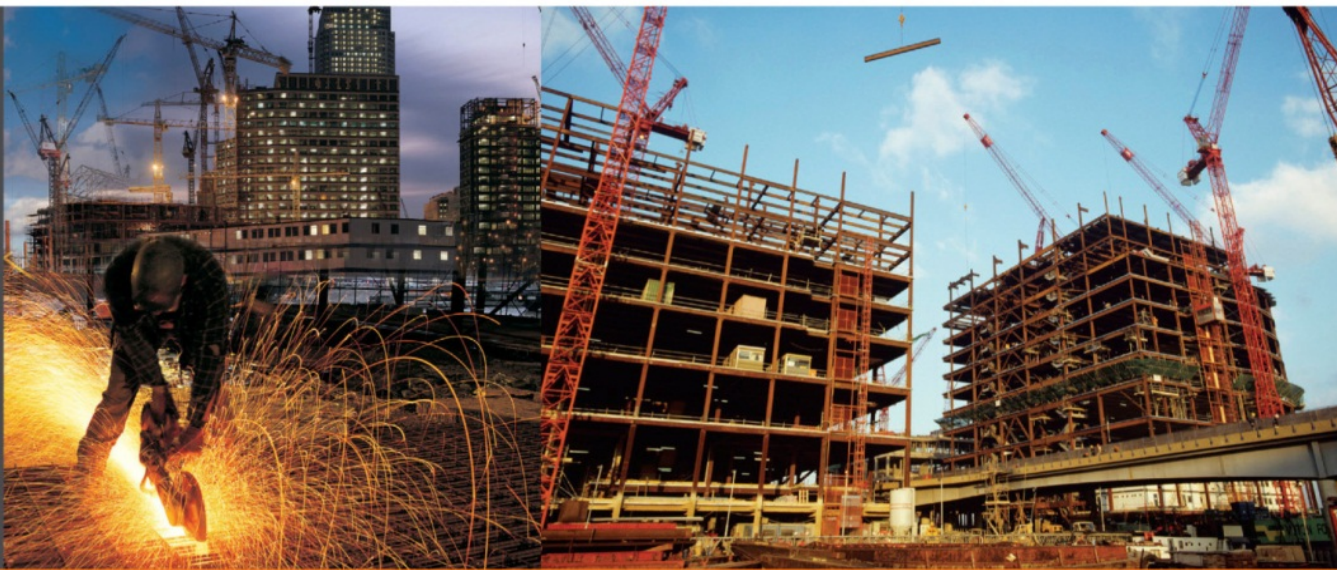




Australian Government
Anti-Dumping Review Panel

▶ **ADRP REPORT No. 15**



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ADRP Report No. 15

WIND TOWERS EXPORTED FROM THE PEOPLE’S REPUBLIC OF CHINA AND THE REPUBLIC OF KOREA

Review of a decision of the Parliamentary Secretary to publish a dumping duty notice in relation to Wind Towers exported from China and Korea.

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PART 1 – INTRODUCTION & DECISION

Background

1. Wind towers are presently manufactured in Australia by A.C.N. 009 483 694 Pty Ltd (**Haywards**), Keppel Prince Engineering Pty Ltd (**Keppel Prince**) and E & A Contractors Pty Ltd. On 16 August 2013 **Haywards** and **Keppel Prince** applied for the publication of a dumping duty notice under s 269TB of the Customs Act 1901 (**the Customs Act**) in relation to wind towers exported to Australia from China and Korea. The applications argued that low-price and dumped wind towers caused material injury to the Australian industry.
2. An investigation was initiated by the Commissioner (**the Commissioner**) of the Anti-Dumping Commission (**the ADC**). The investigation period was from 1 January 2012 to 30 June 2013. On 21 March 2014 the Commissioner published a Report No. 221 (**the Report**) recommending to the Parliamentary Secretary to the Minister for Industry (**the Parliamentary Secretary**) that a dumping duty notice be published in respect of wind towers exported to Australia from China and Korea. The Report itself refers, at various points, both to the views or assessments of the Commissioner (as contemplated by s269TEA) and also those of the ADC. In this decision, it is convenient to simply refer to any views or assessments as those of the Commissioner.
3. The Parliamentary Secretary accepted the recommendations in the Report and decided to impose dumping duties on wind towers exported to Australia from Korea and China. On 16 April 2014 a dumping duty notice was published under s269TG(1) and (2) of the Customs Act.
4. On 16 May 2014, an application for review of this decision by the Anti-Dumping Review Panel (**the Panel**) was lodged on behalf of two companies. One was Senvion Systems SE (formerly named REpower Systems SE) a German-registered company. The other was Senvion Australia Pty Ltd (formerly REpower Australia Pty Ltd), a related body corporate registered in Australia (collectively **Senvion** unless it is necessary to draw a distinction between the two companies).
5. Also on 16 May 2014 a similar application was lodged on behalf of a company registered in Korea, Win&P., Ltd (**Win&P**).
6. On 27 May 2014 I determined, as the Senior Member of the Panel, that for the purposes of s269ZYA the Review Panel was to be constituted by me. I also determined not to reject either application.
7. Following public notification of my intention to review the impugned decision, I received submissions from interested parties, namely Keppel Prince and Haywards (dated 4 July 2014) and also Win&P (dated 27 June



2014) and the Government of the Republic of Korea (**Korea**) (dated 4 July 2014) in accordance with s269ZZJ.

Material taken into account and preliminary observations

8. The role of the Panel member is, generally speaking, to review decisions of either the Commissioner or, under present arrangements, the Parliamentary Secretary acting as a delegate of the Minister. In this case, the decision under review is a decision of the Parliamentary Secretary to publish a dumping duty notice: see s269ZZA(1)(a). In a review of this type, the Panel must determine whether the decision to publish was the correct or preferable one. If I conclude that it was, then I must report to the Parliamentary Secretary recommending that she or he affirm the decision even if I consider that some of the criticisms of the process levelled by an applicant have merit but, notwithstanding, I am not satisfied the ultimate decision was not the correct or preferable decision. If I am satisfied it was not the correct or preferable decision, I must report to the Parliamentary Secretary recommending that she or he revoke the decision and substitute a specified new decision.
9. The Panel's powers to revoke or recommend the revocation of a number of types of reviewable decisions only arise if the reviewable decision was either not the correct decision (when there has been a decision which does not involve the exercise of a discretion) or, alternatively, not the preferable decision (when there has been a decision involving the exercise of a discretion). It is tolerably clear this is the statutory test having regard to the obligation (at various points in Division 9 of Part XVB) on an applicant for review to identify in the application reasons for believing that the decision was not the correct or preferable decision and the power of the Panel to reject an application if this is not done.
10. A decision to publish a dumping duty notice may involve an element of discretion and, if so, an issue may arise in a review about whether the decision was the preferable one. Notwithstanding, the correctness of the decision may arise in a review when, as one example, the decision was based on a conclusion that there had been dumping at a calculated dumping margin when, in fact, the relevant goods have not been dumped or the margin was wrong. Similarly, as another example, a decision to publish a dumping duty notice would not be the correct decision if it was based on an erroneous conclusion that material injury had been caused Australian industry.
11. As a preliminary observation it is necessary to emphasise (as I have in an earlier review decision) that the power to review, is to review the operative decision. It is not a power to "review" all or some of the calculations, assessments or subsidiary decisions made by or on behalf of the



Commissioner that underpinned the operative decision if made by the Commissioner or informed, through a report, the decision-making of the Parliamentary Secretary. Of course in many instances it will be necessary for the Panel member to look at criticisms or comments of an applicant about the way the Commissioner went about making the calculations or reaching subsidiary conclusions in order to form a view about whether, in a case such as the present, the report under s269TEA on which the operative decision (to decide to publish a dumping duty notice) was wholly or substantially based, infected the ultimate decision such as to justify a recommendation that it be revoked. However, the reviewable decision is the operative decision and it is the correctness of that decision only which is to be assessed by the Panel.

12. The Customs Act does not set out in a comprehensive way what the task of the Panel is in conducting a review. Nicholas J comparatively recently considered the role of the TRMO under an earlier statutory scheme for the review of anti-dumping and other decisions under the Customs Act: *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs of the Commonwealth of Australia* [2012] FCA 1192. His Honour noted at [32] there are authorities (indeed many) that the word "review" is not a precise term. What a review entails is to be ascertained by reference to the statutory framework creating the review process: see, as a recent example, *The Pilbara Infrastructure Pty v Australian Competition Tribunal Ltd* [2012] HCA 36.
13. The Customs Act does contain provisions that identify what the Panel can or should do in a review in certain respects. The first point to be noted, in relation to the review of a Ministerial decision (and I will confine the following remarks to such a review) is that the review has been preceded by what is likely to have been an extensive process of investigation and reporting by the Commissioner under Part XVB which, as to a similar earlier statutory scheme, has been described as a "detailed prescriptive regime": *Pilkington (Australia) v Minister of State for Justice & Customs* [2002] FCAFC 423 at [123].
14. The Panel does not undertake its own investigation in the sense of gathering fresh information and is confined, as a broad generalisation, to the information that had been before the Commissioner: s269ZZK(4) and (6). The Panel must, in the ordinary course, report to the Minister within 60 days of the public notification of the review (unless the time is extended by the Minister or reinvestigation has been requested under s269ZZL). The practical effect of this time limit, having regard to the right of interested parties to make submissions within 30 days of the public notification, is that the Panel may well have only 30 days to undertake the review with the benefit of submissions. While the practice of interested parties cannot inform the proper construction of these provisions, the Panel's experience to date is that mostly submissions are in fact made on the thirtieth day after the public notification or shortly before. Presumably interested parties do



this in order to avoid responsive (and probably critical) submissions by other interested parties.

15. It seems to me that having regard to the fact that the Panel will ordinarily have to undertake a review in a comparatively short time frame against a background where the Commissioner will have ordinarily undertaken an extensive process of investigation and reporting, and also having regard to the fact that the Panel can require the Commissioner to reinvestigate, the Panel's role in a review does not entail full reinvestigation of matters considered by the Commissioner and raised by interested parties in the application for review. The investigation by the Commissioner will often entail the evaluation by the Commissioner of material gathered in the investigation both from overseas and domestically. That evaluation may involve subsidiary conclusions or decisions involving assessment and judgement. I do not see the Panel's role as involving this type of evaluation afresh. Rather the Panel's role includes, by way of illustration, assessing whether there has been inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Customs Act or relevant regulations.
16. Three further general points need to be made. The first is that the Panel has taken the approach that the grounds in the application for review confine the issues which will be considered in the review: see Report No 13 of 18 June 2014 concerning Rolled Plated Steel exported from the People's Republic of China at pars 16 - 24. The second is that the Customs Act requires an applicant to set out reasons for believing that the reviewable decision is not the correct or preferable decision: see s269ZZE(2)(a) in relation to Ministerial decisions. Failure to do so may result in rejection of the application. However because an application is not rejected it does not follow that all grounds advance in the application are to be viewed, or have been accepted, as reasonable grounds for the reviewable decision not being the correct or preferable decision: see Report No 7 of 6 December 2013 concerning Hot Rolled Played Steel exported from the People's Republic of China, The Republic of Indonesia, Japan, The Republic of Korea and Taiwan at par 14. The third point is that the obligation on an applicant to set out the reasons is linked to the task the Panel has in determining whether the ultimate decision (the reviewable decision) was the correct or preferable decision.
17. In accordance with s269ZZK(4) of the Customs Act, I have had regard only to information which was relevant information as defined in s269ZZK(6). I have considered the grounds and information set out in the application made by the applicant subject to the constraints in s269ZZK(4) and (6).
18. Upon accepting the applications for review of the Parliamentary Secretary's decision, the ADC was asked to provide comments on the grounds raised in



the applications for review. The response from the ADC was received on 3 July 2014 (**the ADC comments**). Both the request to the ADC and the response were made publicly available, except for the confidential attachments, before the time for submissions expired under s269ZZJ (4 July 2014) though only immediately before that time. Win&P very promptly, on 4 July 2014, made further submissions in relation to the ADC comments. It is possible s269ZZK(4)(b) precluded me from entertaining further submissions from interested parties after 4 July 2014 on the ADC comments. However no party sought to test whether this was so by seeking the opportunity to make such submissions after 4 July 2014. The Panel has relied upon the ADC comments to assist it to identify information which was not relevant information as defined by s269ZZK and to the extent that the ADC has identified information to which it had regard in making its recommendation to the Parliamentary Secretary and which it considered responsive to the claims made by the applicants.

Decision and recommendations

19. I will recommend pursuant to s 269ZZK(1)(a) that the Parliamentary Secretary affirm the decision to impose dumping duties on wind towers exported to Australia from Korea and China and to publish a dumping duty notice under s269TG(1) and (2) of the Customs Act.

PART 2 – REVIEW OF THE DECISION TO PUBLISH A DUMPING DUTY NOTICE

20. It is convenient to identify the issues raised in the applications in the following way. There were two issues raised in both applications:
 - Embeds should not have been considered either as the goods under consideration or part of the goods under consideration.
 - Section 269TAF(1) was not applied correctly in identifying the date of transaction or agreement that best establishes the material terms of the sale of the exported goods for the purposes of currency conversion.

Two additional issues were raised by Senvion:

- Factors other than price should have been considered as influencing the choice of wind tower supplier.
- In the absence of any alleged dumping, the Australian industry would not have won the tender to supply the Mt Mercer project.

Several additional issues (or sub issues) were raised by Win&P:

- An incorrect methodology was used to determine the amount of selling,



general and administration costs (SG&A) under section 269TAC(2)(c) by working out an export SG&A and adding it to the cost of production of the exported goods.

- Certain company common expenses to the sale of the wind towers were wrongly included in its SG&A and other expenses that are unrelated to the goods under consideration were wrongly allocated its SG&A.
- Research and Development (R&D) expenses should not have been included in the SG&A.
- Foreign exchange gains and losses incurred during the investigation period should not have been included in the allocation of SG&A for wind towers.
- If the Commissioner's SG&A calculations were corrected, the Commissioner would not have needed to determine a rate of profit in the constructed normal value as there would be sufficient domestic sales for the calculation of normal value.

I consider each of these issues in turn.

Embeds should not have been considered either as the goods under consideration or part of the goods under consideration.

21. In the Report, the goods the subject of the investigation are discussed in a section headed "The goods". Firstly they are identified simply as "wind towers". Then the Report quotes the description of the goods by the applicants in the application for a dumping duty notice as including: "*Certain utility scale wind towers, whether tapered or not and sections thereof (whether exported assembled or unassembled), and whether or not including and embed being a tower foundation section.*" The Report then notes that wind towers are at least 50 meters high and are used to support an enclosure for an engine and rotor blades for use in wind turbines to generate electrical power. The Report then details the physical elements in a wind tower. A passage then follows:

The description of the goods states "tower sections... whether or not including an embed being a tower foundation section". The Commission notes that wind towers for different wind farm projects may or may not require a foundation section depending on the tower specifications. For those projects where wind towers and embeds are specified, the embeds may be shipped and installed at different times to the tower sections. The Commission takes the view that the different shipment times do not detract from the embeds being considered as part of the goods.



22. This approach is challenged by the applicants. Senvion argues that the description of the goods in the application for the dumping duty notice comprehends "certain utility scale wind towers" which may possibly include embeds (or embedments as Senvion describes them). But, they argue, the wind tower is comprised of wind tower sections plus the installation accessories within those sections. An embedment is more properly part of the foundation of the wind tower. It is a transition piece that enables the wind tower to be joined for concrete foundation. It is thus physically different, has a distinct purpose and is costed and ordered separately in wind farm projects. Win&P advances similar arguments. In addition, Korea draws attention to other elements in the description of the goods in the application for the dumping duty notice. In particular, that part of the description that says a wind tower section "*consist of, at a minimum, multiple steel plates*" and Korea points to the fact that embeds are normally made with one steel plate. Korea also points to exclusions in the application identifying what was not intended to be comprehended ("*external components which are not attached to the wind towers or sections thereof*").
23. The issue raised by both applications for review was whether the description of the goods in the initial application for a dumping duty notice included embeds and, indirectly, whether the repetition of that description in the Anti-Dumping Notice advising of the initiation of the investigation was wrong insofar as it included embeds.
24. The particulars of the goods in the notice issued under s269TC(4) (ADN2013/68) included the following:

The goods may be classified to 7308.20.00. This applies to complete towers, unassembled or assembled and applies to a basic tower that includes doors, ladders, landings and embed or tower foundation.

This description was part of the description provided by the Commissioner in discharge of his statutory obligation to "[set] out particulars of goods the subject of the application": s269TC(4)(a). While it may be accepted that there is some limited scope for arguing that the description of the goods in the application for the dumping duty notice was ambiguous, there is no ambiguity in the notice issued under s269TC(4) which presaged the subsequent investigation. The Commissioner was entitled, in my opinion, to formulate the description as it appeared in the notice. That is because the better view, in my opinion, is that the description of the goods in the application for the dumping duty notice did include embeds. This is apparent from the use of the word "and" twice in the passage from the description set out earlier that, in effect, identified cumulatively elements of what was intended to be the goods for the purposes of the application. The description recognised those elements might not at all times be imported as



goods for consumption or use in Australia in association with the supply of wind towers but might on some occasions. The other aspects of the description of the goods in the application for the dumping duty notice relied on by Korea, do not, in my opinion, constitute a sufficiently clear indication that the central description of the goods should not be understood in the way I have just discussed. I reject the argument of the applicants that the approach of the Commissioner was erroneous.

Section 269TAF(1) was not applied correctly in the identification the date of transaction or agreement that best establishes the material terms of the sale of the exported goods for the purposes of currency conversion.

25. Section 269TAF addresses circumstances where a currency conversion is appropriate for the purposes of enabling a comparison between the export prices of goods exported to Australia and corresponding normal values of like goods. With a qualification that is not presently relevant, subsection (1) provides that the conversion "*is to be made using the rate of exchange on the date of the transaction or agreement that, in the opinion of the Minister, best establishes the material terms of the sale of the exported goods.*" The difference in the approach actually adopted by the Commissioner and the approach advocated by the applicants concerns the date by reference to which the exchange rate is determined and, accordingly, the exchange rate actually deployed (though I add, parenthetically, no party challenging the approach of the Commissioner identified what the differences in the exchange rates may have been and what the consequences of that difference would have been on the calculation of the export price).
26. The Commissioner, in the Report, concluded that the date that best established the material terms of sale was the date of sales revenue recognition in Win&P accounts noting that this was the date that Win&P recognised the amount as a sale as stated in the audited accounts which, as Haywards and Keppel and Prince note in their submissions, would have been the date of dispatch for delivery and the creation of the commercial invoice.
27. Win&P argues that the appropriate (and earlier) date, was the date of the purchase orders. A similar argument is advanced by Senvion and Korea. Their arguments, treating them collectively, include reference to Article 2.4.1 of the Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, footnote 8, which states that "*Normally, the date of sale [the Article contemplates conversion of currencies using the rate of exchange on the date of sale] would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of trade*". Section 269TAF should be construed conformably with that international agreement: see for example *Siam Polyethylene Co Pty Ltd v Minister of State for Home Affairs* [2009] FCA



837 at [5] and following. Their arguments also challenge the way the Commissioner relied on observations by the Trade Measures Review Officer (TRMO) of 14 December 2012 in a report concerning Hollow Structural Sections (at pars 177-178). Their arguments also point to what is said to be a change in position or inconsistency between what is said in the Report and what is said by the ADC in their comments of 3 July 2014.

28. Ultimately, the issue is not whether the reasoning in the Report fully or adequately justified the conclusion reached and acted upon (that the relevant date for making the currency conversion was the date of sales revenue recognition in Win&P accounts) but rather is whether the date selected was appropriate. In the ADC comments, the following is said in relation to this issue:

The Commission determined, based on all the evidence before it, that the purchase orders presented to it by the Applicants did not reflect the delivery times, quantities shipped, the amounts invoiced and the payments actually received.

29. Importantly, in my opinion, Win&P does not challenge an important part of this statement (that the purchase orders did not reflect the payments actually received) in its further submissions of 4 July 2014 though it does, in some detail, challenge or point to other parts of the ADC comments concerning this issue of currency conversion. Nor, in its application for review or its submissions of 27 June 2014, did Win&P assert any fact that would have explicitly challenged the statement in the ADC comments set out above. The closest Win&P comes to putting different facts was a statement that: "*the price, specification and the quantity of the wind towers subject to the contract of sale were all fixed and – if it be relevant – were all honoured by the parties*" but what this means is not at all clear insofar as sale price is concerned. Senvion, the other contracting party, says nothing in its application for review that would challenge the statement in the ADC comments set out above except in relation to the number of wind towers shipped. It said the numbers shipped corresponded with the numbers in the purchase orders.
30. Moreover Senvion, Win&P or Korea do not challenge the fundamental way the export price was determined by the Commissioner, namely the invoiced price nor suggests that there was any incompatibility in applying the currency conversion determined at the date selected by the Commissioner, to that export price. Nor, in my opinion, is there any incompatibility. If it was appropriate to view the export price as the price in the purchase orders in circumstances where that price was also the invoice price and other material aspects of the transaction which in fact took place reflected the terms of the purchase orders, then there would be a compelling argument that the exchange rate at the time the purchase orders issued was the appropriate



rate to determine the export price for the purposes of comparison with normal values of like goods under s269TACB. In that circumstance, an adjusted export price (adjusted for currency differences) would be determined at the time the purchase price was settled (when the purchase orders issued) and would become, for the purposes of s269TAB, the price paid or payable. However when the export price is the invoice price and differs from the price in the purchase orders then the logic of using an exchange rate at an earlier time (when the purchase orders issued) is not obvious.

31. In my opinion, it was open to the Commissioner to select an exchange rate at the time determined and not the time of the purchase orders.
32. I should observe that Senvion, Win&P or Korea do not identify the exchange rate likely to have been used nor the exchange rate they contend should have been used. Whether the ultimate decision (to publish a dumping duty notice in the terms actually published) was correct would depend on whether there was a difference between the two exchange rates and whether that difference was material. No attempt was made to establish that there was a material difference and how that material difference impacted on the ultimate decision. Had this been the only ground raised in the two applications for review, it is probable both applications would have been rejected on the basis that they did not disclose reasons for believing that the reviewable decision was not the correct decision as required by s269ZZE(2)(b). Both applications for review were filed at a point in time when it would not have been possible for me to exercise the powers under s269ZZG (if I was inclined to do so) to enable each applicant to amend the statement in the application. Is not sufficient, as I have endeavoured to explain earlier in this decision, for an applicant for a review simply to identify what may be errors in the analysis undertaken by the Commissioner without also explaining how those errors resulted in the ultimate decision not being correct.

Factors other than price should have been considered as influencing the choice of wind tower supplier.

33. The Report addressed the question of whether the exportation to Australia from China and Korea of wind towers at dumped prices, caused material injury to the Australian industry producing like goods. The analysis included consideration of "non-price related factors" which may have influenced the awarding of tenders and the choice of supplier. In conclusion, the Commissioner indicated that he recognised that factors other than prices were relevant to the decision to award the tender but that the evidence ultimately showed the price was a critical and determinative factor. Senvion criticises this analysis. It notes that it had, in its initial submissions, described in detail the factors that it considered when selecting a wind tower supplier for a wind farm project. They included current suppliers'



accreditation, the need for suppliers to meet international design certification, the need for suppliers to meet a customer's project deadline, the ability of suppliers to manufacture complete wind towers and price. It submits that the Commissioner failed to adequately consider and reasonably take into account the factors it identified (and had been identified by other original equipment manufacturers such as GE and Titan). Senvion argues that the Commissioner simply recited the submissions received from interested parties and undertook no analysis nor set out the basis for its conclusion. The Commissioner, it submits, had not provided rigorous assessment of this issue as is legally required. Senvion concludes its submission by requesting that I redirect the Commissioner to take these matters into account together with the contention that had the Commissioner taken the matters it raised into account, the result would be a finding that no material injury was caused by dumping. The gravamen of the submission is that factors other than price explain the failure of the Australian industry to secure contracts to supply wind towers and, accordingly, it is not explicable because of any price difference between wind towers exported to Australia (on the hypothesis that they were dumped) and wind towers capable of being produced locally.

34. I do not view the Panel's role as involving an assessment of whether the Commissioner's reasons in any particular report are adequate or not, as a discrete issue. It is tolerably clear from the Report that the Commissioner's analysis, resulting in a conclusion that price was the primary or determinative factor in selecting suppliers involved an evaluation of the material pointing to that conclusion together with other material which might suggest another conclusion even if, as Senvion argues, the Report does not disclose or adequately disclose the reasons. To say something is a "predominant factor" or a "critical and determinative factor" necessarily involves a process of comparison and evaluation. Moreover the findings in the Report based on the material before the Commissioner (referred to in the Report) about what was said about price by Senvion and others to unsuccessful Australian tenderers (which is material Senvion does not challenge) provided a rational and reasonable foundation for the ultimate conclusion (that price was the predominant factor in the awarding of tenders and choice of supplier). I reject this ground as warranting a conclusion that the Parliamentary Secretary's decision was not the correct decision.
35. I note that Senvion has not argued that the Commissioner failed to apply correctly or misconstrued s269TG(1) together with s269TAE: see, for example, *ICI Australia Operations Pty Ltd* (1992) 34 FCR 564 at 579, but rather challenges the factual findings actually made.



In the absence of any alleged dumping, the Australian industry would not have won the tender to supply the Mt Mercer project.

36. This issue is linked to the issue just discussed. In the Report the Commissioner considered the question of whether, in a market unaffected by dumping, the Australian industry would have won the tender for a particular project (Mt Mercer). The Commissioner said that to conclude that it would not have, required the Commissioner "to enter a difficult area as it involved "speculation on what might have happened in hypothetical situations". The Commissioner then listed three matters that, in his opinion, increased the difficulty of that task. One identified factor was the lack of documentation that would clearly indicate which party would have been successful in the absence of dumped goods. Another was the distortion to the market and prices offered in tenders by other bidders who were aware of the presence of dumped goods from Korea. The third factor was identified in the following way:

the importance of factors other than price to the purchasing decision and the fact that the lowest priced option is not always preferred - therefore the Commission cannot deduce a likely outcome from the prices tendered.

37. The Commissioner concluded by saying:

The Commission considers that unless there is strong and positive evidence that the Australian industry would not have won the tender it is reasonable to conclude that the tenders won at dumped prices have caused or threatened injury to the Australian industry

38. Senvion argues that this approach is wrong. Four matters are noted in support of this general proposition. The first is that it is unreasonable for the Commissioner to assert that price is the predominant factor in the choice of wind tower suppliers yet factors other than price are relevant to a comparison of tenderers. The second is that there was no lack of documentation. Senvion notes that it has supplied tender analysis documents comparing bids for the Mt Mercer project. The third is that there was no evidence of price distortions in the event of dumping as the bids are made confidentially and if there were distortions, all the bids would be similar (at or near the bid by the party alleged to be dumping). Finally it is submitted that it is not proper or correct for the Commissioner to require evidence to prove the negative (that the Australian industry would not have won the tender).
39. It is, in my opinion, important to understand the context in which the Commissioner was considering this issue. It was under a heading "Imports



from countries not under investigation". What the Commissioner was doing was dealing with an hypothesis that, in substance, involved the proposition that Australian industry was not injured by a failure to secure contracts to supply the Mt Mercer project because, in the absence of dumping, Australian industry would not have won the tender in any event presumably on the basis that a decision to award the contracts would have favoured either wind towers from China or Korea or other countries but not from Australia.

40. The criticism of the Commissioner's reasoning to reach the ultimate conclusion that a consideration of this hypothesis involves speculation and that it would be necessary for strong and positive evidence that the Australian industry would not have won the tender, has some force. However is nonetheless the case that this hypothesis does involve speculation and it was reasonable, in my opinion, for the Commissioner to require information of some substance to displace the conclusion otherwise reached, that price had been the predominant factor (having regard to the material referred to in the preceding discussion about the influence of factors other than price).

An incorrect methodology was used to determine SG&A under section 269TAC(2)(c) by working out an export SG&A and adding it to the cost of production of the exported goods.

41. In the ADC comments, the Commissioner concedes that he made an error of the type identified by Win&P. The error was that in determining amounts for SG&A for the purposes of s269TAC(2)(c)(ii) the Commissioner erroneously used costs incurred in the export sales of wind towers to Australia in the investigation period rather than costs incurred in the domestic sale of wind towers in the investigation period. However in the ADC comments, the Commissioner embraces the observation of Win&P that the method adopted arrives at the same result as the correct method. This appears to be common ground. Accordingly identification of this error does not point to the ultimate decision (to publish the dumping notice) not being the correct decision.

The calculation of SG&A

42. There was no issue raised by Win&P about the general approach of the Commissioner in determining SG&A. It accepted that those costs comprised total SG&A incurred by the relevant wind power department together with total company (Win&P) SG&A though only insofar as those SG&A could be properly allocated to the sale of wind towers. It is in relation to that latter process of allocation that Win&P criticises the approach of the Commissioner. During the investigation, Win&P proposed allocation by reference to its business plan but the Commissioner considered allocation by reference to actual revenue (costs as a percentage of sales revenue). Data was provided by Win&P on the basis that the Commissioner's preferred method of allocation would be used.



43. In its submissions (in its application for review of 16 May 2014, submissions of 27 June 2014 and submissions of 4 July 2014) Win&P argues at length and in some great detail that it had provided the Commissioner with information to which the Commissioner's preferred method of calculating SG&A could be applied. It goes on to argue that the Commissioner failed to use that information correctly or misunderstood that information with the result that the calculation was incorrect. Of some significance in determining whether it was desirable to have the matter reinvestigated, Win&P refers in its submissions to discussions which had occurred between its representatives and the investigators from the ADC. There were obvious difficulties for the Panel in determining what was said and its relevance. Accordingly, I concluded it was appropriate to require reinvestigation pursuant to s269ZZL. I did so by letter dated 21 July 2014.
44. I required that the finding about the SG&A be reinvestigated to address the matters raised in section E of Win&P's application for review and as part of that reinvestigation, if another figure is arrived at for SG&A, the consequences of that on the dumping margin the Commissioner had assessed. I indicated it was desirable that as part of the reinvestigation, the Commissioner reconsider whether information of the type Win&P said it supplied, was in fact supplied and, if it was, to what extent and in what way that information should be used to calculate SG&A. Given that I was requiring a reinvestigation of SG&A, as part of that reinvestigation, I required the Commissioner to review the findings and conclusions about R&D expenses and foreign exchange gains and losses in the light of Win&P's arguments in section E referred to above. Section E addressed the issues identified in the second third and fourth dot points under the list of additional issues set out in paragraph 20 above.
45. On 30 September 2014 I received a reinvestigation report. The Commissioner concluded that the data and information provided by Win&P relating to its calculation of its SG&A was not complete or verifiable, did not reflect fair and reasonable allocation expenses and understated the SG&A relating to the production of the like goods. The Commissioner, in substance, adhered to the conclusions earlier reached about the matters raised in section E. I am obliged by s269ZZK(4A) to have regard to the reinvestigation report in making the recommendation contemplated by s269ZZK(1). While it is not free from doubt, I apprehend it is open to me, in framing my recommendation, to act on the conclusions and findings in the reinvestigation report. I do so.



If the Commission's SG&A calculations were corrected, the Commission would not have needed to determine a rate of profit in the constructed normal value as there would be sufficient domestic sales for the calculation of normal value.

46. The Commissioner determined normal value under s269TAD(2)(c) on the basis that there were no relevant sales made in the ordinary course of trade. Win&P argues that if the already identified mistakes in the calculation of SG&A were recognised and SG&A recalculated, it would be possible to identify sales made in the ordinary course of trade sufficient to engage s269TAC(1). However and notwithstanding, Win&P challenges the way the Commissioner applied the methodology actually used having regard to provisions in the Customs Act and the Customs Regulations 1926 (**the Regulations**).

Section 269TAC(5B) requires that amounts determined as profit under, relevantly, s269TAC(2)(c)(ii), must be worked out as required in the Regulations. The manner of working it out and the identification of factors which must be taken into account are found in reg181A. These were the provisions used by the Commissioner. The Commissioner's line of reasoning in the Report in applying them was as follows. While Win&P had provided information concerning its domestic sale of wind farms, the Commissioner was not satisfied those sales were in the ordinary course of trade. Accordingly, the Commissioner could not use that data as provided in reg181A(2). It was open to the Commissioner to use any of the three methods of calculation in reg181A(3). The Commissioner did so and used the method in reg181A(3)(c). That is to say, working out the amount by using any other reasonable method and having regard to all relevant information. The Commissioner used information concerning profits of manufacturers of fabricated and processed metal products as revealed in data from the Korean Statistical Information Service. That method of calculation under reg181A(3)(c) is subject to the operation of reg181A(4) which provides that if the amount worked out exceeds the amount of profit normally realised by the exporters or producers on sales of goods of the same general category in the domestic market of the country of export, the amount which, in effect, is the additional amount must be disregarded. In an attachment to the Report the Commissioner explained that he created a weighted average from the data derived from the Information Service but noted that he did not have information to identify amounts necessary to apply subreg(4).

47. The ground in the application for review (which, as earlier discussed, confines the issues to be considered in the review) which challenges this



approach is that the 2010 profitability statistics for the metal fabrication industry actually used was not a reasonable method as provided in reg181A(3)(c) because the information was dated and the manufacturers comprehended by that profit figure produced a disparate range of goods. In addition, Win& P argues in its application for review that unless the Commissioner has information available to make the calculation contemplated by subreg(4) then reg181A(3)(c) cannot be used.

48. As to the first point, I do not accept that the method used was demonstrably unreasonable. Win& P does not point to any "relevant information" (see s269ZZK(6)) which would suggest that changing market conditions would have suggested profitability data from 2010 could not be used nor that the nature of the market was such that the profit generated from the sale goods in the broader metal fabrication industry was inapt to apply to a segment of that industry. As to the second point it is comparatively clear that the Commissioner failed to do what is required by subreg(4) because information was not available to undertake the exercise the subreg contemplates. However for this point to go anywhere it would be necessary for Win&P to demonstrate or at least establish on some prima facie basis (which might result in a notice requiring reinvestigation under s269ZZL) that this failure had the consequence that the ultimate decision was not the correct decision because undertaking the exercise required by subreg(4) would have led to some material in different figure for profit. Moreover it is unlikely, in my opinion, having regard to the actual method used by the Commissioner and the data relied on, that the "profit normally realised" would be any different from the "amount worked out" so the calculation contemplated by subreg(4) would have no impact on the "amount worked out". Accordingly I do not accept that, having regard to this ground, that Win&P has established the ultimate decision was not the correct decision.

PART 3 – CONCLUSION

49. The applicants have not demonstrated that the decision under review was not the correct or preferable decision. Accordingly, it is appropriate I recommend that the decision be affirmed. Formally, I recommend pursuant to s 269ZZK (1)(a) that the Parliamentary Secretary affirm the decision to impose dumping duties on wind towers exported to Australia from Korea and China and to publish a dumping duty notice under s269TG(1) and (2) of the Customs Act.

A handwritten signature in blue ink, appearing to read 'Michael Moore'.

Hon Michael Moore
Senior Panel Member
15 October 2014