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By Email

Anti- Dumping Commissioner
Anti-Dumping Commission
GPO Box 1632
Melbourne Victoria 3001

Attention: Director, Investigations 2

Dear Sir/Madam,

Re: Continuation Inquiry 617 – Exports of pallet racking and parts thereof from China and Malaysia

I refer to Continuation Inquiry 617, being the inquiry into whether the anti-dumping measures applying to exports of pallet racking and parts thereof to Australia from China and Malaysia should be continued for a further five years and make the observations and comments ser out in this document in relation thereto.

No comment is made as to whether the continuation of the anti-dumping measures for a further five years is in fact warranted. Rather, it is contended that the conduct of the inquiry and the resultant findings do not justify the continuation of the measures. This for the reasons set out below.

The original investigation, Investigation 441, contained shortcomings and deficiencies. Specifically, the investigation did not investigate what was required to be investigated and what was investigated was improperly investigated. Consequently, the imposition of the anti-dumping measures was not factually or legally justified. These shortcomings and deficiencies in the investigation are set out and summarised in **Attachment A** to this memo.

Unfortunately, the shortcomings and deficiencies set out in **Attachment A** have been perpetuated and carried through to the continuation inquiry. Hence the findings in the continuation inquiry possess the same or similar deficiencies as in the original investigation, thereby precluding a proper, lawful basis for determining whether the measures should be continued for a further five years.

However, there is another matter relevant to a decision as to whether the anti-dumping measures should be continued for a further five years. That matter does not involve whether the statutory test for the continuation of the measures has been satisfied. That issue, that is, whether the statutory test is satisfied is dependent upon whether the continuation inquiry was properly conducted or whether it simply perpetuated the shortcomings and deficiencies in the original dumping investigation.

Rather, the question is whether the imposition of the anti-dumping measures achieved their objective of removing and/or preventing injurious dumping. The answer to that question is not known. It is not addressed in the Statement of Essential Facts. There has been no inquiry as to whether the anti-dumping measures have been effective and:

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- if they have been, why and to what extent they have been; and
- if they have not, when, why and to what extent have they been ineffective.

It is perplexing that it is proposed the anti-dumping measures be extended for a further five years when it is not known whether they have been effective during the five years since their imposition. Dumping duties must be the only tax that is imposed, varied and continued without an assessment as to whether the tax, that is, dumping duties is achieving its objective of removing and/or preventing material injury caused by dumping.

It is perplexing given the consequences that flow from the imposition of dumping duties. Here it is to increase the price at which exports of pallet racking systems enter into the commerce of Australia, and thereby enable the price of pallet racking systems sold in the Australian market to increase. That, of course, increase the cost of storing goods on such systems. Given that virtually all goods consumed in Australia are stored on pallets that are stored on pallet racking systems, it increases the prices of those goods for Australin businesses and consumers.

In this context, it would seem prudent for there to be an assessment of the effectiveness of the anti-dumping measures. That is, given the cost being borne by the community and by the economy in general from the imposition of the anti-dumping measures, it would seem desirable, if not necessary, to ascertain and confirm that the measures are effective in preventing material injury to the domestic industry from being caused by dumping.

Similarly, it also would seem to be in the interest of the domestic industry to know that the anti-dumping measures it has sought are effective in achieving its objective. This, of course, assumes that the domestic industry's objective in seeking the imposition of the measures was to prevent injurious dumping from being caused to it, as opposed to some other purpose. That does not seem evident here as discussed at Sections 3 and 5 of **Attachment A**.

It is not evident because the application sought the imposition of anti-dumping measures on goods that were not produced in Australia, that is, 'parts' of pallet racking systems other than the three structural components.[1] The importation of those 'parts' was and is critical to the existence of an Australian industry producing pallet tacking systems. It is not possible to produce a pallet racking system from beams, braces and uprights alone. This leads to a number of questions, including:

- why seek to impose dumping duties on imports of 'parts' critical to the existence of the Australian industry?;
- why were the only 'parts' identified in the description the three structural components which coincidentally were the only 'parts' produced in Australia, but were not being exported individually in significant quantities as compared with exports of complete pallet racking systems?;

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[1] Note: the export of individual 'parts' of pallet racking systems is the export of the individual 'part' as an article of commerce in its own right and is not the export of a pallet racking system and vice versa. They are each a different 'good' with its own unique characteristics and identity. There is thus no single good described in the description of the goods under investigation but a range of goods, each different from the other. For further discussion, see **Attachment A**.

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- why were all 'parts' other than the three structural components simultaneously exempted from the dumping duties that had been imposed upon them because they were not being sold in Australia but exports of the three structural components were not because they were being sold in Australia?[2];
- how is it commercially possible to sell some 'parts' and not others when both are critical in the production and maintenance of pallet racking systems and what happened to all of the exempted 'parts' imported into Australia if they were not being sold in Australia and why import them if not to sell them?

It would seem, therefore, that preventing injurious dumping to an Australian industry or industries producing the like goods to the exempted 'parts' was not the objective. There were no such industry or industries in Australia to be so injured.

If it was not the objective, then the only reason for seeking the imposition of dumping duties could be to increase prices of pallet racking systems including for the three structural components produced in Australia and/or to limit or exclude import competition. As those seeking the imposition of dumping duties held, either individually or collectively, substantial market power, that leads to competition law considerations in terms of anti-competitive behaviour. This is addressed further in Section 3 of **Attachment A**.

Presumably these issues are being considered in the current inquiry as they were not in the original investigation. However, it is not apparent that they are from the Statement of Essential Facts notwithstanding that they are relevant considerations.

Finally, I reiterate that the shortcomings and deficiencies in Investigation 441 appear to have been carried through to this continuation inquiry. Indeed, the goods required to be inquired into have, again, not been inquired into and those that have been inquired into have not been properly inquired into. Consequently, there is not a proper basis on which to make a decision as to whether the anti-dumping measures should be continued for a further five years. This, of course, assumes that they were validly imposed in the first place, which is unlikely.

If there any questions or any matter requires further clarification, please let me know.

Your sincerely,

Transmitted Electronically

Signature Not Required

Ray Medina
Managing Director

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[2] The websites of members of the Australian industry indicate that they do sell 'parts' of pallet racking systems including those exempted from dumping duties.

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Attachment A

Shortcomings and Deficiencies

Set out below are a number of shortcomings and other deficiencies in Investigation 441 into exports of pallet racking and parts thereof from China and Malaysia.

Section 1 - Background

Description of the goods under investigation

The description of the goods under investigation is in summary:

> "*steel pallet racking, or parts thereof, assembled or unassembled, of dimensions that can be adjusted as required … including beams, uprights … and braces*",

exported from China and Malaysia.

Thus, the goods under investigation are:

- steel pallet racking, assembled or unassembled, of dimensions that can be adjusted as required, that is, complete pallet racking storage systems; and
- 'parts' of those pallet racking storage systems.

'Parts' is, of course, is not a 'good' but describes a category or range of goods that constitute components of another good, the end-product. They are 'parts' of another good; because either they are involved in the production of that good or in enhancing the operation of that good. 'Parts', therefore, may constitute constituent components necessary for the production of the end-product or 'parts' that are ancillary as necessary or enhancing the performance, operation or functionality of the end product. The description of the goods under investigation makes no such distinction but includes all goods that are properly described as being a 'part' of a pallet racking system.

Here the 'parts' of pallet racking systems have not been identified in the description other than the three structural components, namely, beams, uprights and braces. Accordingly, any good properly described or identified as constituting a 'part' of a pallet racking system, whatever its role as such, satisfies the description and, therefore, falls within the goods under investigation. The screenshot at **Attachment C** identifies a number of 'parts' of pallet racking systems, as well as displaying the 'dimensions' (i.e., width x depth x height) of a complete pallet racking system.

In this regard, goods falling within the description as being 'parts' of pallet racking systems is open ended. This is because, the description does not identify which or what 'parts' are being individually exported at dumped export prices and because of that causing material injury to a domestic industry producing a like good to that exported 'part'. Hence any good that constitutes a 'part' of pallet racking systems, regardless of its role or function as a 'part', being individually exported to Australia from the subject countries falls with thin the description and as such constitutes one of the goods under investigation.

How an investigation could be initiated and undertaken into unidentified goods or to an open ended description of goods was not explained. That is, presumably any 'part' exported from China and Malaysia, which is a 'part' of pallet racking system, was being exported at dumped prices and because of that causing material injury to an Australian industry producing like goods to that 'part'. However, precisely which or what are those 'parts' is not known as they were not identified.

Commentary – relevance of scope of dumping investigations

The focus of any dumping investigation is the good or goods allegedly being exported at dumped export prices and because of that causing material injury to a domestic industry or industries in the importing country producing like goods to the exported good or goods. That is, the good or goods being exported determines the scope of the dumping investigation. Further, dumping duties may be imposed only on that good or those goods actually investigated and found to be being dumped and because of that causing material injury.

The threshold question, therefore, is what is the 'good' being exported to Australia and/or what are the 'goods' being exported to Australia that are allegedly causing material injury to a domestic industry or industries producing like goods to that being exported because of dumping?

Here the description of the goods under investigation was not confined to a single good (i.e., pallet racking systems), but extended to a range or collection of goods, namely, pallet racking systems plus each 'part' of a pallet racking system such as those depicted in **Attachment C**. Each such good was required to be investigated and to be separately investigated. That is, each good comprised in the description of the goods under investigation was required to be investigated and to be separately investigated with individual determinations of dumping, material injury and causation. Such investigations could be conducted simultaneously and collectively in the one investigation but there must be individual determinations of the key findings of dumping, material injury and causation for each good being exported to Australia comprised in the goods under investigation.

For example, the export of pallet racking systems is the export of that good and that good alone. It is not the export of a beam, upright, brace, anchor bolt, spacer or any other 'part' of a pallet racking system. Complete pallet racking systems do not compete with individual 'parts' of pallet racking systems on price or otherwise. One does seek to purchase a complete pallet racking system but buy a beam instead because it is being offered for sale at a different, lower price than a complete pallet racking system.

Similarly, the export of a beam is the export of a beam and not of a brace, upright, anchor bolt, spacer or any other 'part' of pallet racking systems. A beam does not compete with braces, uprights or any other 'part' of pallet racking systems on price or otherwise – they are not substitutable goods. Each 'part' is a distinct and separate article of commerce in itself with its own unique characteristics that distinguishes it from all other 'parts'. Hence why each has a different name.

Hence the goods under investigation did not consist of a single good but a range of individual goods, each with its own unique identity and, consequently, different from all others comprised in the description of the goods under investigations.

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Finally, the Australian industry producing like goods to the exports of pallet racking systems consists of those entities in Australia producing pallet racking systems. However, that industry does not include those entities producing, for example, beams, braces and/or uprights or any entities producing other 'parts' of pallet racking systems. The entities producing beams, uprights and/or braces are producing like goods to the exports of, respectively, beams, uprights and/or braces. Those entities may be vertically integrated and also produce pallet racking systems but not necessarily so and, in any event, for dumping purposes, they would constitute a separate domestic industry from each of the domestic industries producing, respectively, beams, uprights and/or braces. Similarly as regards entities, if any, producing other 'parts' of pallet racking systems.

In other words, the domestic industry or industries is dependent upon what is the good or are the goods being exported at allegedly dumped prices and because of that causing material injury. That material injury can only be caused to the domestic industry producing the like good to the good being exported. Pallet racking systems, beams, uprights, braces and each of the other 'parts' of pallet racking are not 'like goods' of one another. Each is a separate article of commerce with its own unique characteristics and, consequently, unique role and function. Hence why they are not substitutable one for another and why they are called different names.

So the applicant's application was for the goods comprised in the description of the goods under investigation to be investigated and for each to be individually investigated. There is no remit for an investigating authority such as the Anti-Dumping Commissioner as assisted and advised by the Anti-Dumping Commission to investigate anything other than or less than the goods comprised in an applicant's description of the goods under investigations.[3]

Unfortunately, that did not occur in Investigation 441. Rather, the goods investigated were not the goods comprised in the applicant's description of the goods under investigation but something other than and something less than the goods so described. Further, what was actually investigated was not properly investigated.

The reasons for these contentions are set out in summary Section 2 below.

***Section 2 - Summary of shortcomings and deficiencies*:**

The reasons for the contentions that the goods required to be investigated were not inf act investigated and that what was investigated was not properly investigated are set out, in summary, below.

(i) ***the goods under investigation were not investigated***: the goods under investigation, that is, the goods that were required to be investigated were '*pallet racking storage systems and parts thereof*'. Those goods were not in fact investigated. Precisely what goods were investigated and for what particular purposes is not clear from the Anti-Dumping Commissioner's report to the Minister, Report 441.

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[3] *Corinthian Industries (Syd) Pty Ltd v Comptroller-General of Customs and Others* (No. G819 of 1988) 7 April 1989, , Federal Court of Australia

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For example, the only 'parts' of pallet racking that were investigated were beams, uprights and braces. No other parts were included in the investigation notwithstanding that it is not possible to produce a complete pallet racking storages system without the other constituent 'parts'. Notwithstanding that they answer the description of 'parts' of pallet racking nor that they were not expressly excluded, so-called accessories were considered not to fall with the description of the goods under investigation. Why they did not and why they were not 'parts' of pallet racking was not explained and, if they were not 'parts' of pallet racking, what they were was not explained.

That 'parts' of pallet racking other than the three structural components were excluded from the investigations was acknowledged by the then Anti-Dumping Commissioner in his report to the Minister:

> *"… during the investigation the **only** components of steel pallet racking that were included in the determination of dumping and the material injury and causation assessment were beams, uprights and braces*". (emphasis added) (Report 441 at page 23)[4]

Thus the only 'parts' of pallet racking storage systems that were included in the investigation were beams, braces and uprights. However, they were not separately investigated but comingled with the other goods comprised in the description as if the goods described in the description constituted a single good, which they did not, as discussed earlier and later below. No other 'parts' were investigated.

In this respect, it also was not clear whether complete pallet racking storage systems were included or how they were included in the investigation, especially in the determination of dumping. This was due in part because the Exporter Questionnaire that exporters were required to complete did not seek information about complete pallet racking storage systems but only information concerning 'parts' of such storage systems. If information and evidence was not sought and, consequently provided by exporters on export and domestic sales of pallet racking systems, it is not clear on what basis the determination of dumping was made and whether it was made solely on information and evidence concerning the three structural components.

[4] It was stated by the then Anti-Dumping Commissioner in Report 441 that beams, uprights and braces accounted for approximately 90% of the value of pallet racking systems. The relevance of this assertion is not apparent. What is being offered for sale and sold are complete pallet racking systems, not individual components of pallet racking systems. Their relative 'value' as a proportion of the price of the pallet racking system is irrelevant – only the price of the pallet racking system is relevant especially as each is a bespoke system. While the 'value' (i.e., cost) of individual components may be of interest from a cost accounting perspective it is not the basis on which pallet racking systems being exported to Australia are sold. Of course, this also has no relevance when components such as beams, uprights and braces are individually exported and sold. Further, the other constituent components have a 'value' that far outweighs their monetary cost in that they are critical for the existence of the Australian industry, a fact that appears to have been overlooked.

Also, if exports of complete pallet racking systems and exports of beams, uprights and braces exported individually were comingled as if the y constituted a single good in the determination of dumping, it is not evident as to how that determination was actually made. The price for a complete pallet racking system, being a bespoke good, is materially different from the price for a beam or an upright or a brace, whether sold for export or domestically. How were such prices comingled for the determination of a single dumping margin and why? They are different goods being exported separately and each is custom-designed and made for its particular application and not commodity products. Components designed for one pallet racking system are not immediately substitutable for those of another, particularly in relation to the structural components, including as between pallet racking systems produced by different producers.

In any event, it is clear that the exports that were required to be investigated were not in fact investigated, that is, all the goods comprised in the description of the goods under investigation were not in fact investigated. How then was it possible to impose anti-dumping measures (i.e., dumping duties) on goods that had not been investigated and why were some goods included in the investigation and not others?;

(ii) ***goods under investigation not a proper subject matter for investigation treated as a single product***: the goods under investigation were treated, for the purposes of the investigation, as though they constituted a single good. As has been discussed, they did not constitute a single good but a range of goods, each different from all the others. Each good falling within the description '*pallet racking and parts thereof*' is a single good – each is a separate, distinct article of commerce with its own unique identity. No doubt this is why each has its own, separate and distinct name – that is, to identify it as being a unique article of commerce and distinguish it from other articles of commerce. For example, the export of a beam is just that, the export of a beam. It is not the export of a brace nor of an upright nor of a complete pallet racking storage system, and so on. Instead of recognising each as being separate, individual good, the range of goods comprised in the description 'pallet racking and parts thereof' were comingled and treated as a single good. Further, those goods could not be considered to be different 'models' of the same good on any basis.

Further, the prices at which each good comprised in the description is sold, whether for export or domestically, would be materially different. Comingling as if they constituted a single good would necessarily distort the dumping margin determination. It would not and could not reflect the margin of dumping of each of the goods being exported. For example, it is commercially absurd to conceive that pallet racking systems, beams, uprights, braces and each other 'part' of pallet racking systems were being exported to Australia at precisely the same margin of dumping (assuming they were being dumped). There was in fact no evidence that was the case, at least none referred to in Report 441.

Hence the findings of dumping, material injury and causation were based on the misconceived and erroneous notion that that range of goods constituted a single good when, of course, they did not Consequently, those findings were fundamentally flawed.

(iii) ***required investigations were not undertaken***: in order to impose dumping duties on a good, the exports of that such good must be investigated and, based on that investigation, found to be being dumped and because of that causing material injury to an Australian industry producing a like good to the particular good being exported. In other words, multiple investigations were required for each good comprised in the range of goods in the description '*pallet racking and parts thereof'*. No such investigations were undertaken. This was because, as set out above, of the erroneous treatment of '*pallet racking and parts thereof'* as constituting a single product (i.e., good). Had multiple investigations been undertaken as required, the outcome would have been materially different whatever that outcome might have been. Not only was the required investigations not undertaken, the investigation that was undertaken was necessarily deficient by comingling a range of individual goods as purportedly constituting a single good and, therefore, failing to conduct the investigations required by law to be conducted in order to impose dumping duties. Again the findings were fundamentally flawed as a result;

(iv) ***'parts' not identified***: the phrase '*parts thereof*' does not identify which 'parts' of pallet racking were being dumped in Australia. Presumably it was being claimed that all 'parts' of pallet racking, whatever they might be were being exported to Australia and because of that causing material injury. However, there was no evidence of that being the case and there could, of course, be no such evidence without identifying the 'parts' being exported. It is surprising that an application was accepted that did not identify the goods to be investigated and provide some evidence that exports of those goods were being dumped and causing material injury because of that dumping and causing injury to a domestic industry or industries producing like goods to each of the parts being exported at allegedly dumped prices. Not only were 'parts' not identified but also what characteristics that rendered a particular 'part' as being only a component of a pallet racking storage system and not for some other storage system or other structure as well was also not identified. What were the characteristics of a beam or an upright that identifies it solely for use in pallet racking and distinguishes it from beams for use in other storage systems and structures? This was not considered, let alone addressed. For these reasons, how was it known which 'parts' to investigate and why was an application accepted that did not identify the goods to be investigated?;

(v) ***constituent 'parts' vs accessory 'parts' not identified***: the description of the goods under investigation did not distinguish between 'parts' that are constituent components in the production of pallet racking storage systems and accessory 'parts' that added functionality or other features to the system, such as mesh protection, shelving products, signage, etc. Despite all such goods being 'parts' of pallet racking, the accessory 'parts' were arbitrarily excluded from the investigation. This apparently was for the reason that they were '*not*

considered' to be part of the investigation despite being included in the description. This further reflects the problem with the description not identifying the 'parts' allegedly being exported at dumped prices and because of that causing material injury to an Australian industry producing those parts if such an industry existed in Australia. Hence, again, goods required to be included in the investigation were arbitrarily excluded from the investigation and not investigated. However, despite this, dumping duties were imposed upon them as they were included in the description of the goods on which dumping duties were imposed;

(vi) ***'parts' not produced in Australia*****:** other than beams, uprights and braces, no 'parts' of pallet racking storage systems are produced in Australia. This was confirmed in the investigation. All other 'parts' are imported and principally from China. Some of those imported 'parts' are critical to the production of pallet racking storage systems. That is, it is not possible to produce a complete pallet racking storage system from beams, uprights and braces alone – the imported constituent 'parts' are required to produce the complete system.

In other words, those imported 'parts' or, at least, some of them are critical to the existence of an Australian industry producing pallet racking storage systems. Without those 'parts' the Australian industry would not and could not exist. It seems a strange industry policy to impose dumping duties on a product that is critical to the existence of the industry apparently being protected. It also seems strange for the Australian industry to seek the imposition of dumping duties on 'parts' that are critical to its existence. Further, how could exports of such 'parts' cause injury to an industry whose existence is dependent upon those 'parts' and who was importing those 'parts' to produce pallet racking systems in Australia? How would the imposition of dumping duties on 'parts' prevent injury being caused to an Australian industry producing like goods to those 'parts' when such an industry does not exist? These matters were not considered let alone addressed in the investigation. Despite this, dumping duties were imposed n those 'parts';

(vii) ***Australian industries producing 'parts'***: given that 'parts' of pallet racking other than the three structural components were and are not produced in Australia, it is not apparent how an application could have been accepted for the imposition of anti-dumping measures on 'parts' when there was no Australian industry or industries producing the 'parts' in question. This would have been and was evident from the application itself despite it including 'parts' of pallet racking in the description of the goods on which the imposition of dumping duties was being sought. This was neither considered nor explained in Investigation 441.

It also was not apparent why the applicant sought to impose dumping duties on 'parts' of pallet racking that neither it nor others produced in Australia. How could imports of such 'parts' cause injury when there was no Australian industry producing like goods to those parts. What was the injury that the applicant considered it was incurring from exports of those 'parts' to Australia because, as was alleged, of their were being dumped? Why was it seeking to increase the price of those 'parts' in the Australian market, especially when, apparently,

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neither the applicant nor the other members of the Australian industry were selling those 'parts' in Australia;

(viii) ***dimensions of pallet racking not adjustable***: at no time has it been explained what were the reasons for including the phrase '*of dimensions that can be adjusted as required*' in the description, nor what that phrase actually referred to. Clearly the inclusion of that phrase was to identify those pallet racking storage systems whose dimensions were adjustable and to distinguish those pallet racking storage systems whose dimensions were not adjustable. There is no other purpose in including that phrase.

The plain, ordinary and literal meaning of 'dimension' is that a 'dimensions' is a measure of the space that a particular object occupies. Critical, therefore, is to identify the object in question and then identify its 'dimensions' (e.g., width, depth, height, etc.) in order to work out the physical space that that object will occupy or does occupy. Here the 'object; is a complete pallet racking storage system. It consists of parallel rows of bays in which loaded pallets are stored on the shelves in the bays (refer **Attachment C**). It is the dimensions of that 'object' that is being referred to in the description. The dimensions of that 'object', being its width, depth and height of the complete physical structure are not adjustable but are fixed and necessarily so due to it being a load bearing structure.

The only component of a pallet racking storage system that is adjustable is the height of the shelves in the bays. Adjusting the height of a shelf does not alter or adjust the dimensions of a pallet racking storage system. Rather, it alters the dimensions of the storage space above and below the shelf being adjusted and only one dimension of that storage space – its height. Hence it only accommodates changes in the height of loaded pallets being stored. It does not and cannot accommodate changes in the dimensions of the pallets used in storing goods, such as their width or depth.

If the reference to adjustable dimensions was intended to be to shelves of adjustable height, this could have been clearly stated. It was not and, no doubt, this is because that was not what was intended, especially when there is no evidence that was in fact was what was intended. Rather, the purpose of that description was to identify and distinguish pallet racking storage systems whose dimensions are adjustable from those whose dimensions are not adjustable. Again, there is no evidence that this was not what was intended by the inclusion of the words '*of dimensions that can be adjusted as required*' in the description of the pallet racking storage systems.

This issue has been the subject of proceedings before the Administrative Appeals Tribunal (**AAT**). At **Attachment B** is an analysis of the decision of the Tribunal in *Comptroller-General of Customs ats One Stop Pallet Racking Pty Ltd (2020/6305) (7 September 2022)*.

Finally, I understand that, in the AAT proceedings, Australian Border Force claimed that a pallet racking storage system whose dimensions (i.e., width, depth and height) were

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adjustable did not in fact exist. However, no evidence was introduced to establish that claim. Nevertheless, if that view were correct, then it would seem strange to apply to have imposed and to impose dumping duties on a product that does not exist. Hence, it can only be presumed, in the absence of evidence to the contrary, that such a pallet racking storage system does exist and that the imposition of dumping duties on that good was precisely what was intended;

(ix) ***lack of consistency in government agencies***: the various approaches by government agencies to the description of the goods is notable both for their consistency and inconsistency as indicated in the following Table:

Table 1: Approach of Government Agencies

Construction/interpretation	***Agency***	***Comment***
Adjusting shelving height adjusts the dimensions of a pallet racking storage system	Australian Border Force, Administrative Appeals Tribunal	What constitutes a complete assembled physical structure of pallet racking storage system not identified, nor the dimensions of such pallet racking storage system. No identification of what dimension(s) of a pallet racking storage system is constituted by the height of its shelving or which dimension(s) is/are adjusted by altering the height of a shelf. No consideration of the dimensions of the physical structure comprising a pallet racking storage system, as opposed to the physical dimensions of the internal storage space within bays of pallet racking above and below a shelf. How adjusting the height of shelves within bays in a pallet racking storage system adjusts the dimensions of the physical structure of pallet racking system was not identified.
Selection of structural components of different required lengths during assembly/installation or pallet racking adjusts the dimensions to that required.	Anti-Dumping Review Panel	Dimensions of pallet racking storage system not identified. However, referred to adjusting the width, height and depth of a pallet racking storage system by selecting structural components (e.g., beams, uprights and braces)

		of the required lengths to adjust dimensions to that required. This refers to a process of 'manufacture', not to the good as imported. On importation the lengths of the structural components have already been determined, being the lengths of the structural components of the complete panel racking storage system as imported and, therefore, its dimensions are already fixed. They are fixed by the design of the storage system prior to manufacture, let alone assembly and installation. A customs duty (i.e. dumping duty) is a tax on importation, not manufacture. A tax on manufacture is an excise duty.
None of the above	Anti-Dumping Commissioner; Anti-Dumping Commission	Identification of a pallet racking storage system as a complete physical structure not undertaken. Dimensions of a pallet racking storage system not identified, nor how the dimensions of a pallet racking storage system are adjustable (i.e., the mechanism(s) for adjustment) or when adjustments may be required and the nature of any such required adjustments to the dimensions of the pallet racking storage system. Only stated that the structural components are not adjustable due to being made of solid steel, which is consistent with the dimensions of the pallet racking storage system not being adjustable but fixed.

In other words:

(i) **consistency,** in that not one agency, that is, not the then Anti-Dumping Commissioner, the Anti-Dumping Commission, the Anti-Dumping Review Panel, Australian Border Force and the Administrative Appeals Tribunal identified what is a complete, assembled steel pallet racking storage system and, having identified the

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'good' in question, then identified what are its dimensions, and then proceed to ascertain whether any of those dimensions are adjustable and, if so, to what extent. These steps were consistently missing in each agencies consideration of the product in question; and

(ii) **inconsistency,** in that each agency construed the description differently, ranging from altering the height of shelves to substituting structural components of different lengths in the production (i.e., assembly) of a steel pallet racking storage system. In the latter case, this, of course, would result in the anti-dumping measures not being a duty of customs but an excise duty and its purported imposition as a custom duty unconstitutional. It misconceives and fails to recognise that the task is to identify the product as imported, not how it may be manufactured/produced.

Given the lack of consistency and the different approaches to a description whose purpose is to clearly, accurately and precisely identify a good on which a tax is being imposed, consideration was not given to rectifying the obvious deficiencies in the description;

(x) ***identifying the Australian industry***: the Australian industry was determined to consist of those producers of pallet racking storage systems. That of itself is not a problem. However, the goods under investigation consisted not only pallet racking storage systems but also '*parts thereof*'. The phrase '*parts thereof*' covers a range of individual components of pallet racking storage systems and, as discussed earlier, there is no Australian industry or industries producing 'parts' of pallet racking storage systems other than beams, uprights and braces. In other words, there was no entity in Australia that produced the 'goods under investigation' – only the end-product (i.e., a complete pallet racking storage system) and some of the components of such a system (i.e., beams, uprights and brace) were produced in Australia. Consequently, there were, in effect, either four relevant industries producing each of complete pallet racking storage systems, beams, uprights and braces or one industry producing complete pallet racking storage systems. If the latter were the case, then beams, uprights and braces along with all other 'parts' should have been excluded from the investigation. As they were included, there were four Australian industries producing each of those goods and, consequently, there should have been at least four separate investigations into exports of each of those goods. There wasn't.

(xi) ***wrongful inclusion of entities as members of the Australian industry***: members of the Australian industry who imported 'part's from China and/or Malaysia should **not** have been included as members of the Australian industry. This is because Article 4.1(i) of the *WTO Anti-Dumping Agreement* excludes from a domestic industry producers in the importing country (i.e., Australia) who "*are themselves importers of the allegedly dumped product*". Accordingly, each of the entities in Australia who otherwise would or may be members of the Australian industry but who imported any of the '*goods under investigation*', such as, for example, constituent components (i.e., 'parts') used in the production of the end-product, should have been excluded as being members of the Australian industry. While Australia has not given domestic legal effect to that provision, which may of itself be a breach of WTO obligations, Australia nevertheless has bound itself at international law to give effect to that provision.

Hence, Australia must and no doubt would administer its anti-dumping regime in accordance with that provision to ensure compliance with its international legal obligations that, as I understand it, cannot be avoided by domestic legislation. However, this did not occur here. Consequently, Australia arguably is in breach of its WTO obligations. Not only was this issue not addressed in the dumping investigation, but also it does also not appear to have even been considered.

Further, even if included as members of the Australian industry, it is not apparent how they could be incurring material injury from goods that they were importing as necessary for the production of pallet racking systems? This also was not considered, let alone addressed in Investigation 441;

(xii) ***wrongful exclusion of entities as members of the Australian industry***: entities that should have been included as members of the Australian industry were wrongfully excluded. They were excluded because, although producers of complete pallet racking storage systems, it was considered that they did not undertake one substantial process of manufacture in Australia in the production of a like good to the goods under consideration. The rationale for such exclusion apparently was because they did not produce one or more of the constituent components of a pallet racking system but, instead had outsourced such production to entities overseas. Why production of one or more components was a necessary precondition to inclusion as a member of the Australian industry is not apparent, nor properly explained.

The statutory requirement is for one substantial process in the manufacture of the like good in question takes place in Australia. As with other goods produced from the assembly of components, the process of manufacture includes the design of the good, including of its constituent components, the production of those components and, ultimately, their assembly into the finished good. – the end-product. Processes of manufacture of a good, especially a good that is produced from the assembly of components, is not confined to the physical production of one or more components. The production of those components are contingent upon the occurrence of other processes of manufacture including critically design and the production of the end-product is contingent on other processes of manufacture, namely assembly of the constituent components.

Entities, such as my company, are involved in the production of complete pallet racking storage systems – from their initial design to their assembly, installation and commissioning. The design, assembly and installation of pallet racking storage systems are all substantial processes in the manufacture of pallet racking storage systems. Without which those processes the production of pallet racking systems would not occur. Design of itself is a substantial and essential process of manufacture without which not even the components of pallet racking storage systems would be produced. Assembly of a complete pallet racking system is no different than the assembly of a motor vehicle, a laptop, refrigerator or washing machine from its constituent components. Each process in the assembly of those goods is an

essential and substantial process of manufacture of the end- product. The only difference is that the assembly of a pallet racking systems does not usually take place on the factory floor.

In this regard, think Henry Ford's assembly lines for the production of the Model-T Ford motor vehicle – each step in the assembly line was a substantial process in the manufacture of the end product, the Model T Ford. The processes of manufacture of that motor vehicle were not confined to the production of the constituent components that were ultimately assembled into the end-product.

Accordingly, there no basis upon which to limit the members of the Australian industry to only those producing one or more of the structural components of pallet racking storage systems. The processes involved in the manufacture of a complete pallet racking storage systems are materially different from the processes in the production of a structural component of such a system. It would appear that the differences between the two were confused. At any rate the exclusion of producers of pallet racking who did not produce one or more of the structural components was wrongful and resulted in the conduct of an investigation otherwise than in accordance with the law be excluding entities who were menders of the Australian industry producing like goods to the goods under investigation;

(xiii) ***determination of a single dumping margin***: a single dumping margin was determined for exports of '*pallet racking storage systems and parts thereof*'. This raises the question of how was that dumping margin determined given that '*pallet racking storage systems and parts thereof*' covers a range of disparate goods and why was it determined as a single dumping margin. As discussed earlier, '*pallet racking storage systems and parts thereof*' is not a description of a single good but a range of goods. That range of goods does not constitute a single good or even a single product. Each good is a separate, distinct article of commerce with its own unique characteristics and, consequently, end-use and, importantly, price. As such each good does not compete with any other good comprised in the goods under investigation, whether on price or otherwise. Hence there was no lawful basis to determine a single product margin because the goods under investigation did not constitute a single product but a range of individual products, each requiring its own dumping investigation and dumping margin determination.

Further, as discussed earlier, it is not apparent how a single dumping margin was calculated or could have been calculated for the goods under investigation when each good when sold, whether for export of domestically, would have a price unique to it. How such prices were comingled into a single dumping determination was not apparent from Report 441, nor was it explained why such a single dumping margin was determined for a disparate range of goods being individually exported to Australia.

Accordingly, the dumping margin that was determined was not a dumping margin of the prices at which complete pallet racking storage systems were being exported to Australia but of something else. Nor was it the dumping margin at which individual 'parts' of pallet racking

were being exported to Australia. Again, exports of the goods that were required to be investigated do not appear to have been investigated and the dumping margin was not the margin of dumping, if any, of the goods required to be investigated but of something else. How or why such a single dumping margin was determined given the goods under investigation was not explained in Report 441;

(xiv) ***determination of dumping of pallet racking systems***: in the determination of a single dumping margin, it was not apparent whether that determination was based on exports of complete pallet racking systems, as opposed to the three structural components of such systems. The reasons why this is not apparent is because not only due to the statement by the then Anti-Dumping Commissioner in Report 441 that the only components included in the dumping margin determination were the three structural components but also the template Exporter Questionnaires that exporters were required to complete only sough information about parts and components of pallet racking systems and not pallet racking systems themselves. That is, the Questionnaire sought information on the domestic and export sales of parts of pallet racking and on the production of parts of pallet racking but not on the sale and production of complete pallet racking systems. It is not known whether relevant information concerning complete pallet racking systems was provided by exporters, but, without it, a determination that exports of complete pallet racking systems were being dumped would not be possible. The lack of transparency in Report 441 on this issue and the fact that s a single dumping margin was determined notwithstanding that the goods under investigation covered a range of goods and not a single good again indicates that the dumping margin was wrongly determined;

(xv) ***exemption of certain 'parts' from dumping duties***: simultaneously with the imposition of dumping duties on 'parts' of pallet racking storage systems, all 'parts' and components of such storage systems other than beams, uprights and braces, were exempted from those dumping duties. This in itself is extraordinary. Why simultaneously impose a tax on certain goods and then immediately exempt those very same goods from that tax? Why was the tax imposed in the first place if the goods on which the tax was being imposed were to be immediately exempted from that tax?

If the 'parts' in question were neither produced nor sold in Australia and hence were being exempted from the dumping duties, how were exports of those 'parts' to Australia causing material injury to an Australian industry producing like goods to those 'parts' and who was that Australian industry? How could exports of those 'parts' to Australia cause injury when those 'parts' were being imported into Australia by the Australian industry as they were constituent components necessary for the production of pallet racking storage systems? At any rate, there was no factual or legal basis to recommend the imposition of dumping duties on the exempted 'parts', nor to impose dumping duties on the exempted 'parts'.

In addition and significantly, it apparently did not appear strange in the investigation that:

(i) grounds existed for the imposition of dumping duties on the 'parts' to be exempted from such duties and
(ii) then, having imposed dumping duties on those 'parts', there existed grounds for exempting those 'parts' from those duties and
(iii) immediately exempt those 'parts' from those exact same dumping duties.

Presumably, if they were to be eligible for exemption immediately upon imposition of the dumping duties, then the imposition of the dumping duties on them was not warranted in the first place. This did not seem to have occurred to anyone. Why not?;

(xvi) ***material injury and causation***: in light of the foregoing, the analysis of material injury and causation in the investigation was necessarily flawed. For example if the determination of dumping and the dumping margin were flawed, then the analysis of material injury being caused by that dumping must be necessarily flawed. However, the material injury and causation analysis was flawed for other reasons as well.

First, any assessment of material injury and causation must necessarily be between each of the particular goods exported to Australia and the 'like goods' produced in Australia. That apparently did not occur here. Regardless of price, an exported beam only competes with and can only compete with a domestically produced beam and not with a domestically produced, upright, brace or a complete pallet racking storage system. No such analysis and findings of fact appear to have been undertaken here. Precisely what material injury and causation analysis was undertaken is not apparent from Report 441 but it is evident that it was not that which was required.

Second, the material injury and causation analysis must be undertaken in relation to the Australian industry as a whole. That is, the material injury being caused by dumping must be being caused to the Australian industry producing 'like goods' as a whole. Such an analysis was not undertaken. This is because the Australian industry consists of six entities. However, only two of those entities participated in the investigation and provided relevant information and evidence. There was no evidence and none referred to in Report 441 that the economic performance of those two entities was representative of the other members of the Australian industry or of the Australian industry as a whole. Indeed, it does not even appear to have been properly considered. It does not follow logically or commercially that the economic performance of one or two members of an industry is representative of the other members or of the industry as a whole regardless of the production volumes of those two members. To the contrary, it is more likely that producers of the greater volume of the goods under investigation are less likely to be representative of the domestic industry as a whole because of their size and that their business model and, consequently, economic performance is likely to be much more reliant on sales volumes. Hence the injury purportedly being incurred was not that of the Australian industry as a whole but only of those members who participated in the investigation.

Third, the structural components of a pallet racking storage system of one producer are not necessarily submittable for those of another and are often specifically designed and produced not to be substitutable with those of other producers. The reasons for this are obvious . This lack of substitutability between systems produce by different producers affects competition between the pallet racking storage systems of different producers. Hence price may not be the principal reason for purchasing decisions. However, this issue, while being a relevant consideration, does not appear to have been considered, let alone addressed in Investigation 441notwithstanding being a material relevant consideration.

(xvii) ***substitutability of components and causation***: a feature of the Australian pallet racking market is the lack of substitutability of components and, in particular, the structural components of pallet racking between different producers. That is, for example, structural components produced by producers overseas in, say, China are not substitutable for those produced by producers in Australia, say, for example, the applicant, Dematic Pty Limited, as each have characteristics unique to each that preclude substitutability. Indeed, they are designed and produced with this objective as indicated earlier above. This affects competition between pallet racking produced by different producers affecting purchasing decision by customers including in their selection of pallet racking produced by one producer over another. In other words, the price elasticity of demand between pallet racking produced by different suppliers would be affected by such lack of substitutability. Despite being a relevant consideration, this issue was not considered, let alone addressed, in the material injury and causation analysis in the investigation. It would seem that the then investigators were unaware of and had not been appraised of this fact regarding the Australian pallet racking market;

(xviii) ***material injury, causation and methodology***: the assessment of material injury and causation in Investigation 441 was problematic for a number of reasons. First, information and evidence from not only the majority of members of the Australian industry was not provided but also from purchasers of pallet racking storage systems despite the Anti-Dumping Commission's attempt to obtain such information and evidence. Thus there was thus no information and evidence from purchasers of pallet racking systems as to the reasons for their purchasing decisions.

Second, as was noted in Report 441, the majority of pallet racking systems are supplied into the project sector of the Australian market. That is, supply is by way of a tender process for the design, supply installation and commissioning of the complete pallet racking system. As such, each pallet racking system so supplied is bespoke to the particular project. In this process, the Australian supplier tenders for the project, which includes the bespoke design of the pallet racking systems and the price for its supply, installation and commissioning. Once agreed with the customers and a deposit paid, the Australian supplier negotiates and places a purchase order for the production and supply of the complete pallet racking system with the overseas producer.

Importantly, in this process, pricing is agreed between the Australian supplier and the customer before a purchase order is placed with the overseas producer. In other words, the

price is agreed with the customer before and independently of the placing of a purchase order with the overseas producer. In such circumstances, it is not clear and was not explained in Report 441 how the exports could be causing injury when pricing was agreed between the Australian suppler and the customer before purchase orders were placed with the overseas producer. That is, how the export prices of the latter were causing injury when the prices with the purchasers of pallet racking systems were agreed in advance of those export prices? This was not addressed in the analysis.

Further, even if the price at which the overseas producer sold the pallet racking system to the Australian supplier was a dumped price, it is not evident how that price flowed through to the price paid by the customer to the Australian supplier supplying the pallet racking system. That is, unless it is determined that the dumped export price to the Australian supplier flowed through to the price payable to the Australian supplier by its customer purchasing the system and, for example, was not absorbed in the margin, and the extent to which it flowed through, it cannot be concluded that dumping provided the Austrlaian supplier with a price advantage over the Australian industry. This was not considered, let alone addressed, in Report 441.

Finally, the supply of the majority of pallet racking systems in Australia in the project sector is on a project-by-project basis. Hence the point of competition is at this level of trade and requires an analysis of the pricing on a case-by-case basis similar to that undertaken in the investigation into power transformers. The fact that the price includes such things as the design of the pallet racking systems and its installation and commissioning, as well as the supply of the good itself (i.e., the complete pallet racking system), is irrelevant. The purchase of any good includes embodied in it a variety of factors such as its design, its assembly from components and its testing to ensure it functions in accordance with is specifications and intended purpose. The purchase of a motor vehicle or computer are readily available examples except that the assembly and testing occurs in the factory and not the warehouse as is the case for pallet raking systems. Hence, pallet racking systems are no different in this regard from other goods produced from the assembly of components.

Notwithstanding this, it was determined that in order to assess price competition for pallet racking, certain projects were selected and price competition was analysed on the following basis:

> "*In assessing the direct price competition between dumped goods and the locally produced goods in the project sector, the Commission focused on the <u>itemised steel pallet racking prices</u> where available. Otherwise, it was necessary to examine <u>the total project prices and have regard to the proportion of those prices represented by the value of steel pallet racking</u>.*" (underlining added)(page 73 of Report 441)

Why this approach was adopted is not apparent. Competition between the imported pallet raking systems with the domestically produced systems is the actual price offered to the purchaser for the design, supply, installation and commission of the particular system. What is being purchased is the complete system, not part thereof. Competition between the imported

system and the domestically produced system is not at the individual component level but the supply of the complete system, that is, its design, supply, installation and commissioning. If the system consists of or incorporates allegedly dumped goods, then it would need to be established, supported by evidence, that that those dumped goods have affected the price offered for the supply of the system and the extent to which they have affected the price. In other words, whether it provided the imported system with a competitive price advantage over the domestically produced systems because of dumping and the extent to which it did so.

This does not appear to have been addressed in Report 441. Also not addressed was the fact that the domestically produced pallet racking systems would be being produced from imported constituent components that were apparently determined to be being dumped. This was not addressed in the material injury and causation analysis and it is not clear why it was not.

The issue that was required to be addressed but was not, was whether and, if so, to what extent did dumped export prices flow through to the price tendered to purchasers by Australian suppliers of imported pallet racking systems, thereby conferring on that supplier a competitive advantage in price due to dumping? Again, this was not considered, let alone addressed, in Report 441. Because it was not addressed, no conclusion supported by evidence could properly have been made that material injury to the Australian industry was being caused by dumping.

Conclusion

In light of the above, it is apparent that there were significant, material shortcomings and deficiencies that affected the findings on which the imposition of dumping duties were based. This is not to say that the imposition of dumping duties may not have been warranted but, rathe, the investigation that was undertaken did not warrant the imposition of dumping duties due to the shortcomings and deficiencies.

Obviously, the mattes raised in the paragraphs are summaries. Each could be expanded with considerably more detail.

Regarding the continuation inquiry, it would appear, at least from the Statement of Essential Facts, that these shortcomings and deficiencies have been carried through and perpetuated in that inquiry, with the consequence that that inquiry does not provide a proper basis for a decision as to whether to continue the measures for a further five years. This is also discussed further in Section 5 below.

Implications

If, as contended, the goods required to be investigated were not in fact investigated but something other than and less than those goods were investigated and if the goods actually investigated were not properly investigated, then the subsequent imposition of dumping duties on the goods under investigations (i.e., the goods required to be investigated) could not have been warranted.

The implications of this are that the increased costs of pallet racking systems and parts thereof would flow through to not only purchasers of such systems and parts, whether imported or domestically produced, but also to entities storing goods on such systems and, ultimately, to Australian businesses and consumers paying increased prices for goods stored on such systems due to increased storage costs. In other words, it would contribute to Australian businesses increased cost of business and to consumers increased cost of living and inflation.

The consequence of this is that those bearing the cost of the imposition of dumping duties, both directly and indirectly, would or should be entitled to be compensated for the increased costs incurred, as well as adverse consequences that may have been incurred if the imposition was unlawful. Presumably, such persons would be entitled to be compensated not only for their increased costs but also for any adverse effects caused thereby. This, of course, assumes the imposition of dumping duties was unlawful, both in terms of imposition and manner of imposition, which would seem likely to have been the case. If, therefore, the deficiencies with Investigation 441 are carried through and perpetuated in the continuation inquiry, the consequences and implications will be the same.

Section 3 – Anti-competitive behaviour and competition law issues

The apparent confusion as to what actually were the goods being exported that were allegedly causing injury because of dumping and to whom, raises issues of not only how the findings of dumping, material injury and causation were actually determined but also whether the anti-dumping regime was being used for a purpose otherwise than to prevent injurious dumping.

For example, why did the application for the imposition of anti-dumping measures extend to goods that were not in fact produced in Australia but were imported because they were critical to the production of pallet racking storage systems? Imposition of dumping duties on exports to Australia of such goods could not be to prevent injurious dumping. Rather, it could only be for some other extraneous ulterior purpose. Was that purpose to artificially inflate the price of pallet racking in Australia and/or to restrict import competition? The would seem to be the only possible consequences of imposing a protective customs tariff in the form of dumping duties. Did this amount to anti-competitive conduct such as that proscribed by Section 46 of the *Competition and Consumer Act 2010*?[5]

Despite questions of anti-competitive being raised by the circumstances of the application as it extended to goods not produced in Australia but the import of which were critical for the existence of the Australian industry producing pallet racking, no inquiries appear to have been regarding such conduct. It is not apparent why such inquiries were not made.

That Australia's anti-dumping regime has been used to achieve outcomes other than the intended sole purpose of the regime, namely, to remove and/or prevent injurious dumping is unsurprising as it

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[5] See also *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90; [2004] HCA 48 regarding taking advantage of market power especially *"Further, to suggest that there is a distinction between taking advantage of market power and taking advantage of property rights is to suggest a false dichotomy, which lacks any basis in the language of s 46" (at para 125)*

has occurred in the past. The recent Federal Court case of *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5) [2022] FCA 1475* provided evidence of such abuse. In that case BlueScope Steel Limited (**BlueScope**) and its Chief Executive Officer were found to have been attempting to induce other suppliers of steel products to contravene the *Competition and Consumer Act 2010* by arriving at an understanding with other suppliers of steel products that they would use certain price lists and sell at certain prices (see: Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5) [2022] FCA 1475 (fedcourt.gov.au)). Fines were imposed for the offences including a fine of $50 million on BlueScope, with a separate fine for its Chief Executive Officer. It is understood from the judgement that those attempts were not successful.

The 'weapon' that BlueScope used in its attempt to persuade other suppliers of steel products to agree to its price fixing arrangements was the threat by BlueScope of it applying for the imposition of anti-dumping measures. This was reflected in the judgement in which there were over 80 references to 'dumping'. Those references detailed how the threat of applying for the imposition of dumping duties was used to persuade other suppliers of steel products to the price fixing arrangements.

This is not to suggest that attempts at price fixing are occurring in the pallet racking industry and, as far as I am aware, there is no evidence of the occurrence of that behaviour, although the above case does raise the interesting question of whether the injury incurred by the Australian industry was due to artificially high prices for the steel sourced domestically from suppliers like BlueScope.

At any rate, the point here is that the application for the imposition of anti-dumping measures could not have been to prevent injurious dumping because it extended to include exports of goods that were not in fact produced in Australia. That is, there was no Australian industry producing like goods to those 'parts'. Further, those 'parts' were in fact critical to the existence of the Australian industry and were being imported by the Australian industry to produce pallet racking storage systems.

Hence the imposition of dumping duties must have been for some other extraneous purpose and not to prevent injurious dumping because there was and could be no injurious dumping of such exports in the circumstances. Rather than for its indented purpose of preventing injurious dumping, were those members of the Australian industry with substantial market power, either individually or collectively, seeking to avail themselves of the anti-dumping regime to inflate prices in the Australian market and/or limit competition from imports? If so, was this contrary to Section 46 of the *Competition and Consumer Act 2010*?

It is surprising and of concern that, in the circumstances, these issues also were not considered let alone addressed in the investigation. This remains the case in the continuation inquiry.

Section 4 - What should have been the scope of the dumping investigation?

In assessing the application for the imposition of anti-dumping measures, it would not have been unreasonable for the then Anti-Dumping Commissioner to have asked the applicant two simple questions in light of the description of the '*goods under investigation*' in the application, namely:

(i) what was being referred to or described by the phrase '*steel pallet racking … of dimensions that can be adjusted as required*' if not the width x height x depth of a pallet

racking storage system because, if it was something other than the width x height x depth of the pallet racking storage system, this was not apparent from the plain, ordinary meaning of those words, especially the reference to '*dimensions*'; and

(ii) what 'parts' of pallet racking were being exported to Australia in addition to beams, uprights and braces that were causing injury because of dumping and was there an Australian industry producing each such 'part' and, if so, which 'parts' and by whom?

Had these questions been asked, and they apparently were not, then the ensuing dumping investigation(s) would have been significantly different and resulted in different outcomes.

Specially, there would have been and should have been at least four separate dumping investigations, which could have been conducted simultaneously, namely:

(i) one investigation into exports of '*steel pallet racking with shelving whose height can be adjusted as required*'; and

(ii) three separate investigations into exports of each of beams, uprights and braces as each is a separate and distinct 'good' when individually exported separately from the end-product.

The outcome of each such dumping investigation would necessarily have been different to the one that was conducted. Instead of a single, muddled investigation into a range of products that were comingled together as if they were a single product, there would have been four separate dumping investigations each with its own outcome. Whatever the outcome of those investigations, self-evidently they would have been materially different from that of the investigation that was conducted.

Regrettably, the above questions were not asked and the required investigations were not undertaken, the consequences of which are as set out earlier above. Again, this deficiency has flowed through and been perpetuated in the continuation inquiry.

Section 5- Continuation inquiry

Regarding the continuation inquiry into whether the anti-dumping measures on pallet racking should be continued for a further five years, that is Continuation Inquiry 617, it would seem that it has merely continued and perpetuated the shortcomings and deficiencies of Investigation 441. The description of the goods under investigations not only remains unchanged but the inquiry into the goods under investigation appears to have been conducted no differently from Investigation 441 with its attendant shortcomings and deficiencies.

Model Control Code (MCC)

For example, in Section 3.4 of the recently published Statement of Essential Facts, the proposed model control code (**MCC**) for the goods under investigation apparently '*describes the key characteristics of the goods*'. The goods referred to in the MCC are '*beams, uprights and braces*'. No mention is made of complete pallet racking storage systems, whether assembled or unassembled, nor the 'parts' required to produce a complete pallet racking storage system. That is, whether there are different 'models' of each of such goods and, if there are, what those 'models' are. It appears to

assume that the only goods under investigation are beams, uprights and braces, which, if so, is manifestly incorrect.

The concept of 'models' for pallet racking is also curious. This is because each pallet racking storage systems is bespoke – uniquely designed, produced and installed to meet the requirements of its particular application. . Each is individually designed, produced, installed and commissioned, including its constituent components such as its structural components. How there could be different 'models' of a bespoke good, that is, a custom-designed, produced, installed and commissioned and, therefore, a unique good is not evident. Nor for that matter how or why 'models' could be relevant to bespoke products.

No explanation or rational of how or why an MCC could be here relevant to bespoke pallet racking storage systems. Again, there appears to be some confusion and misconception as to the good or goods under investigation. There may be different models of beams, and different models of braces and different models of uprights being exported to Australia, but they are not being separately investigated in the continuation inquiry just as they were not separately investigated in the original investigation, which is of itself a deficiency.

Substitutability of components

Also, in this context it is important to note that the three structural components of pallet racking, that is, the beams, uprights and braces are not necessarily substitutable between pallet racking storage systems produced by different producers. That is, producers of the structural components of pallet racking, especially the Australian producers, ensure that the components they produce are not substitutable for those of other producers and vice versa. This appears to have escaped the attention of those investigating notwithstanding its clear relevance as to competition between pallet racking produced by different producers. Query then whether the MCC does in fact reflect different models of, say, beams, uprights and braces produced by a producer and between different producers.

Relevance of MCC

Finally, it is not apparent what the relevance the MCC has. Specifically how does the so-called different models of beams, uprights and braces relate to the prices at which complete, bespoke pallet racking systems is not explained nor evidence provided of its relevance to the prices for uniquely designed pallet racking systems. Neither pallet racking systems nor the components used to produce them, especially the structural components are commodity products. Pallet racking systems are load bearing physical structures. Hence the requirement that they be designed and engineered to operate as a load bearing structure and hence why they are designed and engineered to meet either Australian or international standards.

Basically, it is not possible or permissible to alter those dimensions without altering the design of the pallet racking storage system because to do so could jeopardise the structural integrity and strength of the system. Hence the requirements of SafeWork NSW ([Pallet racking fact sheet | SafeWork NSW]) and WorkSafe Victoria ([Pallet racking operation and maintenance | WorkSafe Victoria]) that an alteration to a pallet

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racking storage system requires the supervision of a structural engineer. Does not involve substituting one commodity component for another. Far from it. This does not appear to have been understood.

Statutory requirements and assessment of economic condition of the Australian industry

Those matters aside, the purpose of the continuation inquiry is to ascertain whether the expiration of the anti-dumping measures would lead or be likely to lead to the continuation or recurrence of the material injury that the measures are intended to prevent, that is material injury caused by dumping.

Given that the anti-dumping measures have been in place since early 2019, it would seem reasonable to expect that the continuation inquiry would examine whether the anti-dumping measures have in fact been effective in preventing material injury caused by dumping and, if not, why not, when and to what extent were they ineffective. No such investigations appear to have been undertaken. This appears consistent with the practice in Australia not to inquire into whether anti-dumping measures are in fact effective in achieving their intended purpose as I understand it.

It would seem somewhat futile to recommend the continuation of anti-dumping measures if it was not known whether the measures had in fact been effective in achieving their intended purpose, that is, of preventing injurious dumping. If the measures had not been effective, it presumably would be important to know why they were not effective, to what extent they were ineffective and when they had become ineffective.

However, this does not appear to have been undertaken. Section 5 of the Statement of Essential Facts purports to address this issue, that is, the economic performance of the Australian industry since the imposition of the anti-dumping measures. However, it merely sets out the economic performance of two of the members of the Australian industry. There is no evidence that their economic performance is or could be representative of the industry as a whole. If they are the largest producers of pallet racking systems in Australia, it is unlikely that their performance would be representative of the industry as a whole. The opposite is more likely the case. In any event there is no evidence that they are in fact representative.

The information that was used to assess the economic performance of the Australian industry consisted of information provided by two members of the Australian industry and import data from Australin Border Force[6]. Of course, import data reflects the customs value of imported goods determined in accordance with Division 2 of Part VIII of the *Customs Act 1901*, which is different from the export price of goods exported to Australia. It also is not the price at which the exported pallet racking system competes with the domestically produced system in the Australian market on price. The relevance of this data here is at best questionable.

Also, how that import data was reconciled with the data provided by the two members of the Australian industry is not apparent. Presumably that data is sales data of those two members of sales to their customers, which, of course, is different from import data. How these two different

[6] See Sections 2.4.1 and 5.2 of the Statement of Essential Facts. Contrary to the assertion in Section 2.4.1 of the Statement of Essential Facts, my company was not invited to participate in the continuation inquiry,

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sets of data were reconciled is not apparent. Obviously the on-sale of the imported pallet racking systems by the Australian importer/supplier to its customers in the Australian market would be at different prices to the import prices declared on importation for customs duty purposes, which is different from the export price in turn.

This is not assisted by the graphs in Section 5 of the Statement of Essential Facts. For example, Figures 3 and 4 purportedly disclose sales volume trends of the two members of the Australian industry. Those sales volumes are apparently sales volume by weight (i.e., by kilogram). Pallet racking systems are not sold by weight. The measure of sales volume is the number of pallet racking systems sold. That is the good being sold – a complete fully installed operational pallet racking storage system, not a random collection of commodity products sold by weight.

That pallet racking systems are sold as bespoke products pursuant to a tender process was acknowledged in Investigation 441 and again in this continuation inquiry. To suggest that sales volume is measured in the weight of the steel in the pallet racking systems sold fundamentally misconceives how pallet racking systems are sold in the Australian market. This misconception flows through to the other Figures in Section 5 of the Statement of Essential Facts. Those Figures equally disclose a misconception of how pallet racking systems are sold, which is not by weight.

Further, the graphs in Section 5 of the Statement of Essential Facts not only do not disclose sales volumes of pallet raking systems sold, whether by the two members of the Austrlaian industry and/or others, but also do not disclose sales of any of the other goods comprised in the goods under investigation, that is, the 'parts' of pallet racking. They appear to have been forgotten or, at least, excluded from the inquiry. Despite this, it appears that recommendation b for the dumping duties to be continued on such 'parts'.

Also, there is no data referred to in Section 5 of the Statement of Essential Facts that assesses the competitiveness of the pallet racking systems offered for supply to customers in the Australian market with those from the subject countries on price. Given that each pallet racking systems being offered for supply is bespoke, such an assessment can only be undertaken on a transaction-by-transaction basis. In this regard it is no different from the analysis that was undertaken into exports of power transformers, from which guidance should be sought. Pallet racking is not a commodity product that is sold on a per kilogram or similar basis. While such an approach may be attractive from a cost accounting perspective, dumping is concerned with price, not cost. There appears to be no information, on a transaction-by-transaction basis, of the exported pallet racking systems competing with the domestically produced systems on price. Hence no conclusions can be drawn as to the effectiveness or otherwise of the anti-dumping measures.

This is supported by the information presented in Section 5 of the Statement of Essential Facts and, in particular, the various graphs. Apart from being erroneously based being based on weight, those graphs disclose no effect that the anti-dumping measures had on prices or sales following the imposition of dumping duties. Rather, those graphs disclose economic trends in terms of prices, sales volumes and profits and profitability for the two members of the Australian industry who provided data that are consistent with market conditions prevailing during the period 2019 to 2022. That is,

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their economic performance reflected prevailing market conditions with no evidence that such performance would be any different in the absence of the measures.

Section 6.8.3 of the Statement of Essential Facts does acknowledge that competition between the exported pallet racking systems and the domestically produced systems is on a transaction-by-transaction basis, that is on a project basis. However, it would appear that only information was provided by one member of the Australian industry as to tenders that it had not been successful in wining, which it claimed was due to price. No independent evidence was obtained to substantiate/verify such claims.

Importantly, there was no quantitative analysis of the number of tenders offered in the Australian market over the inquiry period and how many were won by the Australian industry and how many by suppliers of the exported pallet racking systems and how many by other imported pallet racking systems, nor the criteria on which the successful tenderer 'won' the tender. It is the analysis that was required to be undertaken as being the only relevant analysis of competition on price as well as other factors at the point of competition on a transaction-by-transaction basis. In the absence of such analysis any conclusions as to what was occurring whole the measures were in place and would like to occur in the absence of the measures is at best speculative as opposed to what is probable. That is, there is no evidence to support what is likely to occur in the absence of dumping duties.

Interestingly, despite the turbulent and challenging economic climate since the anti-dumping measures were imposed in 2019, no review of the anti-dumping measures was sought by the Australian industry during this period. Nevertheless, prices of the two members of the Australian industry, although erroneously calculated on a 'unit selling price' presumably be weight for comparison with the CTMS on a per kilogram basis in Figures 6 and 7, disclose that their prices have increased throughout the inquiry period. This despite the fact of import competition from exports from the subject countries and from the non-subject countries and the turbulent economic times.

This indicates that the anti-dumping measures have ceased to be relevant, assuming that they were ever relevant, and that prices and sales have been and are being governed by market conditions or, at least, there is no evidence to the contrary. The question then is what is to be achieved by continuing the measures and continuing them at their current levels which are now well over five years out of date being based on an investigation period of 1 October 2016 to 30 September 2017?

Perpetuation of shortcomings and deficiencies

There is no injury being caused by dumping to be removed and there is no evidence that material injury would likely recur in the absence of the measures. The absence of evidence is due to the shortcomings and deficiencies in the continuation inquiry that have been continued from Investigation 441. That is, the difficulties in obtaining sufficient relevant information are appreciated, as is the then necessity of relying upon the best available information provided the attendant risks are taken into account. However, that is not the problem here or, at least, not the principal problem. That problem is the nature and scope of the continuation inquiry undertaken due to the shortcomings and deficiencies identified in Section 2 of this **Attachment A** in relation to Investigation 441 applying equally to the continuation inquiry with the same consequences.

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In reviewing Sections 5 and 6 of the Statement of Essential Facts, it is apparent that the shortcomings and deficiencies in Investigation 441 have carried on through to the continuation inquiry.

That is, there continues to be a misconception of the goods under investigation as being a single good of some description when in fact it is a range of goods and the resulting issues identified in Section 2 of this **Attachment A** have been perpetuated. Indeed they appear to have been compounded by the attempt to assess the economic performance of the Australian industry (as purportedly represented by two members of that industry) based the weight of product sold notwithstanding that pallet racking systems are not priced and sold by weight. They are priced and sold as complete bespoke systems, a fact which has been acknowledged both in Investigation 441 and this continuation inquiry. Why the facts have been departed from is a mystery.

At any rate, the effectiveness of the anti-dumping measures or otherwise remains unknown.

Not only has the misconception of a single good being carried through to the continuation inquiry but also the 'parts' of pallet racking, including the 'parts' exempted from the dumping duties, appears to be wholly missing from the continuation inquiry. How can it be recommended that dumping duties be continued on such 'parts' when they have not been inquired not and there are no findings of fact supported by evidence that the expiry of the measures would lead to a recurrence of dumping of those 'parts' and because of that causing a recurrence of material injury to the Australian industries producing those 'parts' if there are such industries?

To reiterate, the same or similar shortcomings and deficiencies in Investigation 441 have been carried through to this continuation inquiry with the same or similar consequences and implications. What was required to be inquired into has not been inquired into and what has been inquired into has not been properly inquired into. Hence there is no proper basis for the recommended continuation of the anti-dumping measures.

In this context, dumping duties appears to be the only tax whose imposition, variation and, here, continuation is not subject to inquiry as to whether the tax actually achieves its stated policy objective, which in this case is of preventing material injury caused by dumped exports. The object of dumping duties is to remedy injury if and when injury occurs because of dumping. It is not to provide tariff protection to a domestic industry. There is no evidence that the dumping duties have had that effect of remedying injury caused by dumping, assuming injury to be being caused by dumping which remains to be established.

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Attachment B

Administrative Appeal Tribunal Case

The decision of the Tribunal in *Comptroller-General of Customs ats One Stop Pallet Racking Pty Ltd (2020/6305) (7 September 2022)* was handed down on 6 September 2022 following a hearing some 9 months earlier on 8 December 2021.

The substance of the decision is contained in the following paragraph: -

> "*The subject goods are **clearly** "of dimensions that can be adjusted as required" applying the ordinary meaning of that term. That term construed in context and having regard to purpose of the dumping duty notice, **clearly** requires the pallet racking to have some adjustable dimensions. If some dimensional adjustments can be made, including just of storage level heights, that is sufficient for the subject goods to meet the description of the goods under consideration in the dumping duty notice. The heights of the racks where pallets can be stored are **clearly** important dimensions of a steel pallet racking system*." (bold emphasis added)

For a relatively short decision that took 9 months to hand down, it is, at best, unpersuasive and the lack of detailed reasoning is disappointing and unsatisfactory. The reasons for this are discussed below, along with related issues.

Consideration of decision

Initial observations

Like all decisions of the ATT, it is an administrative decision that addresses only the matter before the Tribunal, although, as a matter of good administrative practice, there should be consistency in decisions. The value of a decision on other cases lies in the persuasive value of the reasoning underpinning the decision.

With respect, the reasoning in this case is not persuasive.

Also, the Tribunal did not consider whether the anti-dumping measures had been validly imposed. That was not an issue before the Tribunal.

Initial observations of reasons for decision

Critical to the decision are the following statements from the paragraph extracted above:

> *"The subject goods are **clearly** 'of dimensions that can be adjusted as required' applying the ordinary meaning of that term."*

> *"That term construed in context and having regard to purpose of the dumping duty notice, **clearly** requires the pallet racking to have some adjustable dimensions."*

> "*The heights of the racks where pallets can be stored are* ***clearly*** *important dimensions of a steel pallet racking system*."

The frequent use of the word '*clearly*' reflects the lack of detailed reasoning for the decision despite the lengthy period before a decision was handed down. Use of the word 'clearly' often is resorted to when detailed reasons are not available to support the conclusion – it obviates the need to provide detailed reasons.

In any event, the above statements are assertions of opinion, not findings of fact based on evidence and those expressions of opinion are not persuasive reasons for the decision.

Analysis of reasons for decision

The Tribunal's decision was that the height of the shelves in a pallet racking storage system is a dimension of that storage system. Consequently, if that dimension is adjustable, that is, if the height of the shelves are adjustable, then the dimension is adjustable as required and the description in the dumping duty notice is satisfied.

There are a number of problems with this decision but the principal one is that the reason on which it was based was because it was 'clear' that this was the case. That is, the absence of reasoning.

A 'dimension' of an object, good, physical structure or some other thing is a measure of the physical space that the 'thing' occupies (e.g., length, width, depth, etc.). The question, therefore, is what is the 'thing' being measured? Here that 'thing' is a complete pallet racking storage system, whether assembled or unassembled. It is the 'thing' being measured by its dimensions. The dimensions of a pallet racking system, that is, it's width, depth and height, can be seen in the screen shot at **Attachment C**.

Hence, a systematic, rigorous analytical approach to the issue would consist of something along the following lines:

- first, determine what is the 'ordinary meaning' of the word 'dimension';
- then identify what is the subject good whose dimensions are to be assessed;
- then identify the dimensions of that good;
- then, having identified the dimensions of the subject good, determine whether any of those dimensions are adjustable and, if so, how and to what extent; and
- finally, having identified those dimensions that are adjustable (if any), determine whether they are adjustable as required.

It is not apparent why these steps could not be taken and were not taken. There would seem to be no impediment in doing so.

Taking the first issue, what is the ordinary meaning of 'dimension'? As indicated above, essentially it is a spatial measurement such as length, width, height, circumference, volume, etc. It is the measure of physical space that an object or other thing occupies.

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The question, therefore, is what is being measured – what is the ‘thing’, that is, the physical object, product, structure or space being measured. What is to be measured will determine the dimensions to be taken into account.

Here the ‘thing’ is a physical structure, namely, a complete pallet racking storage system. The question then is what are the dimensions of that physical structure? Typically, those dimensions would be the length, width and height of the structure. These three dimensions would inform not only the length, width and height that the structure would occupy but also, when combined the total cubic area that the structure would occupy. It measures the physical space that would be occupied by the pallet racking system when assembled and installed.

The question is whether any of these dimensions are adjustable? None of them are. This is necessarily the case to ensure, as a load bearing structure, that the structural integrity and strength of the structure is ensured so as to avoid or minimise the risk of collapse when in operation and any resultant physical damage, injury and/or death. Were any of these dimensions to be adjustable, then such structural integrity and strength could and likely would be undermined and/or compromised.

Height of shelves as a dimension

Both the Tribunal and Australian Border Force argued that the height of shelving is a dimension of pallet racking. Precisely what dimension was not identified by either entity.

If the height of shelving in a pallet racking storage system is a dimension of the system, what does that dimension measure and why? Of itself, the height of a shelf measures the distance of the shelf from what is immediately below it, that is, the floor or another shelf. That would not seem particularly relevant.

Rather, the height of a shelf indicates the available storage space above and below the shelf for loaded pallets to be stored. However, what is being measured is the internal storage space above and below the shelf. Hence, what is altered when the height of a shelf is raised or lowered is the storage space above and below the shelf.

However, only one dimension is being altered – the height of the storage space above and below the shelf whose height is increased or lowered. The width and depth of the internal storage space remain unaltered. No other dimensions are being altered and no dimension of the pallet racking storage system itself is altered by altering the height of a shelf.

Adjusting the height of shelving in a pallet racking storage system and, consequently, the height of the internal storage space above and below the shelving does not alter the dimensions of the pallet racking storage system itself. Those dimensions remain fixed and adjusting the height of the shelving is only possible because those dimensions are fixed.

This is no different to adjusting the height of the shelving in refrigerator or the position of the seats in a passenger motor vehicle. Adjusting either does not alter the dimensions of the refrigerator or of the passenger motor vehicle. That is not to dispute that the dimensions of the storage space in the refrigerator or the seating space in the passenger motor vehicle are being

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altered. It is not the storage/passenger space whose dimensions are being measured but the physical product containing that storage/passenger space – namely, the refrigerator and passenger motor vehicle. The dimensions of those products remain unaltered and necessarily so.

Ask the question, is the height of the shelves in the refrigerator adjustable, the answer would be yes. On the other hand, ask the question are the dimensions of the refrigerator adjustable, the answer would be no. Simple commonsense. Similarly, does altering the height of the refrigerator shelves alter the dimensions of the refrigerator and, if so, which ones?

Here, it is not the internal storage space within a pallet racking storage system whose dimensions are referred to in the description, nor the height of the shelving. Nor are the dimensions of the bays within a pallet racking storage system referred to in the description. The dimensions referred to in the description are the dimensions of the pallet racking storage system itself.

If the dimensions of something else was intended, then that could have been clear, accurately and precisely reflected with clear, plain words in the description. It was not. Presumably it was known by the authors of the description that the only adjustable component of most pallet racking systems are the heights of the shelves. However, that is not what the authors referred to in the description but something else and presumably intentionally so.

Use of term 'dimensions'

The use of the term 'dimensions' in the description is odd and was not addressed by the Tribunal.

It is odd because if the intent was that the phrase '*of dimensions that can be adjusted as required*' was to refer to shelving for the storge of loaded pallets, the height of which shelving was adjustable as required, why not have simply stated that. For example, '*pallet racking … with shelving of adjustable height*'. Clear, accurate and precise if that was what was intended.

Why then use a significantly less clear, accurate and precise phrase and, in particular, the more obscure and cryptic key word 'dimension' used? Again, no explanation was provided by the applicant in its application, nor by the then Anti-Dumping Commissioner in adopting that phrase. Nor was any evidence adduced to support what was intended by the use of this word and why.

If what was intended was 'shelving of adjustable height, this being the only component of pallet racking that is adjustable, then why not simply state that in the description? By not stating that in the description but using a phrase that does not refer to adjustable shelving would indicate that it was referring to something else and intentionally so. Precisely what, is not known as no explanation was provided either by the applicant or by the then Anti-Dumping Commissioner. However, it is not unreasonable to conclude that it was not adjustable shelving notwithstanding any attractiveness of such a construction.

Intent in use of the phrase 'of dimensions that can be adjusted as required'

Again, in that context, what did the applicant for the imposition of the anti-dumping measures intend by using the phrase '*of dimensions that can be adjusted as required*' and what evidence is there of that intent? In other words, why did that applicant use that phrase as opposed to '*with*

shelves the height of which can be adjusted as required' or something similar if that was in fact what was intended by the description and why did governmental authorities persist with that description?

Specifically, in what circumstances would the dimensions of pallet racking require adjustment?

One circumstance would be when the height of the loaded pallets change requiring an adjustment to the shelving to increase or reduce the storage space above or below the shelf.

Another circumstance would be when the width or depth of the pallet on which the goods are stored changes - that is the width or depth of the pallet increases or decreases. That change in pallet size cannot be accommodated by an adjustment to the width or depth of the bays in the pallet racking system. Those dimensions are fixed.

Hence the dimensions of a pallet racking system cannot be adjusted as required if they cannot be adjusted to accommodate a change in the width or depth of the pallets on which goods loaded for storage on the pallet racking system. In short, the dimensions cannot be adjusted as required.

Accordingly, a pallet racking storage system exported to Australia whose dimensions cannot be adjusted to accommodate such a change on pallet sizes does not satisfy the description. Accordingly, the anti-dumping measures do not apply to such exports.

Expert opinion – structural engineer

In its decision the Tribunal referred to an opinion that the Applicant in the proceedings had obtained an expert opinion separately from the proceedings and provided to Australian Border Force prior to the commencement of the AAT proceedings. It was provided to Australian Border Force to assist in persuading it that the Applicant's imports were not liable for dumping duty. Its provision was unrelated to any AAT proceedings.

That expert opinion was provided by Govinda Pandey, Chief Executive Officer of Rockfield Technologies Australia Pty Ltd. Mr Pandey is a qualified and experienced structural engineer and Rockfield Technologies a well-known engineering firm in Australia. Mr Pandey also was involved in the drafting of Australian Standard AS4084-2012.

In his letter, Mr Pandey expressed the opinion that the structural components of a pallet racking storage system were not adjustable and, specifically, the dimensions set out in a diagram of a pallet racking system were fixed. The opinion expressed in that letter was neither challenged nor refuted by ABF, nor did ABF seek and obtain a contrary expert opinion.

This expert opinion was the only expert opinion that has been obtained by anyone at any time in connection with Investigation 441.

The Tribunal rejected this expert opinion. In its decision it explained the reason for rejecting the opinion as being because the expert had not been called by the Applicant so as to be available for cross examination on the opinion provided.

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That is a somewhat surprising reason for rejecting the opinion. The Applicant did not place the opinion in evidence before the Tribunal – the Respondent did as part of its Statement of Issues, Facts and Contentions. Further, that opinion was not in dispute. The Respondent had not tendered evidence rebutting that opinion such as a contrary expert opinion.

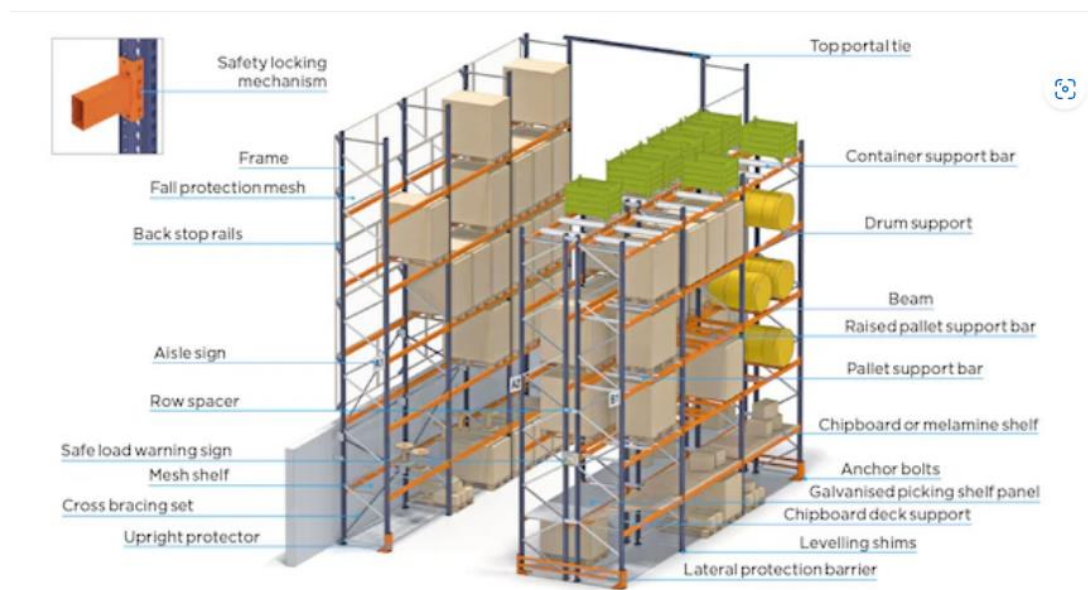
In short, the opinions expressed in that letter were not in dispute. Importantly, they could not be in dispute because they were essentially statements of fact, as was self-evident from the letter itself.

Conclusion

It would seem that after nine months of deliberation, the Tribunal opted to decide the case on the basis of was intended by the phrase '*pallet racking with adjustable shelves*' in the description was 'clear'. As stated, that reason is not persuasive.

Attachment C

Pallet Racking and Parts Thereof



Source: Pallet racking components and parts names - Mecalux.com] [Note: This website also contains an extensive list of 'parts' of pallet racking.]