadsheet, at column "BR". We have removed it from the *"NV adjustment"* worksheet in our amended *"Appendix 4 – Normal value"* spreadsheet. As a reminder, we say that there is no appropriate ground to make such adjustment. We also submit that the calculation was not explained to us, and does not appear to bear any relevance to the reel buy back transactions in any case.

The Commission's dumping margin finding was with respect to Scaw's exports was 39.7%. This bears no reasonable relationship to the margin calculated by the Appellants based on the actual, corresponding, properly adjusted normal values and export prices for the investigation period. The Appellants' calculation of the dumping margin is **[CONFIDENTIAL TEXT DELETED – number]**%.

## 6 Corrections

In closing we wish to correct certain typographical and informational errors that appeared in our clients' application to the Anti-Dumping Review Panel ("the Review Panel"), for which we apologise.

(a) On page 3,[12] the word *"hawse"* was a typographical error. It should have read *"we"*.

(b) On page 5, the sentence:

> *Here we see a statement of causation based on the unrationalised assumption that*

[11] This "general category" scope should not be controversial, because the "J"/"W" category goods were regarded by the Commission itself not to be like goods to the Australian sales and were not part of the Commission's normal values in its own margin calculations.

[12] References are to the page numbers in the confidential version of Attachment B to the application for review.

*dumped imports caused (a "consequent loss") of sales volume.*

should have read:

*Here we see a statement of causation based on the unrationalised assumption that dumped imports caused a loss (a "consequent loss") of sales volume.*

(c) The table on page 18 included incorrect shading in two cells, and two incorrect quarter references. The incorrect shading is shown in red, and the correct shading is now in green. The incorrect quarter references are shown in revision marking:

**Cost differences between domestic and export models falling into different PCNs**

| PCN | Q1 | Q2 | Q3 | Q4 | Comment |
|---|---|---|---|---|---|
| [CONFIDENTIAL TEXT DELETED – PCNs] | 9% | 9% | 5% | 1% | Export CTMS always higher |
| | -3% | -3% | -9% | -11% | Export CTMS always lower |
| | 1% | | -3% | | Export CTMS lower in ~~Q1~~3 |
| | 0% | 1% | -4% | | Export CTMS lower in ~~Q2~~3 |
| | -3% | -2% | -6% | -9% | Export CTMS always lower |
| | 5% | 6% | 2% | 1% | Export CTMS always higher |
| | -15% | -14% | | -17% | Export CTMS always lower |
| | -13% | -15% | -3% | -28% | Export CTMS always lower |

(d) On page 31 the phrase:

*which affect the comparability of the export price and the normal value*

should have read:

*which affects the comparability of the export price and the normal value*

(e) On the same page, the sentence:

*The Report's comments that the finding on this point is justified because Scaw did not change its price to Haggie Reid.*

should have read:

*The Report comments that the finding on this point is justified because Scaw did not change its price to Haggie Reid.*

(f) On page 35, in the first line below heading 11, the word *"Commission"* should have read *"Review Panel"*.

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We are at the Review Panel's disposal should any matters need to be clarified.

Yours sincerely

Daniel Moulis
Partner Director