



Australian Government
**Department of Industry, Science,
Energy and Resources**

**Anti-Dumping
Commission**

CUSTOMS ACT 1901 - PART XVB

**TERMINATION REPORT
NO 582**

**ALLEGED DUMPING AND SUBSIDISATION OF
CLEAR FLOAT GLASS
EXPORTED TO AUSTRALIA FROM MALAYSIA**

18 February 2022

CONTENTS

CONTENTS..... 2

ABBREVIATIONS..... 3

1 SUMMARY AND CONCLUSIONS..... 4

1.1 INTRODUCTION.....4

1.2 AUTHORITY TO MAKE DECISION.....4

2 BACKGROUND..... 6

2.1 INITIATION.....6

2.2 CONDUCT OF THE INVESTIGATION.....6

2.3 SUBMISSIONS RECEIVED FROM INTERESTED PARTIES7

3 THE GOODS AND LIKE GOODS..... 9

3.1 FINDING.....9

3.2 LEGISLATIVE FRAMEWORK.....9

3.3 THE GOODS9

3.4 TARIFF CLASSIFICATION10

3.5 MODEL CONTROL CODE.....10

3.6 LIKE GOODS11

4 DUMPING INVESTIGATION - MALAYSIA 13

4.1 FINDING.....13

4.2 LEGISLATIVE AND POLICY FRAMEWORK13

4.3 COOPERATIVE EXPORTERS.....14

4.4 UNCOOPERATIVE EXPORTERS.....15

4.5 XINYI ESM15

4.6 LEVEL OF DUMPING21

4.7 VOLUME OF DUMPED IMPORTS.....21

5 SUBSIDY INVESTIGATION - MALAYSIA..... 22

5.1 FINDING.....22

5.2 RELEVANT LEGISLATION.....22

5.3 INVESTIGATED PROGRAMS23

5.4 SUMMARY OF PROGRAMS.....24

5.5 INFORMATION CONSIDERED BY THE COMMISSION25

5.6 SUBSIDY ASSESSMENT - XINYI ESM26

5.7 LEVEL OF SUBSIDISATION27

5.8 VOLUME OF SUBSIDISED GOODS.....27

6 TERMINATION OF THE INVESTIGATION - MALAYSIA 29

6.1 TERMINATION29

7 APPENDICES AND ATTACHMENTS..... 31

APPENDIX A ASSESSMENT OF ALLEGED SUBSIDY PROGRAMS..... 32

A1 INTRODUCTION.....32

A2 ASSESSMENT OF PROGRAMS34

PUBLIC RECORD

ABBREVIATIONS

ABF	Australian Border Force
ADN	Anti-Dumping Notice
the Act	<i>Customs Act 1901 (Cth)</i>
the applicant, the Australian industry, Oceania Glass	Oceania Glass Pty Ltd
AUD	Australian dollars
CFG, the goods	clear float glass
the commission	Anti-Dumping Commission
the Commissioner	Commissioner of the Anti-Dumping Commission
CTMS	cost to make and sell
EC	Energy Commission
EFG	Emirates Float Glass LLC
EPR	electronic public record
EXIM	Export Import Bank of Malaysia Berhad
GMB	Gas Malaysia Berhad
GMES	Gas Malaysia Energy and Services Sdn Bhd
GOM	Government of Malaysia
the goods	the goods the subject of the application (also referred to as the goods under consideration)
Guardian RAK	Guardian Zoujaj International Float Glass Co. LLC
IRB	Inland Revenue Board
LTAR	less than adequate remuneration
the manual	<i>Anti-Dumping Commission Dumping and Subsidy Manual (December 2021)</i>
MCC	model control code
MIDA	Malaysian Investment Development Authority
the Minister	Minister for Industry, Energy and Emissions Reduction
MITI	Ministry of International Trade and Industry
OCOT	ordinary course of trade
REQ	response to the exporter questionnaire
RGQ	response to the government questionnaire
RIQ	response to the importer questionnaire
SEF	statement of essential facts
SIE	state-invested enterprise
UAE	United Arab Emirates
Watson Glass	Watson Glass Pty Ltd
Xinyi ESM	Xinyi Energy Smart (Malaysia) Sdn Bhd

1 SUMMARY AND CONCLUSIONS

1.1 Introduction

This *Termination Report No 582* (TER 582) has been prepared in response to an application (the application) by Oceania Glass Pty Ltd (Oceania Glass, the applicant). The application seeks the publication of a dumping duty notice in respect of clear float glass (CFG, the goods) exported to Australia from Malaysia and the United Arab Emirates (UAE), and a countervailing duty notice in respect of CFG exported to Australia from Malaysia.

Oceania Glass alleges that the Australian industry has suffered material injury caused by the goods exported to Australia from Malaysia and the UAE at dumped prices, and from Malaysia at subsidised prices.

This termination report set outs the Commissioner of the Anti-Dumping Commission's (the Commissioner) reasons for terminating the dumping investigation and the subsidy investigation in relation to all exports of the goods to Australia from Malaysia.¹

1.2 Authority to make decision

Division 2 of Part XVB of the *Customs Act 1901* (the Act)² describes, among other things, the procedures to be followed and the matters to be considered by the Commissioner in conducting investigations in relation to the goods covered by an application under section 269TB(1). Section 269TDA sets out the circumstances in which the Commissioner must terminate an investigation.

The Anti-Dumping Commission (the commission) has prepared this report to support the Commissioner in his consideration of the application, pursuant to the commission's function specified in section 269SMD.

1.2.1 Application

On 15 March 2021, Oceania Glass lodged an application alleging that the Australian industry manufacturing CFG has suffered material injury caused by exports of the goods to Australia from Malaysia and the UAE at dumped prices, and from Malaysia at subsidised prices.

Having considered the application, the Commissioner decided not to reject the application and initiated an investigation into the alleged dumping and subsidisation (*Investigation No 582*) on 27 April 2021.

¹ The commission will publish the findings and recommendations in relation to the UAE in a separate report. The commission will make this available on the public record at a later date.

² All legislative references in this report are to the *Customs Act 1901*, unless otherwise stated.

PUBLIC RECORD

Anti-Dumping Notice (ADN) No 2021/054 and *Consideration Report No 582* provide further details relating to the Commissioner's initiation of the investigation.³

1.2.2 The goods and like goods (Chapter 3)

The Commissioner considers that locally produced CFG is 'like' to the goods the subject of the application.

1.2.3 Dumping investigation - Malaysia (Chapters 4 and 6)

In relation to the goods exported to Australia from Malaysia, the commission found that:

- Xinyi ESM was the only exporter of the goods during the investigation period (1 April 2020 to 31 March 2021)
- exports of the goods to Australia from Xinyi ESM were not at dumped prices during the investigation period
- the total volume of dumped goods exported to Australia from Malaysia during the investigation period was below negligible volumes (less than 3% of total import volume).

Accordingly, the Commissioner has terminated the dumping investigation regarding:

- Xinyi ESM pursuant to section 269TDA(1)(b)(i), and
- Malaysia pursuant to section 269TDA(3).

Table 1 summarises the commission's dumping margin relevant to this report.

Country	Exporter	Dumping margin
Malaysia	Xinyi Energy Smart (Malaysia) Sdn Bhd	-7.4%

Table 1: Dumping margin

1.2.4 Subsidy investigation – Malaysia (Chapters 5 and 6)

In relation to the goods exported to Australia from Malaysia, the commission found that:

- Xinyi ESM was the only exporter of the goods during the investigation period
- there was no evidence that Xinyi ESM received a countervailable subsidy over the investigation period with respect to the goods
- the total volume of goods exported to Australia from Malaysia during the investigation period that were in receipt of a countervailable subsidy was zero.

Accordingly, the Commissioner has terminated the subsidy investigation regarding:

- Xinyi ESM pursuant to section 269TDA(2)(b)(i), and
- Malaysia pursuant to 269TDA(7).

³ Electronic Public Record (EPR) 582, nos 002 & 003.

2 BACKGROUND

2.1 Initiation

On 27 April 2021, the Commissioner initiated an investigation into the alleged dumping of CFG exported to Australia from Malaysia and the UAE and the alleged subsidisation of CFG exported to Australia from Malaysia. The Commissioner's investigation followed an application lodged by Oceania Glass, a manufacturer of CFG in Australia, under section 269TB.

In its application, Oceania Glass claimed that the Australian industry has suffered material injury in the form of:

- price depression
- price suppression
- lost profit and profitability
- reduced return on investment
- reduced attractiveness to reinvest.⁴

The Commissioner specified in the initiation notice that:

- the investigation period is 1 April 2020 to 31 March 2021
- the injury analysis period for the purpose of determining whether material injury to the Australian industry has been caused by exports of dumped and/or subsidised imports is from 1 April 2017.⁵

2.2 Conduct of the investigation

2.2.1 Statement of essential facts

The statement of essential facts (SEF) was originally due to be placed on the public record by 16 August 2021. However, the Commissioner extended the due date for the SEF and final report on 2 occasions.⁶ The Commissioner placed the SEF on the public record on 14 December 2021. In the SEF, the Commissioner proposed that the dumping and subsidy investigation relating to Malaysia be terminated.

2.2.2 Australian industry

The Commissioner is satisfied that the applicant, Oceania Glass, represents the entire Australian industry producing like goods to the goods the subject of the application.

⁴ EPR 582, No 001.

⁵ ADN No 2021/054 (the initiation notice).

⁶ EPR 582, nos 011 & 019.

2.2.3 Importers

The commission identified several entities declared as importers of the goods from Malaysia and the UAE during the investigation period in the Australian Border Force (ABF) import database. The commission forwarded importer questionnaires to 8 potential importers and placed a copy of the importer questionnaire on the commission’s website for completion by other importers that the commission did not contact directly.

The commission received one response to the importer questionnaire (RIQ) from Watson Glass Pty Ltd (Watson Glass). The commission verified Watson Glass’s RIQ and published a verification report on the public record.⁷

2.2.4 Exporters

The commission forwarded exporter questionnaires to 3 known exporters at the beginning of the investigation. The commission received completed responses to the exporter questionnaire (REQs) from all 3 exporters. The commission has summarised details of the REQs below.

Country	Exporter name	Extension length	Questionnaire submission date
Malaysia	Xinyi Energy Smart (Malaysia) Sdn Bhd	28 days	1 July 2021
UAE	Emirates Float Glass LLC	27 days	27 June 2021
	Guardian Zoujaj International Float Glass Co LLC	N/A	3 June 2021

Table 2: Exporter questionnaire responses

The commission initially identified several other potential exporters from both Malaysia and the UAE through the ABF import database. In the course of conducting this investigation, the commission determined that these entities were not exporters of the goods, having found that their details were incorrectly entered in the ABF import database.

2.2.5 Foreign governments

The commission forwarded a government questionnaire to the Government of Malaysia (GOM) at the beginning of the investigation. The commission received a response to the government questionnaire (RGQ) from the GOM on 1 July 2021. The Commissioner has considered the RGQ in reaching the conclusions contained within this report.

2.3 Submissions received from interested parties

The commission received 5 submissions from interested parties prior to the publication of the SEF. The Commissioner considered these submissions when reaching the

⁷ EPR 582, no 016.

PUBLIC RECORD

conclusions contained within the SEF and this report. These submissions are available on the public record.

EPR number	Interested party	Date received
004	Emirates Float Glass LLC	30 May 2021
005	Guardian Zoujaj International Float Glass Co LLC	3 June 2021
008	Government of Malaysia	1 July 2021
012	Oceania Glass Pty Ltd	18 August 2021
014	Xinyi Energy Smart (Malaysia) Sdn Bhd	23 September 2021

Table 3: Submissions received prior to the SEF

Following publication of the SEF, the commission received one submission from Oceania Glass relevant to the proposed termination in relation to Malaysia. The Commissioner has considered this submission in reaching the conclusions contained within this report.⁸

EPR number	Interested party	Date received
022	Oceania Glass Pty Ltd	17 January 2022

Table 4: Submissions received following the SEF – Malaysia

⁸ The commission notes that other submissions were made by interested parties relevant to the investigation as it relates to the UAE. The commission will consider with those submissions in a separate report in relation to the UAE.

3 THE GOODS AND LIKE GOODS

3.1 Finding

The Commissioner considers that the CFG produced locally by Oceania Glass are 'like goods' to the goods the subject of the application.

3.2 Legislative framework

Section 269TC(1) requires that the Commissioner must reject an application for a dumping duty notice if, among other things, the Commissioner is not satisfied that there is, or is likely to be established, an Australian industry in respect of like goods.

In making this assessment, the Commissioner must firstly determine that the goods produced by the Australian industry are 'like' to the imported goods. Section 269T(1) defines like goods as:

...goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

An Australian industry can apply for relief from injury caused by dumped or subsidised imports, even if the goods it produces are not identical to those imported. The industry must however, produce goods that are like to the imported goods.

Where the locally produced goods and the imported goods are not alike in all respects, the Commissioner assesses whether they have characteristics closely resembling each other against the following considerations:

- i. physical likeness
- ii. commercial likeness
- iii. functional likeness
- iv. production likeness.

3.3 The goods

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

*Clear float glass (CFG) in nominal thicknesses of 3 to 12 millimetres (mm).*⁹

The following table details the tolerances for each of the thicknesses in the nominated range:

⁹ EPR 582, no 002.

PUBLIC RECORD

Nominal thickness (mm)	Acceptable tolerances (mm)	
	Minimum	Maximum
3	2.80	3.50
4	3.51	4.50
5	4.51	5.50
6	5.51	7.00
8	7.01	9.00
10	9.01	11.00
12	11.01	12.30

Table 5: Acceptable nominal thickness of CFG

The goods the subject of the application have the following characteristics:

- transparent
- flat, and
- rectangular or square in shape.

Glass with the following characteristics is not the goods the subject of the application:

- coating, colour, tint or opaqueness
- absorbent, reflective or non-reflective layer
- wired
- bent, edge-worked, engraved, drilled, enamelled or otherwise worked
- framed or fitted with other materials
- toughened (tempered) or laminated
- acid etched, or
- low iron.

3.4 Tariff classification

The goods are classified to the following tariff subheading in Schedule 3 to the *Customs Tariff Act 1995*:

- 7005.29.00 (statistical codes 03, 04, 05, 06 and 09).

The tariff subheading and statistical codes may include goods that are both subject and not subject to this investigation. The listing of the tariff subheading and statistical codes are provided for reference only and do not form part of the goods description set out above. Please refer to the goods description at section 3.3 for authoritative detail regarding the particulars of the goods the subject of this investigation.

The tariff subheading above captures imports of CFG in square metres, and the commission has used this unit of measurement in its volume and unit analysis.

3.5 Model control code

As detailed in the initiation notice, the commission proposed the model control code (MCC) structure below:

PUBLIC RECORD

Category	Sub-category	Sales data	Cost data
Nominal Thickness	3 mm	Mandatory	Mandatory
	4 mm		
	5 mm		
	6 mm		
	8 mm		
	10 mm		
	12 mm		

Table 6: MCC structure

Interested parties were invited to make submissions with any proposals to modify the MCC structure.

The commission did not receive any submissions proposing to modify the MCC structure. Relevant to this report, the commission's dumping assessment was made having regard to the MCC structure in Table 6.

3.6 Like goods

This section sets out the commission's assessment of whether the locally produced goods are identical to, or closely resemble, the goods and are therefore 'like goods'. For the purposes of the findings below, the commission has relied upon information obtained from the verification of Oceania Glass's manufacturing facilities as part of *Continuation Inquiry No 575*, information provided by cooperating exporters of the goods and prior findings of the commission.

3.6.1 Physical likeness

The commission considers that the CFG the Australian industry produces for sale into the Australian market are physically like to the goods. They share similar physical characteristics, being clear (transparent), flat, rectangular or square in shape, and traded with a nominal thickness of 3 mm to 12 mm.

3.6.2 Commercial likeness

The commission considers the CFG the Australian industry produces for sale in the Australian market are commercially like to the goods. They are sold into the same market sectors, are interchangeable and use similar distribution channels.

3.6.3 Functional likeness

The commission considers the CFG the Australian industry produces for sale in the Australian market are functionally like to the goods. They have similar end-uses, including window and door applications, and are able to be further worked into alternate products through laminating, coating, and other value-add processes.

3.6.4 Production likeness

The commission considers the Australian industry uses the same or similar raw material inputs and manufacturing processes domestically that exporters use to produce the goods.

3.6.5 Like goods assessment

Based on the above findings, the commission considers that the CFG the Australian industry manufactures, whilst not identical, have characteristics closely resembling the goods exported to Australia, as:

- the physical characteristics of the goods and locally produced goods are similar
- the goods and locally produced goods are commercially alike, as they are sold to common users, and directly compete in the same market
- the goods and locally produced goods are functionally alike, as they have a similar range of end uses
- the goods and locally produced goods consist of the same raw materials and are manufactured in a similar manner.

Based on the commission's assessment, the Commissioner is satisfied that the Australian industry for CFG produces like goods to the goods the subject of the application, as defined in section 269T(1).

4 DUMPING INVESTIGATION - MALAYSIA

4.1 Finding

The commission found that the goods exported to Australia from Malaysia have not been dumped.

The commission's assessment of dumping for Malaysia is set out below.

Country	Exporter	Dumping margin
Malaysia	Xinyi Energy Smart (Malaysia) Sdn Bhd	-7.4%

Table 7: Dumping Margin

The commission's calculations of Xinyi ESM's export price, cost to make and sell (CTMS), normal value and dumping margin are set out at **Confidential Attachments 1 to 4**.

4.2 Legislative and policy framework

In the report to the Minister under section 269TEA(1), the Commissioner must recommend whether the Minister ought to be satisfied as to the grounds for publishing a dumping duty notice under section 269TG.

Under section 269TG, one of the matters the Minister must be satisfied of in order to publish a dumping duty notice is that exporters exported dumped goods to Australia.

Section 269TDA(1) also requires that the Commissioner must terminate the investigation, in so far as it relates to an exporter, if satisfied that the exporter has not dumped the goods, or there has been dumping during the investigation period, but the dumping margin is less than 2%.

Dumping occurs when an exporter exports a product from one country to another country at a price less than its normal value. The export price and normal value of goods are determined under sections 269TAB and 269TAC, respectively.

4.2.1 Export price

The export price is determined in accordance with section 269TAB, taking into account whether the purchase or sale of goods are arms length transactions under section 269TAA. Section 269TAB(1)(a) generally provides that, subject to certain conditions, the export price of any goods exported to Australia is the price paid (or payable) for the goods by the importer, where the goods have been exported to Australia otherwise than by the importer, and have been purchased by the importer from the exporter in arms length transactions.

Where the conditions in section 269TAB(1)(a) are not met, such as when the export transactions are not arms length or the importer(s) have not purchased the goods from the exporter, the export price is determined under sections 269TAB(1)(b) or (c).

Section 269TAB(3) provides that, where the export price cannot be established under the preceding provisions, the export price is determined by having regard to all relevant information.

4.2.2 Normal value

The normal value is determined in accordance with section 269TAC. Section 269TAC(1) provides that the normal value of any goods exported to Australia is the price paid (or payable) for like goods sold in the ordinary course of trade (OCOT) for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

However, if one of the circumstances set out in sections 269TAC(2)(a) or (b) is present, such as where there is an absence or low volume of relevant sales of like goods in the market of the country of export or there is a particular market situation, section 269TAC(1) may not be used. In this instance, the normal value of the goods is to be calculated through either a constructed normal value under section 269TAC(2)(c) or using prices of like goods exported to a third country under section 269TAC(2)(d).

An exporter's domestic sales of like goods are taken to be in low volume where:

the volume of sales of like goods for home consumption in the country of export by the exporter or another seller of like goods is less than 5% of the volume of goods the subject of the application that are exported to Australia by the exporter.

Unless the Minister is satisfied that the volume is still large enough to permit a proper comparison for the purpose of assessing a dumping margin.¹⁰

Section 269TAC(6) provides that, where the normal value cannot be established under the preceding provisions, the normal value is determined by having regard to all relevant information.

4.2.3 Dumping margin

Dumping margins are determined under section 269TACB. For all dumping margins calculated for the purposes of this investigation, the commission compared the weighted average Australian export prices with the corresponding quarterly weighted average normal values for the investigation period in accordance with section 269TACB(2)(a).

4.3 Cooperative exporters

Section 269T(1) provides that, in relation to a dumping investigation, an exporter is a 'cooperative exporter' where the exporter's exports were examined as part of the investigation and the exporter was not an 'uncooperative exporter'.

¹⁰ Section 269TAC(14).

PUBLIC RECORD

In relation to Malaysia, the Commissioner considers Xinyi ESM to be a cooperative exporter, on the basis that its exports were examined and it was not an uncooperative exporter.

4.4 Uncooperative exporters

Section 269T(1) provides that an exporter is an uncooperative exporter, if the Commissioner is satisfied that:

- an exporter did not give the Commissioner information that the Commissioner considered to be relevant to the investigation within a period the Commissioner considered to be reasonable, or
- an exporter significantly impeded the investigation.

Xinyi ESM was the only exporter of the goods from Malaysia in the investigation period identified by the commission. As Xinyi ESM was a cooperative exporter, there were no exporters from Malaysia that the commission considers uncooperative exporters pursuant to section 269T(1).

4.5 Xinyi ESM

4.5.1 Verification

The commission verified the information provided in Xinyi ESM's REQ. A report covering the commission's verification findings is available on the public record.¹¹

The commission is satisfied that Xinyi ESM is the producer of the goods and like goods. The commission is further satisfied that the information that Xinyi ESM provided is accurate and reliable for the purpose of assessing dumping in relation to its exports of the goods.

4.5.2 Export price

The commission considers Xinyi ESM to be an exporter of the goods,¹² as Xinyi ESM:

- is the manufacturer of the goods
- is named on the commercial invoice as the supplier
- is named as consignor on the bill of lading
- arranges and pays for the inland transport to the port of export
- arranges and pays for the port handling charges at the port of export
- arranges and pays for the ocean freight and marine insurance in relation to sales at cost, insurance and freight incoterms.

¹¹ EPR 582, no 017.

¹² The commission generally identifies the exporter as a principal in the transaction, located in the country of export from where the goods were shipped, that gave up responsibility by knowingly placing the goods in the hands of a carrier, courier, forwarding company, or its own vehicle for delivery to Australia; or a principal in the transaction, located in the country of export, that owns, or previously owned, the goods but need not be the owner at the time the goods were shipped.

PUBLIC RECORD

The commission is satisfied that for all Australian export sales during the investigation period, Xinyi ESM was the exporter of the goods.

Xinyi ESM did not make Australian sales of the goods to any related customers during the investigation period.

In respect of Xinyi ESM's Australian sales of the goods to its unrelated customers during the investigation period, the verification team found no evidence that:

- there was any consideration payable for, or in respect of, the goods other than price
- the price appeared to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller, or
- the buyer, or an associate of the buyer, was directly or indirectly reimbursed, compensated or otherwise received a benefit for, or in respect of, the whole or any part of the price.¹³

The commission therefore considers that all export sales made by Xinyi ESM during the investigation period were arms length transactions.

From the above findings, the commission is satisfied that Xinyi ESM is an exporter of the goods to Australia, that the goods were exported to Australia otherwise than by the importer and that the goods were purchased in arms length transactions by the importer from the exporter.

In respect of Australian sales of the goods by Xinyi ESM, the commission has determined the export price under section 269TAB(1)(a), being the price paid by the importer to Xinyi ESM, less transport and other costs arising after exportation.

4.5.3 Normal value

Xinyi ESM did not make domestic sales of like goods to any related customers during the investigation period.

In respect of Xinyi ESM's domestic sales of like goods to its unrelated customers during the period, the commission found no evidence that:

- there was any consideration payable for, or in respect of, the goods other than price
- the price appeared to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller, or
- the buyer, or an associate of the buyer, was directly or indirectly reimbursed, compensated or otherwise received a benefit for, or in respect of, the whole or any part of the price.

¹³ Section 269TAA.

PUBLIC RECORD

The commission therefore considers that all of Xinyi ESM's domestic sales to its unrelated domestic customers during the investigation period were arms length transactions.

Section 269TAAD states that domestic sales of like goods are not in the OCOT if arms length transactions are:

- unprofitable in substantial quantities over an extended period and
- unlikely to be recoverable within a reasonable period.¹⁴

The commission tested profitability by comparing the net invoice price, less any reimbursements, against the relevant cost for each domestic sales transaction.

The commission then tested whether the unprofitable sales were in substantial quantities (not less than 20%) by comparing the volume of unprofitable sales to the total sales volume, for each model over the period.

Finally, the commission tested recoverability by comparing the net invoice price, less any reimbursements, against the relevant weighted average cost over the period for each domestic sales transaction.

Using the MCC structure outlined in section 3.5, the commission compared the volume of relevant domestic sales to the volume of export sales for MCCs which were exported to Australia. As the volume of relevant domestic sales of each of Xinyi ESM's exported models are 5% or more of the volume exported, the commission considers it can make a proper comparison at the MCC level.

The commission also assessed the total volume of relevant domestic sales of like goods as a percentage of the total volume of goods exported to Australia and found that the volume of relevant domestic sales was not less than 5%.

The commission is satisfied that there were sufficient volumes of sales of like goods sold for home consumption in the country of export that were arms length transactions and sold at prices that were within the OCOT.

The commission has therefore determined the normal value for Xinyi ESM under section 269TAC(1).

4.5.4 Adjustments

As domestic sales were used as a basis for normal value under section 269TAC(1), the commission considers that certain adjustments are necessary in accordance with section 269TAC(8). These adjustments ensure that differences between the domestic and export sales would not affect the comparison of the normal value and export price.

The commission is satisfied that there is sufficient information to justify the adjustments outlined in Table 8 below.

¹⁴ In general, the commission will consider 'extended period' and 'reasonable period' to be the investigation, review or inquiry period.

PUBLIC RECORD

The normal value and export price have been compared at free on board terms.

Adjustment Type	Basis for adjustment	Deduction/addition
Domestic credit terms	Credit terms are different between export and domestic sales	Deduct an amount for domestic credit terms
Domestic inland transport	Cost incurred from transporting like goods from the factory to the domestic customer	Deduct an amount for domestic inland transport
Domestic ocean freight	Domestic ocean freight is paid for transport to certain domestic customers	Deduct an amount for domestic ocean freight
Export inland transport	Cost incurred from transporting the goods from the factory to the port	Add an amount for export inland transport
Export port and handling charges	Cost incurred at the port, including port handling charges, bill of lading fees, etc.	Add an amount for export port and handling charges
Export bank charges	Bank charges paid on foreign currency accounts	Add an amount for export bank charges
Export credit terms	Credit terms are different between export and domestic sales	Add an amount for export credit terms

Table 8: Summary of adjustments – Xinyi ESM

Oceania Glass’s submission in response to adjustments

In its submission of 17 January 2022, Oceania Glass raised its concerns that the commission had not made 2 adjustments to Xinyi ESM’s normal value, being for:

- differences in the physical characteristics of the goods sold domestically and exported
- differences in domestic and export packaging costs.¹⁵

The Commissioner’s consideration of Oceania Glass’s submission

In relation to physical characteristics, Oceania Glass submits that the commission’s verification report for Xinyi ESM was silent on whether there were any physical differences between the goods sold domestically and exported.

As part of the verification process, the commission examined the physical characteristics of the goods sold domestically and exported, and detailed its findings in the verification report. Specifically, the commission outlined that goods sold domestically and exported were not distinguished from each other during production and incurred the same production costs.¹⁶

¹⁵ EPR 582, no 022, p 1-2.

¹⁶ EPR 582, no 017, Chapter 2.

PUBLIC RECORD

Using the MCC structure as outlined in section 3.5, the commission found that Xinyi ESM sold the same MCCs on the domestic and export market. As set out in section 4.5.3, the commission was satisfied that there was a sufficient volume of relevant domestic sales of each exported MCC at the MCC level. The commission considers that the MCC structure provided for a proper comparison between export price and normal value.

As detailed in the manual, the commission develops an MCC structure having regard to differences in physical characteristics which give rise to material differences in price.¹⁷ The commission is satisfied that physical characteristics that give rise to material differences in price comparability are accounted for in the MCC structure for this investigation. Oceania Glass did not provide commentary or evidence in its submission of any alternative physical characteristic that would result in material differences in price, nor did it raise any concerns or issues in relation to the MCC structure.

The commission had regard to Xinyi ESM's product codes as part of the verification of the MCC structure. The commission examined the product codes within each MCC and found that Xinyi ESM sold identical product codes on the domestic and export market, with the exception of 2 product codes that were sold to the export market only.¹⁸ For the 2 product codes that were sold on the export market only, the commission is satisfied that a closely resembling product code was sold on the domestic market. The two closely resembling product codes flowed through to the appropriate MCC to be used in the comparison between export prices and normal values.

The commission's additional analysis of the product codes confirms that a proper comparison was made using the MCC structure, without the need for an adjustment.

In relation to packaging costs, Oceania Glass submits that, in general, export packaging costs are higher than domestic packaging costs, due to the additional packaging required to limit damage when transporting the goods to export markets. On this basis, Oceania Glass submits that the commission ought to make an upwards adjustment to Xinyi ESM's normal value to account for higher export packaging costs.

The commission verified the packaging costs for both the goods sold domestically and exported, and detailed its findings in Xinyi ESM's verification report.¹⁹ The commission found that, contrary to certain other exporters (from countries outside of Malaysia), Xinyi ESM uses the same packaging for the goods sold domestically and exported, and that the packaging costs for domestic and export markets are the same.²⁰ The commission considers that this is a commercial decision by Xinyi ESM which does not necessitate an adjustment.

¹⁷ The Manual, Chapter 14.

¹⁸ Xinyi ESM's product code system provides details of key physical characteristics, refer to Confidential Attachment C-3-1 'Product Code Ruling' to the REQ.

¹⁹ EPR 582, no 017, Chapter 6.

²⁰ EPR 582, no 017, Table 3.

PUBLIC RECORD

Accordingly, the commission has not made any adjustments for differences in packaging costs in calculating Xinyi ESM's normal value, given the circumstances.

4.5.5 Dumping margin

The dumping margin was assessed by comparing the quarterly weighted average Australian export prices to the corresponding quarterly weighted average normal value for the investigation period.²¹

The dumping margin for the goods exported to Australia by Xinyi ESM for the investigation period is **-7.4%**.

The commission's calculations for Xinyi ESM are at **Confidential Attachments 1 to 4**.

Oceania Glass's submission in response to Xinyi ESM's dumping margin

In its submission of 17 January 2022, Oceania Glass raised its concern that the -7.4% dumping margin for Xinyi ESM is significantly below the dumping margins for exporters from the UAE (which as outlined in the SEF were 23.8% and 42.5% for the 2 cooperating exporters). Oceania Glass highlighted that there is price competition in the Australian market between Malaysian and UAE goods, and that the raw material prices for the 2 countries are similar. Consequently Oceania Glass submitted that it considers the differences in dumping margins to be perplexing.

The Commissioner's response to Oceania Glass's submission

The commission notes that the dumping margin is influenced by both the export price and the normal value. In circumstances where export prices for different exporters are similar, differences in normal values may give rise to differences in dumping margins. To examine Oceania Glass's claim, the commission compared the export prices and normal values for Xinyi ESM to the exporters from the UAE.²² The commission found that, on average, the normal value for Xinyi ESM's goods were lower than those of the exporters from the UAE. The commission considers that this is a factor in the lower dumping margin for Xinyi ESM compared to the exporters from the UAE.

The commission has also compared the average domestic raw material costs for Xinyi ESM with the costs of the exporters from the UAE.²³ The commission found that, on average, Xinyi ESM's domestic raw material costs were lower than those of the exporters from the UAE. As domestic raw material costs influence the domestic price, and by extension the normal value, the commission considers that this may also be a factor in the differences in dumping margins between Xinyi ESM and the exporters from the UAE.

The commission's comparisons are contained in **Confidential Attachment 6**.

²¹ Section 269TACB(2)(a).

²² Converted into Australian Dollars (AUD) for comparison purposes.

²³ Converted into AUD for comparison purposes.

4.6 Level of dumping

Section 269TDA(1) provides that the Commissioner must terminate a dumping investigation, in so far as it relates to an exporter of the goods, if satisfied that there has been no dumping by the exporter of any of those goods, or if the dumping margin for the exporter is less than 2%.

As discussed in section 4.5, the commission is satisfied that the goods exported to Australia by Xinyi ESM are not dumped. Accordingly, the Commissioner is terminating the dumping investigation as it relates to Xinyi ESM, pursuant to section 269TDA(1)(b)(i).

4.7 Volume of dumped imports

Pursuant to section 269TDA(3), the Commissioner must terminate the investigation, in so far as it relates to a country, if satisfied that the total volume of goods that have been or may be dumped is a negligible volume. Section 269TDA(4) defines a negligible volume as less than 3% of the total volume of goods imported into Australia over the investigation period, where section 269TDA(5) does not apply. Section 269TDA(5) does not apply to this investigation.

Using data from the ABF import database and having regard to the information collected and verified during the investigation, the commission determined the total volume of imports in the Australian market. This information is contained in **Confidential Attachment 5**.

Xinyi ESM was the only Malaysian exporter during the investigation period and its goods were not dumped. Therefore there were no goods exported to Australia from Malaysia at dumped prices.

Accordingly, the Commissioner has terminated the dumping investigation as it relates to Malaysia, pursuant to section 269TDA(3), on the basis that the volume of dumped goods, as a proportion of the total volume of imports, is negligible.

5 SUBSIDY INVESTIGATION - MALAYSIA

5.1 Finding

The commission has found that Malaysian exporters have not received countervailable subsidies in respect of the goods exported to Australia during the investigation period.

Accordingly, the Commissioner is satisfied that it is necessary to terminate the subsidy investigation under sections 269TDA(2)(b)(i) and 269TDA(7).

5.2 Relevant legislation

Section 269T(1) defines 'subsidy' as follows:

subsidy, in respect of goods exported to Australia, means:

- (a) a financial contribution:
 - (i) by a government of the country of export or country of origin of the goods; or
 - (ii) by a public body of that country or a public body of which that government is a member; or
 - (iii) by a private body entrusted or directed by that government or public body to carry out a governmental function;

that involves:

- (iv) a direct transfer of funds from that government or body; or
 - (v) the acceptance of liabilities, whether actual or potential, by that government or body; or
 - (vi) the forgoing, or non-collection, of revenue (other than an allowable exemption or remission) due to that government or body; or
 - (vii) the provision by that government or body of goods or services otherwise than in the course of providing normal infrastructure; or
 - (viii) the purchase by that government or body of goods or services; or
- (b) any form of income or price support as referred to in Article XVI of the General Agreement on Tariffs and Trade 1994 that is received from such a government or body;

if that financial contribution or income or price support confers a benefit (whether directly or indirectly) in relation to the goods exported to Australia.²⁴

²⁴ Section 269TACC sets out the steps for working out whether a financial contribution or income or price support confers a benefit.

PUBLIC RECORD

Section 269TAAC defines a 'countervailable subsidy' as follows:

- (1) For the purposes of this Part, a subsidy is a countervailable subsidy if it is specific.
- (2) Without limiting the generality of the circumstances in which a subsidy is specific, a subsidy is specific:
 - (a) if, subject to subsection (3), access to the subsidy is explicitly limited to particular enterprises; or
 - (b) if, subject to subsection (3), access is limited to particular enterprises carrying on business within a designated geographical region that is within the jurisdiction of the subsidising authority; or
 - (c) if the subsidy is contingent, in fact or in law, and whether solely or as one of several conditions, on export performance; or
 - (d) if the subsidy is contingent, whether solely or as one of several conditions, on the use of domestically produced or manufactured goods in preference to imported goods.
- (3) Subject to subsection (4), a subsidy is not specific if:
 - (a) eligibility for, and the amount of, the subsidy are established by objective criteria or conditions set out in primary or subordinate legislation or other official documents that are capable of verification; and
 - (b) eligibility for the subsidy is automatic; and
 - (c) those criteria or conditions are neutral, do not favour particular enterprises over others, are economic in nature and are horizontal in application; and
 - (d) those criteria or conditions are strictly adhered to in the administration of the subsidy.
- (4) The Minister may, having regard to:
 - (a) the fact that the subsidy program benefits a limited number of particular enterprises; or
 - (b) the fact that the subsidy program predominantly benefits particular enterprises; or
 - (c) the fact that particular enterprises have access to disproportionately large amounts of the subsidy; or
 - (d) the manner in which a discretion to grant access to the subsidy has been exercised;determine that the subsidy is specific.
- (5) In making a determination under subsection (4), the Minister must take account of:
 - (a) the extent of diversification of economic activities within the jurisdiction of the subsidising authority; and
 - (b) the length of time during which the subsidy program has been in operation.

Section 269TACD provides that, if the Minister is satisfied that a countervailable subsidy has been received in respect of the goods, the Minister must, if the amount of the subsidy is not quantified by reference to a unit of the goods, work out how much of the subsidy is properly attributable to each unit of the goods.

5.3 Investigated programs

The applicant alleged the existence of 4 programs in relation to exports of the goods from Malaysia, based on previous findings made by the commission in respect of subsidies

PUBLIC RECORD

received for other products manufactured in Malaysia (specifically aluminium extrusions). The applicant argued that such subsidies would be applicable to CFG, as the GOM offers these subsidies to businesses that invest in manufacturing in Malaysia. Accordingly, the applicant considers that CFG from Malaysia would be in receipt of the same benefits.

The applicant also alleged that Xinyi ESM received natural gas for less than adequate remuneration (LTAR). This allegation was based on an announcement from Xinyi ESM that it had entered into an agreement with a state-invested enterprise (SIE) for the acquisition of land and services infrastructure, including gas supply.

The GOM provided information in its RGQ on 2 additional programs not previously identified.

Based on information provided by the GOM in its RGQ and information provided by the GOM to the World Trade Organization (WTO), the commission identified that Programs 1 (income tax reductions ('Pioneer Status')) and 2 (income tax allowance) were in fact made up of separate programs.

The above findings brought the total of investigated programs to 9 for this investigation.

5.4 Summary of programs

The commission has set out each program and its finding in respect of each program in the table below.

Program Number ²⁵	Program name	Program Type	Countervailable subsidy received?
Programs included in application			
1A	Pioneer Status	Tax	No
1B	Exemptions of income	Tax	No
2A	Investment tax allowance	Tax	No
2B	Exemption of income equivalent to capital expenditure incurred	Tax	No
3	Double deductions for export credit insurance	Tax	No
6	Reinvestment allowance	Tax	No
7	Gas at less than adequate remuneration (LTAR)	LTAR	No
Further identified programs			
8	Green technology tax incentive	Tax	No
9	Wage subsidy program	Tax	No

Table 9: Investigated subsidy programs

²⁵ Program numbering from 1-6 is consistent with that in *Investigation No 362 (INV 362)*. Program 4 (Double deductions for freight charges relating to goods originating from Sabah and Sarawak) was not included as Oceania Glass has not claimed that a benefit has been received under this program in its application. Program 5 (Double deduction for insurance premiums for exporters and importers) was investigated in INV 362 but ceased to apply from the 2016 year of assessment.

The commission's findings in relation to each program investigated are outlined in **Non-confidential appendix A**.

5.5 Information considered by the commission

5.5.1 Information provided by exporters

The commission has relied upon information provided by Xinyi ESM, the only exporter of the goods from Malaysia during the investigation period, when assessing the alleged subsidy programs. This included information Xinyi ESM provided in its REQ, as well as information provided during and after verification.

5.5.2 Information provided by the Government of Malaysia

In accordance with section 269TB(2C), the commission invited the GOM for consultations during the consideration phase of the investigation concerning the claims made by the applicant in relation to countervailable subsidies.

On 27 April 2021, the commission also sent a government questionnaire to the GOM, which included questions relating to each of the alleged subsidy programs identified in the application. A response to the questionnaire was provided by the GOM to the commission on 10 June 2020.²⁶

5.5.3 Other information considered as part of the subsidy assessment

The commission also considered as part of the subsidy assessment:

- information provided in the application
- submissions received in relation to subsidies provided to Malaysian exporters²⁷
- information the GOM provided to the WTO²⁸
- previous investigations by the commission into subsidies provided to Malaysian exporters
- information from government and non-government entities in Malaysia.

The commission notes that following the SEF, there were no submissions regarding the Commissioner's proposal to terminate the subsidy investigation.

²⁶ EPR 582, no 007.

²⁷ EPR 582, nos 008, 012 & 014.

²⁸ World Trade Organization (WTO), 'Committee on Subsidies and Countervailing Measures - Subsidies - New and full notification pursuant to article XVI:1 of the GATT 1994 and article 25 of the Agreement on Subsidies and Countervailing Measures – Malaysia', WTO doc no 21-5232, WTO, 2021.

5.6 Subsidy assessment - Xinyi ESM

The commission investigated whether Xinyi ESM received a benefit from any countervailable subsidy during the investigation period as part of the verification process.²⁹

The commission did not find any evidence that Xinyi ESM had received a benefit under any of the alleged programs. The commission also did not find any evidence of additional subsidies notified by the GOM or through an examination of Xinyi ESM's financial records.

The details of the commission's analysis for each investigated program is at Appendix A, however the commission has also summarised its findings below.

Programs 1A, 1B, 2A, 2B, 3 and 6 – tax related programs

Oceania Glass's application included an extract from Glass Worldwide July/August 2019 which stated that Xinyi Glass has received beneficial taxation treatment to establish its production facility at Malacca.

The commission examined Xinyi ESM's tax records and found that Xinyi ESM did not benefit from any of the tax related subsidy Programs 1A, 1B, 2A, 2B, 3 and 6 in the investigation period. The commission found that Xinyi ESM claimed capital allowance deductions during the investigation period. However, the commission is satisfied that the capital allowance deductions were for the depreciation of assets which are available to all entities in Malaysia, i.e. the deductions are not specific and are not a countervailable subsidy.

Program 7 – Natural gas at LTAR

In its application, Oceania Glass alleged that Xinyi ESM would have received natural gas at LTAR due to the purchase agreement that Xinyi ESM had made with the SIE, Perbadanan Kemajuan Negeri Melaka (PKNM).³⁰

As detailed in the verification report, the commission verified Xinyi ESM's purchases of natural gas in the investigation period.

As part of the verification, Xinyi ESM provided the commission with copies of its:

- gas supply agreement
- invoices of gas purchases
- land purchase agreement with PKNM.

From the evidence provided in these documents, the commission confirmed that Xinyi ESM did not purchase natural gas from PKNM during the investigation period, nor did it enter into a supply agreement with PKNM for the supply of natural gas.

²⁹ EPR 582, no 017, Chapter 12.

³⁰ EPR 582, no 001, p 48.

PUBLIC RECORD

Due to the historical regulation of the natural gas market by the GOM, the commission conducted further analysis to determine the existence of a countervailable subsidy. The commission found that Xinyi ESM had not received a countervailable subsidy under Program 7.

The commission's analysis of Program 7 is detailed in section A2.7 of this report.

Program 8 – Green technology tax incentive

The GOM disclosed this tax incentive in its RGQ. However, the commission found that Xinyi ESM did not benefit from Program 8 during the investigation period.

Program 9 – Wage subsidy program

During the verification, the commission identified that Xinyi ESM had received a benefit under Program 9. In the verification report, the commission had calculated a preliminary subsidy margin of 0.1% on the basis that Program 9 may be a countervailable subsidy, subject to the commission's further analysis. As detailed in section A2.9, although the commission found that the GOM conferred a benefit to Xinyi ESM under Program 9, the benefit was not countervailable as it was not specific. Accordingly, the commission has found that Xinyi ESM has not received a countervailable subsidy in respect of the goods during the investigation period.

5.7 Level of subsidisation

Section 269TDA(2) provides that the Commissioner must terminate a countervailing investigation, in so far as it relates to an exporter of the goods, if satisfied either that:

- an exporter did not receive a countervailable subsidy in respect of the goods
- if an exporter did receive a subsidy, the level of the subsidy did not at any time during the investigation period exceed a negligible level.

The commission has found no evidence that Xinyi ESM received a countervailable subsidy in respect of the goods during the investigation period.

The Commissioner is terminating the subsidy investigation in relation to Xinyi ESM in accordance with section 269TDA(2)(b)(i).

5.8 Volume of subsidised goods

Section 269TDA(7) provides that the Commissioner must terminate a subsidy investigation, in so far as it relates to a country of export of the goods, if satisfied that the total volume of goods that have, or may be, exported to Australia in respect of which a countervailable subsidy has been, or may be, received is negligible.

PUBLIC RECORD

Pursuant to section 269TDA(8), a negligible volume for Malaysia is a volume less than 4% of the total volume of goods imported into Australia over a reasonable examination period.³¹

The commission has found that:

- Xinyi ESM was the only exporter of the goods from Malaysia during the investigation period
- the total volume of goods exported by Xinyi ESM (and by extension Malaysia) found to be in receipt of a countervailable subsidy was zero.

The Commissioner has therefore terminated the subsidy investigation in relation to Malaysia in accordance with section 269TDA(7), as the total volume of goods that have been exported to Australia in respect of which a countervailable subsidy has been received is negligible.

³¹ Malaysia is classified as a Developing Country under Part 4, Division 1 of the *Customs Tariff Regulations 2004*.

6 TERMINATION OF THE INVESTIGATION - MALAYSIA

6.1 Termination

Section 269TDA sets out the circumstances in which the Commissioner must terminate an investigation in its entirety, or in respect of a specific exporter. Section 269TDA provides for rules of termination based on volumes and scale of dumping and subsidisation by countries and exporters.

6.1.1 Termination of dumping investigation

Section 269TDA(1)(b)(i) states that the Commissioner must terminate an investigation, so far as it relates to an exporter, if satisfied that there has been no dumping by an exporter of the goods.

Table 10 sets out the commission’s dumping margins for the only Malaysian exporter, Xinyi ESM, in respect of the goods exported to Australia over the investigation period:

Country	Exporter	Dumping Margin
Malaysia	Xinyi Energy Smart (Malaysia) Sdn Bhd	-7.4%

Table 10: Dumping Margin

The Commissioner is satisfied that Xinyi ESM did not export dumped goods to Australia during the investigation period. As a result, subject to section 269TDA(1)(b)(i), the Commissioner must terminate the dumping investigation in relation to Xinyi ESM.

Moreover, section 269TDA(3) states that the Commissioner must terminate the investigation, in so far as it relates to a country, if satisfied that the total volume of goods that have been dumped is a negligible volume.

Accordingly, as a result of the findings in this report, the Commissioner is satisfied that the total volume of dumped goods exported to Australia from Malaysia over the investigation period is negligible (i.e. zero). Subsequently, pursuant to section 269TDA(3), the Commissioner must terminate the dumping investigation so far as it relates to Malaysia.

6.1.2 Termination of subsidy investigation

Section 269TDA(2)(b)(i) states that the Commissioner must terminate a subsidy investigation, in so far as it relates to an exporter of the goods, if satisfied that there has been no countervailable subsidies received.

The Commissioner is satisfied that Xinyi ESM did not receive countervailable subsidies over the investigation period. As a result, in accordance with section 269TDA(2)(b)(i), the Commissioner must terminate the subsidy investigation in relation to Xinyi ESM.

PUBLIC RECORD

Furthermore, section 269TDA(7) states that the Commissioner must terminate a subsidy investigation, in so far as it relates to a country of export of the goods, if satisfied that the total volume of goods that have, or may be, exported to Australia in respect of which a countervailable subsidy has been, or may be, received is negligible.

Based on the findings in this report, the Commissioner is satisfied that the total volume of goods that have been exported to Australia from Malaysia, in respect of which a countervailable subsidy has been received, is negligible (i.e. zero). Therefore, the Commissioner must terminate the subsidy investigation in relation to Malaysia, pursuant to section 269TDA(7).

7 APPENDICES AND ATTACHMENTS

Confidential Attachment 1	Xinyi ESM export price
Confidential Attachment 2	Xinyi ESM CTMS
Confidential Attachment 3	Xinyi ESM normal value
Confidential Attachment 4	Xinyi ESM dumping margin
Confidential Attachment 5	Volume of imports
Confidential Attachment 6	Comparison of dumping margins

APPENDIX A ASSESSMENT OF ALLEGED SUBSIDY PROGRAMS

A1 Introduction

A1.1 The commission's assessment

As Xinyi ESM was the only exporter of the goods from Malaysia during the investigation period, the findings and conclusions in this Appendix are based on the commission's examination of Xinyi ESM's exports.

A1.2 Definition of government, public and private bodies

In its assessment of each program, the commission has had regard to the entity responsible for providing the financial contribution (if any) under the relevant program, as part of the test under section 269T(1) for determining whether a financial contribution is a subsidy. Under section 269T(1), for a contribution to be a subsidy, the contribution must have been made by:

- a government of the country of export or country of origin of the goods
- a public body of that country or a public body of which that government is a member, or
- a private body entrusted or directed by that government or public body to carry out a governmental function.

A1.1 Government

As described in section 16.2 of the manual, the commission considers the term 'government' is taken to include government at all different levels, including at a national and sub-national level.

A1.2 Public bodies

The term 'public body' is not defined in the Act. Determining whether an entity is a public body requires evaluation of all available evidence of the entity's features and its relationship with government, including the following:

- 1) The objectives and functions performed by the body and whether the entity in question is pursuing public policy objectives. In this regard relevant factors include:
 - legislation and other legal instruments
 - the degree of separation and independence of the entity from a government, including the appointment of directors
 - the contribution that an entity makes to the pursuit of government policies or interests, such as taking into account national or regional economic interests and the promotion of social objectives.
- 2) The body's ownership and management structure, such as whether the body is wholly- or part-owned by the government, or whether the government has a majority of shares in the body. A finding that a body is a public body may be supported through:

PUBLIC RECORD

- the government's ability to make appointments
- the right of government to review results and determine the body's objectives
- the government's involvement in investment or business decisions.

The commission considers this approach is consistent with the WTO Appellate Body decision of *United States – Countervailing Measures (China)*.³² In that case, the Appellate Body referred to the following 3 indicia which may assist in assessing whether an entity was a public body vested with, or exercising, government authority:

- where a statute or other legal instrument expressly vests government authority in the entity concerned
- where there is evidence that an entity is, in fact, exercising governmental functions
- where there is evidence that a government exercises meaningful control over an entity and exercises governmental authority in the performance of government functions.

These principles have also previously been considered in the Federal Court of Australia.³³

A1.3 Private bodies

Where an entity is neither a government nor public body, the commission will consider it a private body, in which case, a government direction to make a financial contribution in respect of the goods must be established in order for the contribution to be considered a subsidy, as defined by section 269T(1).

Having regard to section 16.3 of the manual, in determining the character of an entity which may have provided a financial contribution the commission will consider whether a private body has been:

- 'entrusted' to carry out a government function, which occurs when a government gives responsibility to a private body
- 'directed' to carry out a government function, which occurs in situations where the government exercises its authority over a private body.

Accordingly, not all government acts will be considered as entrusting or directing a private body. Encouragement or mere policy announcements by government, of themselves, are not sufficient to satisfy this test. However, threats and inducements may be evidence of entrustment or inducements. It is where the private body is considered a proxy by government to give effect to financial contributions that this test will be satisfied.

³² DS379 United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.

³³ See; *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870, [27] - [70]; *Dalian Steelforce Hi Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885, [50] - [73].

A2 Assessment of programs

A2.1 Program 1A – Pioneer status

Background

The GOM provides assistance in the form of an exemption of statutory income for the purposes of calculating income tax to certain enterprises which have been granted 'pioneer status'.

The purpose of Program 1A is to encourage investments in promoted products/activities in the manufacturing, agriculture, tourism (including hotel) and approved services sectors that can contribute to the future growth and development of the economy.

Any company which has received a benefit under Program 1A cannot receive a benefit under the investment tax allowance (Program 2A) for the same promoted activity or promoted product, unless it surrenders its pioneer status.

Legal basis

The legal basis for Program 1A is the *Promotion of Investments Act 1986*.

Program 1A is ongoing.

WTO notification

The commission considers that the GOM notified the WTO of Program 1A for the period 1 January 2020 to 31 December 2021.³⁴

Eligibility criteria

Pioneer status may be granted to companies which participate in promoted activities or produce promoted products.³⁵

Companies are required to submit an application to the Malaysian Investment Development Authority (MIDA), an agency under the Ministry of International Trade and Industry (MITI) before commencing operation/production of the promoted activity/product. This ensures the applicant complies with the eligibility conditions.

The GOM grants a company with pioneer status a 70% exemption (or any other rate as prescribed by the Minister) of its statutory income for the purpose of calculating income tax. The amount of statutory income may also be further reduced by meeting certain criteria.

The tax relief period begins on the specific production day and continues for a period of 5 years (unless extended under certain circumstances).

³⁴ WTO, *WTO doc no 21-5232*.

³⁵ Malaysian Investment Development Authority (MIDA), [Promoted Activities](#), MIDA website, 2021.

Commission's assessment

Xinyi ESM confirmed that it has not applied for, nor received, pioneer status under the *Promotion of Investments Act 1986*. On the basis of this and other information obtained from Xinyi ESM, the commission has determined that the company did not receive a benefit under Program 1A during the investigation period.

A2.2 Program 1B – Exemptions of income

Background

The GOM provides assistance in the form of an exemption of statutory income for the purposes of calculating income tax to approved businesses.

The purpose of Program 1B is to encourage high impact, high value-added and strategic investments that contribute to the future growth and development of the Malaysian economy.

Any company which has received a benefit from having pioneer status (Program 1A) or the investment tax allowance (Program 3) under the *Promotion of Investments Act 1986* is not eligible to receive a benefit under Program 1B.

Any company which has received a benefit under the reinvestment allowance (Program 6) under schedule 7A of the *Income Tax Act 1967* is not eligible to receive a benefit under Program 1B.

Legal basis

The legal basis for Program 1B is the *Income Tax (Exemption) Order (No.11) 2006 [P.U.(A) 112/2006]*.

Program 1B is ongoing.

WTO notification

The commission is not aware of any WTO notification of Program 1B.

Eligibility criteria

Approved businesses are any company intending to participate in high impact, high value-added and strategic investments that can contribute to the future growth and development of the Malaysian economy.

The GOM outlined the eligibility criteria for an approved business as:

- value added
- level of technology measured based on number of management and technical employees in the company, and
- compliance with a specific amount of fixed asset investment (excluding land cost) by specific time period.

PUBLIC RECORD

Companies are required to submit an application to the Malaysian Investment Development Authority (MIDA), an agency under the Ministry of International Trade and Industry (MITI) before commencing operation/production. This ensures the applicant complies with the eligibility conditions.

After MIDA is satisfied that the company has complied with the eligibility conditions, MIDA will determine the production date for the company and determine the start and end date of the exemption.

Later, approved companies submit their claims to the Inland Revenue Board (IRB) together with their annual tax returns containing the calculation of claimed tax exemptions.

The GOM grants an approved business a 70% exemption (or any other rate as prescribed by the Minister) of its statutory income for the purposes of calculating income tax. The amount of statutory income may also be further reduced by meeting certain criteria.

Commission's assessment

Xinyi ESM confirmed that it has not applied for, nor received an exemption of income under Program 1B during the investigation period. On the basis of this and other information obtained from Xinyi ESM, the commission has determined that the company did not receive a benefit under Program 1B during the investigation period.

A2.3 Program 2A – Investment tax allowance

Background

The GOM provides assistance in the form of an exemption of statutory income equivalent to a proportion of certain capital expenditure incurred by qualifying companies.

The purpose of Program 2A is to encourage investments in promoted products/activities in the manufacturing, agriculture, tourism (including hotel) and approved services sectors that can contribute to the future growth and development of the economy.

Legal basis

The legal basis for Program 2A is the *Promotion of Investments Act 1986*.

Program 2A is ongoing.

WTO notification

The commission considers that the GOM notified the WTO of Program 2A for the period 1 January 2020 to 31 December 2021.³⁶

³⁶ WTO, *WTO doc no 21-5232*.

Eligibility criteria

Program 2A may be granted to any company which participates in a promoted activity or produces a promoted product.³⁷

Companies are required to submit an application for the exemption to MIDA, an agency under MITI.

A company granted an investment tax allowance is generally entitled to deduct 60% of its qualifying capital expenditure from 70% of its statutory income.³⁸ Any unutilised allowance can be carried forward to subsequent years until fully utilised.

Commission's assessment

Xinyi ESM confirmed that it has not applied for, nor received an income tax allowance under Program 2A during the investigation period. On the basis of this and other information obtained from Xinyi ESM, the commission has determined that the company did not receive a benefit under Program 2A during the investigation period.

The commission notes that Xinyi ESM claimed capital allowance deductions during the investigation period. On the basis of information obtained from Xinyi ESM regarding those capital allowance deductions, the commission has determined that these were standard depreciation of assets that are available to all entities in Malaysia. The capital allowance deductions are not specific and do not relate to any additional deduction or exemption such as Program 2A. Therefore, the company did not receive a benefit under Program 2A during the investigation period.

A2.4 Program 2B – Exemption of income equivalent to capital expenditure incurred

Background

The GOM provides assistance in the form of a tax exemption equivalent to a proportion of certain capital expenditure incurred by qualifying companies.

The purpose of Program 2B is to encourage high impact, high value-added and strategic investments that contribute to the future growth and development of the Malaysian economy.

Legal basis

The legal basis for Program 2B is *Income Tax (Exemption) Order (No.12) 2006 [P.U.(A) 113/2006]*.

Program 2B is ongoing.

³⁷ MIDA, [Promoted Activities](#), MIDA website, 2021.

³⁸ These amounts may vary depending on the type of approval granted by the relevant authority.

PUBLIC RECORD

WTO notification

The commission is not aware of any WTO notification of Program 2B.

Eligibility criteria

Program 2B may be granted to any company intending to participate in high impact, high value-added, and strategic investments that can contribute to the future growth and development of the Malaysian economy. The allowance is only given on capital expenditure incurred on industrial buildings, plant and machinery directly used.

The GOM outlined the eligibility criteria for a company as:

- value added
- level of technology measured based on number of management and technical employees in the company and
- compliance with a specific amount of fixed asset investment (excluding land cost) by specific time period.

Companies are required to submit an application for the exemption to MIDA, an agency under MITI. The company is then required to establish the commencement of this program period which is on the incurrence of the first capital expenditure duly certified by MIDA. Subsequently, companies approved under the program submit their claims to the IRB together with their annual tax returns containing the calculation of claim for the tax allowance.

A company granted an income tax allowance is entitled to a tax exemption at a rate as determined by the Minister in the approval letter for the business. The amount of statutory income exempt cannot be in excess of 70% (or any other rate as prescribed by the Minister) for each year of assessment. Any unutilised allowance can be carried forward to subsequent years until fully utilised.

Commission's assessment

Xinyi ESM confirmed that it has not applied for, nor received an exemption of income equivalent to capital expenditure under Program 2B during the investigation period. On the basis of this and other information obtained from Xinyi ESM, the commission has determined that the company did not receive a benefit under Program 2B during the investigation period.

The commission notes that Xinyi ESM claimed capital allowance deductions during the investigation period. On the basis of information obtained from Xinyi ESM regarding those capital allowance deductions, the commission has determined that these were standard depreciation of assets that are available to all entities in Malaysia. The capital allowance deductions are not specific and do not relate to any additional deduction or exemption such as Program 2B. Therefore, the company did not receive a benefit under Program 2B during the investigation period.

A2.5 Program 3 – Double deductions for export credit insurance

Background

The GOM provides a double deduction for income tax purposes to exporters for amounts incurred in relation to export credit insurance premiums, to encourage Malaysia's exporters to penetrate into non-traditional markets.

Legal basis

The legal basis for Program 3 is *Income Tax (Deductions of Premiums for Export Credit Insurance) Rules 1985 [P.U. (A) 526/1985]* made under section 154 of the *Income Tax Act 1967*.

Program 3 was established in 1985 and is ongoing. Program 3 is effective from year of assessment 1986 and subsequent years of assessment.

WTO notification

The commission is not aware of any WTO notification of Program 3.

Eligibility criteria

Program 3 is available to all Malaysian incorporated companies. To be eligible, a company must be approved by the Minister of Finance and pay an export credit insurance premium with an insurance company. During the investigation period, the Export Import Bank of Malaysia Berhad (EXIM) was the only approved insurance company under this program.

Upon request by a policyholder, the EXIM will issue a certificate under *Income Tax (Deduction for Export Credit Insurance) Rules 1985* for policyholders to claim a double deduction. The policyholder has to retain the above-mentioned certificate along with all official receipts issued by EXIM.

There is no application process. Companies make claims during submission of an income tax return (i.e. self-assessment).

Commission's assessment

Having regard to Xinyi ESM's tax returns, the commission has determined that the company did not receive a benefit under Program 3 during the investigation period.

A2.6 Program 6 – Reinvestment allowance

Background

The GOM provides assistance in the form an exemption from statutory income for tax purposes to companies engaged in manufacturing and selected agricultural activities that incur capital expenditure for the purposes of expansion, automation, modernisation or diversification of their businesses.

PUBLIC RECORD

Any company which has received a benefit from having pioneer status (Program 1A) or the investment tax allowance (Program 3) under the *Promotion of Investments Act 1986* is not eligible to receive a benefit under Program 6.

Legal basis

The legal basis for Program 6 is schedule 7A of the *Income Tax Act 1967*.

The approved capital expenditure is contained in Public Rulings 10/2020 and 11/2020.

Program 6 is ongoing.

WTO notification

The commission is not aware of any WTO notification of Program 6.

Eligibility criteria

Companies can only claim the reinvestment allowance upon fulfilling the following conditions:

- the business has been in operation for not less than 36 months and
- the company has incurred in the basis period for a year of assessment capital expenditure on a factory, plant or machinery used in Malaysia for the purposes of a qualifying project.

Companies can only claim the reinvestment allowance upon the completion of a qualifying project, i.e. after a building is completed or when the plant/machinery is put to operational use.

The reinvestment allowance will be given for a period of 15 consecutive years beginning from the year of assessment in which the first reinvestment is made.

The reinvestment allowance is given at the rate of 60% on the qualifying capital expenditure incurred by the company, and can be offset against 70% of its statutory income for the year of assessment. Any unutilised allowance can be carried forward up to a maximum of 7 years of assessment. A company can offset the reinvestment allowance against 100% of its statutory income for the year of assessment if the company attains a productivity level exceeding the level determined by the Ministry of Finance.

Commission's assessment

Xinyi ESM confirmed that it has not applied for, nor received a reinvestment allowance under Program 6 during the investigation period. On the basis of this and other information obtained from Xinyi ESM, the commission has determined that the company did not receive a benefit under Program 6 during the investigation period.

A2.7 Program 7 – Gas at less than adequate remuneration

Background

The GOM has regulated natural gas prices in Malaysia at the distribution segment since 2002. Regulation was introduced in response to the Asian Financial Crisis of 1997-1998.³⁹

Since 2014, the GOM has taken steps to reform the natural gas market and shift it away from regulation by increasing the regulated gas price in 6-monthly increments until it reaches market parity. This staggered increasing of the regulated gas price ceased in 2019, however some elements of price regulation remain.

The relevant segment of the market for this investigation is the distribution segment. Natural gas provided at the distribution segment is used for a number of applications, including the production of CFG. The main natural gas supplier at the distribution segment is Gas Malaysia Energy and Services Sdn Bhd (GMES). GMES is a wholly-owned subsidiary of Gas Malaysia Berhad (GMB). A range of industries make up GMB's customer base. Relevantly, glass products constituted 9% of the industrial customer base by volume during its financial year ending 31 December 2020.⁴⁰

GMES purchases natural gas at the transmission segment from Petronas Energy & Gas Trading Sdn Bhd (PEGT). PEGT is a wholly-owned subsidiary of Petroliaam Nasional Berhad (PETRONAS), which is wholly-owned by the GOM.

In order to further facilitate the transition to market-based pricing, the GOM made the decision to regulate the natural gas price for the distribution segment from GMES to its customers for the period 1 January 2020 to 31 December 2021.⁴¹

The regulated price from GMES to its customers is made up of several components, including the unregulated base price from Petronas to GMES and, until 1 October 2021, a legacy cost (called the Gas Cost Pass Through (GCPT)). Throughout the investigation period, the GCPT resulted in a surcharge to customers of GMES, resulting in higher than market prices.⁴²

The unregulated natural gas price from PEGT to GMES is determined by the Malaysia Reference Price (MRP), Peninsula Gas Utilisation (PGU) tariff and additional negotiations between the seller and the customer.⁴³

Legal basis

There is no specific legal basis for Program 7.

³⁹ EPR 582, no 007, p 16.

⁴⁰ Gas Malaysia Berhad (GMB), Annual Report 2020, GMB, 2021, p 33.

⁴¹ Energy Commission (EC), Annual Report 2019, EC, 2021, p 118.

⁴² EC, [Regulated Piped Gas Prices](#), EC website, 2021.

⁴³ PETRONAS, [Gas Pricing & Tariff](#), PETRONAS website, 2021.

PUBLIC RECORD

The supply of gas through pipelines in Malaysia is regulated by the Energy Commission which is authorised under the *Gas Supply Act 1993*.

The strategic shifts to reform the gas market in Malaysia are detailed in the *10th Malaysia Plan and New Energy Policy (2011-2015)* and *11th Malaysia Plan (2016-2020) – Subsidy Rationalisation Policy*.

WTO notification

The commission is not aware of any WTO notification of Program 7.

Eligibility criteria

There is no application process. All customers of GMES automatically have access to Program 7.

Commission's assessment

The commission considers that there is no benefit conferred under Program 7 as the current natural gas price for GMES is higher than the prevailing unregulated prices.

The commission considers Program 7 is facilitated by the Energy Commission. The commission considers that the Energy Commission is a public body for the purposes of section 269T.

The commission considers that the regulation of pricing from GMES by the Energy Commission constitutes a private body being directed by the government to carry out a governmental function. The commission therefore considers any benefit provided by GMES is a subsidy for the purposes of section 269T.

The amount of benefit where there has been a provision of goods or services by a private body directed by the government to carry out a governmental function is the difference between:

- the price paid by enterprises for those goods or services, and
- adequate remuneration for the goods or services in relation to prevailing market conditions.

If the price paid is less than this amount, a benefit has been conferred.

The commission considers that the prevailing market conditions for natural gas in Malaysia is the unregulated price for natural gas offered by private suppliers. The commission found that the current natural gas price for GMES is the unregulated price plus a surcharge amount, resulting in prices from GMES which are higher than the prevailing market conditions.

Accordingly, there is no benefit conferred from the supply of natural gas from GMES.

A2.8 Program 8 – Green technology tax incentive

Background

The purpose of Program 8 is to boost the Malaysian green economy and assist in reaching the objective of 20% renewable energy capacity mix for the nation by 2025, in line with reducing 45% of Green House Gas emission intensity by 2030. This is done through encouraging investments in green technology industries for projects and encouraging companies to acquire assets that have been verified as green technology.

Eligible green technology projects receive Green Investment Tax Allowance (GITA) of 100% of qualifying capital expenditure incurred, which can be offset against 70% of statutory income in the year or assessment. Any unutilised allowances can be carried forward until they are fully absorbed.⁴⁴ There is also Green Income Tax Exemption (GITE) for green technology service providers.⁴⁵

Legal basis

The legal basis for Program 8 is section 127 of the *Income Tax Act 1967*.

Program 8 is ongoing.

WTO notification

The commission is not aware of any WTO notification of Program 8.

Eligibility criteria

Companies applying are eligible if they are incorporated under the *Companies Act 2016* and achieve the following green results:

- conserve the use of energy and/or other forms of natural resources or promotes the use of renewable energy or recycles waste material resources
- minimise the degradation of the environment or reduces greenhouse emissions
- promote health and improve the environment.⁴⁶

Companies must make an application to the Malaysian Investment Development Authority (MIDA).⁴⁷ Once approval has been received, the companies must submit annually to the Malaysian Green Technology and Climate Change Centre for validation.

Claims must then be submitted to the Inland Revenue Board along with the company's annual tax returns containing the calculation of claim for the tax exemption.

⁴⁴ EPR, no 007, p 65.

⁴⁵ Available on the Malaysian Green Technology and Climate Change Centre website at <https://www.mgtc.gov.my/our-services/green-investment-tax-incentives-gita-gite/>

⁴⁶ EPR, no 007, p 59.

⁴⁷ Available on the MyHijau website at <https://www.myhijau.my/green-incentives/>

Commission's assessment

The commission found that Xinyi ESM did not make an application for, and were therefore not a recipient of, Program 8 during the investigation period.

A2.9 Program 9 – Wage subsidy program

Background

Program 9 subsidised the wages of employees earning under a certain threshold by financially supporting employers suffering from the economic impact of COVID-19.⁴⁸ Program 9 commenced in April 2020 and has subsequently been extended past the initially planned 6 month period.⁴⁹

Legal basis

Program 9 was implemented under *Employer Circular No. 3/2020* and *No. 5/2020*.

Program 9 was established on 1 April 2020 and is ongoing.

WTO notification

The commission is not aware of any WTO notification of Program 9.

Eligibility criteria

Employers needed to apply online and keep their business details such as number of eligible employees up to date through an online portal. Eligibility conditions include:

- decline in revenue
- employer registration
- employee wages
- other conditions, including retrenchment of certain employees.

The eligibility and subsidy amount entitled was also dependent on the size of the company, however there have been changes and expansions to the scheme past the initial implementation.⁵⁰

Commission's assessment

The commission found that Xinyi ESM received a benefit under Program 9. However, the commission considers that Program 9 is not a countervailable subsidy as it is not specific.

⁴⁸ EPR, no 007.

⁴⁹ Available on the Malaysian Ministry of Finance website at <https://belanjawan2021.treasury.gov.my/manfaat/index.php/en/wage-sub-prog-en>

⁵⁰ Available on the Malaysian Ministry of Finance website at <https://belanjawan2021.treasury.gov.my/manfaat/index.php/en/wage-sub-prog-en>

PUBLIC RECORD

The commission considers that Program 9 is considered to confer a benefit to eligible enterprises because it is a direct financial payment received from a government of a country.⁵¹ Where Xinyi ESM received wage subsidies during the investigation period under Program 9 in connection with the production, manufacture or export of CFG, it would confer a benefit in relation to those goods and the financial contribution would meet the definition of subsidy under section 269T.

Under section 269TAAC(1), a subsidy is countervailable if it is specific. Under section 269TAAC(3) and subject to section (4), a subsidy is not specific if eligibility is automatic and based on strictly applied objective conditions, and those criteria do not favour particular enterprises over others, are economic in nature, and horizontal in application.

The commission considers that the eligibility criteria for the wage subsidy program do not favour any particular enterprises, sectors, or regions over others. All employers who meet the criteria regarding the negative economic impacts due to the COVID-19 pandemic are eligible to receive the benefit.

As such, the commission determines that Program 9 is not a countervailable subsidy in respect of the goods.

⁵¹ Section 269TACC(2)(a).