Australian Government
Anti-Dumping Review Panel

Application for review of a Commissioner's decision

Customs Act 1901 s 269ZZQ

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Commissioner of the Anti - Dumping Commission.

Section 269ZZO *Customs Act 1901* sets out who may make an application for review to the ADRP of a review of a decision of the Commissioner.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after the applicant was notified of the reviewable decision.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel begins to conduct a review (by public notice in the case of termination decisions and by notice to the applicant and the Commissioner in the case of negative prima facie decisions, negative preliminary decisions and rejection decision). Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after the Panel begins to conduct a review. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

[1] By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZQA(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application, refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. **Applicant's details**

Applicant's name: Keppel Engineering Pty Ltd (KPE)

Address: 184 Darts Road, Portland Victoria 3305

Type of entity (trade union, corporation, government etc.): Australian manufacturer Wind Towers

Applicant's name: Ottoway Fabrication Pty Ltd (OF)

Address: 61 - 67 Plymouth Road, Wingfield SA 5013

Type of entity (trade union, corporation, government etc.): Australian manufacturer Wind Towers

2. **Contact person for applicant**

Full name: Stephen Garner (KPE)

Position: General Manager

Email address: steve.garner@keppelprince.com.au

Telephone number: (03)5523 8816

Full name: Michael Lewis (OF)

Position: Group Business Development Manager

Email address: Mike.lewis@ottowayengineering.com.au

Telephone number: (08)8341 0045

3. **Set out the basis on which the applicant considers it is entitled to apply for review to the ADRP under section 269ZZO**

KPE and OF are the applicants for the publication of a dumping duty notice in relation to certain wind towers exported from the Socialist Republic of Vietnam (Vietnam). The applicants are members of the Australian industry producing the goods the subject of the application.

The Australian industry comprises KPE, OF and Haywards Steel Fabrication & Construction Crisp Bros. (Haywards). Haywards has previously produced like goods in Australia, and retains the ability to do so, however it did not produce like goods during the investigation period. Haywards is not party to the application for the dumping duty notice but provided written support of it.

4. **Is the applicant represented?**

Yes

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under

☐ Subsection 269TC(1) or (2) – *a negative prima facie decision*

☒ Subsection 269TDA(1), (2), (3), (7), (13), or (14) – *a termination decision*

☐ Subsection 269X(6)(b) or (c) – *a negative preliminary decision*

☐ Subsection 269YA(2), (3), or (4) – *a rejection decision*

☐ Subsection 269ZDBEA(1) or (2) – *an anti-circumvention inquiry termination decision*

6. Provide a full description of the goods which were the subject of the reviewable decision

The goods the subject of this investigation are:

> Certain utility scale wind towers, whether or not tapered, and sections thereof (whether exported or assembled or unassembled), and whether or not including an embed being a tower foundation section.

Further information regarding the goods is outlined below:

Wind towers are designed to support the nacelle (an enclosure for an engine) and rotor blades for use in wind turbines that have electrical power generation capacities equal to or in excess of 1.00 megawatt (MW) and with a minimum height of 50 metres measured from the base of the tower to the bottom of the nacelle (i.e. whether the top of the tower and nacelle are joined) when fully assembled.

A wind tower section consists of, at a minimum, multiple steel plates rolled into cylindrical or conical shapes and welded together (or otherwise attached) to form a steel shell, regardless of coating, end finish, painting, treatment or method of manufacture, and with or without flanges, doors, or internal components (e.g. flooring/decking, ladders, lifts, electrical junction boxes, electrical cabling, conduit, cable harness for nacelle generator, interior lighting, tool and storage lockers) attached to the wind tower section. Several wind tower sections are normally required to form a completed wind tower.

An “embed”, or TBR (tower base ring), is the term used to describe the foundation section of the wind tower. This section is manufactured in the same manner as a tower section only it is a lot shorter in height and usually comprises one or two steel plates rolled into barrels and joined with flanges attached. This section is usually cast into the ground as part of a towers’ foundation structure.

Wind towers and sections thereof (whether exported assembled or unassembled) are included within the scope of the goods the subject of this application whether or not they are joined with non-subject merchandise, such as nacelles or rotor blades, and whether or not they have internal or external components attached to the subject goods, or include an embed, being a tower foundation section.

Goods excluded from the application are:

- nacelles and rotor blades, regardless of whether they are attached to the wind tower.
- any internal or external components which are not attached to the wind towers or sections thereof.

Wind towers for different wind farm projects may or may not require a foundation section (embed) depending on the tower specifications.

7. Provide the tariff classifications/statistical codes of the imported goods

The goods are generally, but not exclusively, classified to the following tariff classification in Schedule 3 to the Customs Tariff Act 1995:

7308.20.00 Statistical codes 03, 04
7308.90.00 Statistical codes 52 - 56, 63, 65
8502.31.10 Statistical code 31

8. If applicable, provide the Anti-Dumping Notice (ADN) number of the reviewable decision
If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

Anti-Dumping Notice (ADN.) No. 2018/20 refers

9. Provide the date the applicant received notice of the reviewable decision

The applicants' representative for the application for the dumping duty notice was notified by email on 6 February 2018 by the Anti-Dumping Commission (the Commission). A copy of AND. No. 2018/20 was attached to the email. The applicants representative forwarded the applicants a copy of the email and ADN. the same day notifying them of the Commission's decision.

A copy of ADN. No. 2018/20 is attached to this application.

Attach a copy of the notice of the reviewable decision to the application

PART C: GROUNDS FOR YOUR APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

10.1 The decision of the Anti-Dumping Commissioner ("the Commissioner") to treat the related companies in the CS Wind Group as separate entities is not the correct or preferable decision.

Termination Report 405 (TER405) notes the treatment and consideration of the related companies as separate entities in the CS Wind Group.

> The Anti-Dumping Review Panel (ADRP) has noted recently that under Australian law, the separate legal personality of companies in a corporate group has to be recognised. While legislation exists in certain circumstances allowing for the grouping of companies, absent such legislative provisions it is only in very rare circumstances that the "corporate veil" can be lifted and the corporate structure ignored.
>
> The Commission has had regard to the approach adopted by the ADRP.

In having regard to the approach adopted by the ADRP in the Commissioner has not has regard to:

- the circumstances of the relevant case before the ADRP;
- the very rare circumstances that the "corporate veil" can be lifted and the corporate structure ignored; and
- the circumstances of the current case.

10.2 The decision of the Commissioner to treat CS Wind Vietnam as a other seller and producer of like goods in the Vietnamese domestic market is not the correct or preferable decision.

The Commission has not at any point examined whether CS Wind Vietnam was a seller in its own right. Such an examination should include the roles of each company in the sales and production process and the arms length nature of transactions between the parties.

10.3. The Commissioners decision to treat related party transactions between companies in the CS Wind Group as arms length transactions is not the correct or preferable decision.

The Commissioner has not complied with the legislation by not properly testing the arms length nature of related party transactions between the companies in the CS Wind Group

There is no evidence that the Commission considered or undertook any assessment of the factors outlined in the legislation and the manual.

The lack of assessment of arms length transactions means it is likely that such transactions are transfer prices set by CS Wind Korea, do not reflect a competitive market price and understate the constructed normal value and dumping margin.

10.4 The Commissioner's decision to use the by using the weighted average profit of CS Wind Vietnam and CS Wind Korea to determine a profit for the normal value is not the correct or preferable decision.

The Commissioner has improperly determined a profit to be applied to the normal value by considering CS Wind Vietnam as a other seller and by using the weighted average profit of CS Wind Vietnam and CS Wind Korea.

As noted at sections 10.1 and 10.2 CS Wind Vietnam could not be considered a other seller of like goods in the Vietnamese domestic market.

Section 10.3 notes a lack of proper arms length testing of the nature of the transactions between the related parties in the CS Wind Group.

10.5 The Commissioner's decision to calculate an export price without properly considering whether additional items to the export represented a consideration other than the price is not the correct or preferable decision.

The Commissioner has improperly calculated an export price by failing to address whether flange bolts and additional items were provided at a price that represents a consideration payable for the goods other than the price.

Other items provided, including the flange bolts, as part of the goods exported form part of the export and the pricing has not been properly examined to ensure that there is not a benefit to the importer.

10.6 The Commissioner's decision to calculate a normal value that excludes relevant SG&A costs is not the correct or preferable decision.

The Commissioner has improperly calculated a normal value by failing to include SG&A costs from 2015.

As noted in submissions and supporting evidence the wind towers may only have been invoiced in 2016 but all the sales effort in relation to the contract occurred in 2015. In addition, a large part of SG&A costs in regard to production would have been incurred in 2015 in sourcing raw materials and suppliers with production most likely commencing in 2015. Excluding such costs would result in lower SG&A costs and not a fully absorbed CTMS for the goods.

10.7 The Commissioner's decision to calculate a normal value that excludes an adjustment for non-market costs for electricity is not the correct or preferable decision.

The Commissioner has improperly calculated a normal value by failing to adjust the exporters electricity costs for the market situation found in regard to electricity in Vietnam.

The Commissioner justified not adjusting for electricity costs on the basis that electricity costs were a less significant cost component, the adjustment would result in a minor increase in the dumping margin and the purchase of electricity was an arms length transaction.

The significance or effect of an item on a dumping margin is not a factor for consideration in calculating a dumping margin. That a purchase was arms length is not the relevant test in determining whether a cost represents a competitive market cost.

10.8 The Commissioner's decision that the size of the dumping margin had not materially impacted the Australian industry's economic performance is not the correct or preferable decision.

The errors identified in the sections above have affected the Commissioner's calculation of the dumping margin and subsequently the Commissioner's decision that the size of the dumping margin has not materially impacted the Australian industry's economic performance

The Commissioner found that the size of the dumping margin had not materially impacted the Australian industry's economic performance. Australian industry considers that this finding is flawed as the margin is understated due to the reasons stated in the previous sections above and that a properly calculated dumping margin would result in a finding that the size of the dumping margin had materially impacted the Australian industry's economic performance.

10.9 The Commissioner's decision that non-price factors were determinative in the decisions to award projects to CS Wind Korea during the investigation period is not the correct decision or preferable decision

The Commissioner has not had regard to evidence from the applicants that demonstrate that whilst non-price factors were a consideration, price was ultimately the determinative factor in awarding the number of wind towers.

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10

11.1 The Commissioner should treat the related companies in the CS Wind Group as a single entity.

At section 10.1 it was shown that circumstances existed where the CS Wind companies could be treated as a separate entity.

The Australian industry submits that there is no impediment under Australia's anti-dumping law to treating the CS Wind Group of companies as a separate entity.

11.2 The Commissioner should not treat the CS Wind Vietnam as a other seller in the Vietnamese domestic market.

At section 10.2 it was shown that due consideration had not been had to whether CS Wind Vietnam was a other seller in the Vietnamese domestic market and that the evidence did not support such a finding.

11.3 The Commissioner should properly test the arms length nature of the transactions between the related parties in the CS Wind Group.

At section 10.3 it was shown that the related party transactions had not been properly tested to ensure that they represented a competitive market price.

11.4 The Commissioner should determine a rate of profit under Regulation 45(3)(c) using any other reasonable method and having regard to all relevant information.

The Australian industry in its submissions to the exporter report and the SEF submitted that relevant information is that contained in the financial records of CS Wind Corporation and in its Annual Reports.

The rate of profit is based on CS Winds global sales and reflects the profit that CS Wind Corporation achieves on its global sales.

11.5 The Commissioner should re-examine the other items exported with the wind towers to ensure that such items were not provided at a price that represents a consideration payable for the goods other than the price.

Industry submits that the other items provided, including the flange bolts, form part of the export and the pricing needs to be properly examined to ensure that there is not a benefit to the importer.

11.6 The Commissioner should properly calculate a normal value by including SG&A costs from 2015.

Inclusion of such costs will likely result in a higher normal value and dumping margin, as noted at section 10.6 the allocation of overheads is likely understated by only relying on 2016 data. A proper allocation of overheads by including the 2015 data would also likely result in a higher normal value and dumping margin.

11.7 The Commissioner should adjust the exporters electricity costs in the normal value for the market situation found in regard to electricity in Vietnam

Electricity costs in the constructed normal value should be adjusted up wards as submitted by the Australian industry.

11.8 An increased dumping margin from proper consideration of the matters raised in the previous sections would demonstrate that industry's prices were competitive with the undumped export prices. This would result in a finding that the dumping margin had materially impacted the Australian industry's economic performance.

Industry submits that the price undercutting and causal link analysis needs to be re-examined in the light of an increased dumping margin.

11.9 The evidence supports that non-price factors were not determinative in the decisions to award projects to CS Wind Korea during the investigation period.

Industry has provided evidence to support its contention that price was the prime focus and determinative factor in awarding the contracts for the projects.

12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision

Not applicable.

PART D: DECLARATION

The applicants' authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* beginning to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:.....

Name: Rodney Bryan Jones

Position:

Organisation: 65 453 117 616

Date: 6 / 3 / 18

PART E: AUTHORISED REPRESENTATIVE

*This section must only be completed if you answered yes to question **Error! Reference source not found.**.*

Provide details of the applicant's authorised representative

Full name of representative: Rodney Bryan Jones

Organisation: Rodney Bryan Jones ABN: 65 453 117 616

Address: PO Box 7172 GREENWAY ACT 2900

Email address: rodbjones@tpg.com.au

Telephone number: [redacted]

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature: .....
(Applicant's authorised officer)

Name: Michael Lewis

Position: Group Business Development Manager

Organisation: Ottoway Fabrication Pty Ltd

Date: 5/3/18

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question ***Error! Reference source not found.***.

Provide details of the applicant's authorised representative

Full name of representative: Rodney Bryan Jones

Organisation: Rodney Bryan Jones ABN: 65 453 117 616

Address: PO Box 7172 GREENWAY ACT 2900

Email address: rodbjones@tpg.com.au

Telephone number: [redacted]

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:.....

(Applicant's authorised officer)

Name: Dan McKinna

Position: Assistant General Manager

Organisation: Keppel Prince Engineering Pty Ltd

Date: 06 / 03 / 2018

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

10.1 The decision of the Anti-Dumping Commissioner ("the Commissioner") to treat the related companies in the CS Wind Group as separate entities is not the correct or preferable decision.

Termination Report 405 (TER405) notes the treatment and consideration of the related companies as separate entities in the CS Wind Group.

> The Anti-Dumping Review Panel (ADRP) has noted recently that under Australian law, the separate legal personality of companies in a corporate group has to be recognised. While legislation exists in certain circumstances allowing for the grouping of companies, absent such legislative provisions it is only in very rare circumstances that the "corporate veil" can be lifted and the corporate structure ignored.
>
> The Commission has had regard to the approach adopted by the ADRP.
>
> The Commission considers that the CS Wind Korea is the exporter in this dumping inquiry (and not CS Wind Korea and CS Wind Vietnam treated as a single entity). Accordingly, and as noted in SEF 405, the Commission has applied the Regulations and has determined profit pursuant to subsections 45(3)(c) and 45(4) of the Regulation using the methodology above.

In having regard to the approach adopted by the ADRP in the Commissioner has not has regard to:

- the circumstances of the relevant case before the ADRP;
- the very rare circumstances that the "corporate veil" can be lifted and the corporate structure ignored; and
- the circumstances of the current case.

Relevant ADRP case

ADRP REP034 dealt with the issue of two separate manufacturers and exporters, Nervacero S.A. and Celsa Barcelona who are part of the same Spanish group of companies and whether Australian law permitted the companies to be grouped for the purposes of a single dumping margin.

> Separate dumping margins were determined and calculated for each company by the Commission, who subsequently collapsed the companies to calculate a single margin.
>
> The Commission referred to s.269TAA(4)(b) of the Act and the circumstances specified for treating bodies corporate as associates of each other and to a WTO Panel decision (*Korea-Anti-Dumping Duties on Imports of Certain Paper from Indonesia.*) as support for its approach.
>
> The Commission also referred to ADRP REP025, which found that the Commission's approach to treat of group of companies as a single entity reasonable and in accordance with World Trade Organisation (WTO) jurisprudence.
>
> Nervacero submitted that Australian law does not allow the "collapsing" of separate corporate entities so as to determine a single dumping margin for them.

The ADRP noted that the starting point must be the position under Australian law and whether or not it permits the Commission's approach (of collapsing the entities) to determining the dumping margin in the case of Nervacero.The ADRP also noted that this question was not raised by the applicant in the review referred to in ADRP REP025.

The ADRP stated it is well established in Australian law that the separate legal personality of companies in a corporate group has to be recognised.19 There exists legislation which in certain circumstances allows for the grouping of companies and some of these instances are listed by Nervacero in its submission. However, absent such legislative provision it is only in very rare circumstances that the "corporate veil" can be lifted and the corporate structure ignored20

The ADRP noted it was not clear that the limited circumstances in which the corporate veil can be lifted under Australian law exist in the case of Nervacero and Celsa Barcelona.

Very rare circumstances that the "corporate veil" can be lifted

The ADRP noted "Adams v Cape Industries plc [1990] 1 Ch 433, considered in Australian Competition and Consumer Commission v Yazaki Corp (No2) [2015] FCA 1304" as a such a circumstance.

The matter regarding to lifting the corporate veil related to Yazaki Corporation of Japan and its wholly owned Australian subsidiary Australian Arrow Pty Ltd and whether where the first respondent was incorporated in Japan – where the second respondent was incorporated in Australia – where the second respondent was the wholly owned subsidiary of the first respondent – whether the first respondent was carrying on business in Australia.

> The ACCC argued for a broader interpretation of the "carrying on business" criterion and one that was not restricted, in the case of an overseas parent and a wholly owned Australian subsidiary, to concepts of agency or piercing the corporate veil….The ACCC submits that, on the facts, both Yazaki and AAPL can be considered to have been carrying on business in Australia. It put its argument in two ways. The first was that Yazaki was carrying on AAPL's business generally. It submits that whilst the mere indirect legal and commercial capacity of an overseas parent to control and direct its Australian subsidiary is not sufficient, in this case Yazaki directly and actively monitored and influenced AAPL's operations across its automotive electronic components business in Australia. The second way the ACCC puts its case on this point is to confine it to that aspect of AAPL's business involving Toyota WHs in Australia. The submission is that Yazaki's relationship with AAPL in relation to Toyota WHs was closer (and different) from that relating to other goods supplied by AAPL and other purchasers it dealt with. The ACCC also submits that, insofar as Yazaki engaged in anti-competitive conduct in Australia, that in itself constituted carrying on business in Australia with the consequence the Act and the Competition Code applied to the anti-competitive conduct which took place outside Australia [312]

The Court found that:

> The ACCC's alternative argument that both Yazaki and AAPL were conducting the business in Victoria/Australia of supplying WHs to TMCA is much stronger. That is because of the degree of direction and control exercised by Yazaki over the supply of WHs to TMCA. I refer to the findings set out above (at [336]-[343]). If one looks at the process of supply as a continuum from bidding for the supply contracts to the actual supply some years later, Yazaki had a substantial involvement in the process. The first crucial step involved Yazaki to the exclusion of AAPL. Yazaki made the bids for supply of WHs in Australia and by reason of its anti-competitive conduct, the decision as to which bids would be genuine. AAPL supplied certain parts to TMCA. Insofar as the supplier had control over what those parts were to be, the "supplier" was Yazaki not AAPL. Insofar as there were local bids, they were, as the respondents submit albeit in a different context, "by way of formality only". As to the post allocation of supply stage, although there was a good deal of contact between AAPL and TMCA after the awarding of supply, it is apparent that Yazaki maintained a level of control over and involvement in the process. That can be seen from Mr Ward's evidence-in-chief where he refers to the need for approval from Yazaki for the idea to combine the floor WHs, the prices put forward in June 2004, the "Obeya" meetings, the Australian prices to be submitted by Yazaki in July 2005, reviewing position with Yazaki in May 2006, and the contact which Mr Nagasawa had with the TBU, including draft requests for approval in relation to the 2002 Toyota Camry Minor RFQ. [363]

The findings set out at [336]-[343] referenced above are.

> [336] Yazaki's TBU in Japan was responsible for Yazaki's relationship with TMC and for dealing with Yazaki's subsidiaries in respect of their supply of WHs to TMC's subsidiaries. Employees within the TBU visited AAPL from time to time. The TBU was responsible for the awarding of business, and AAPL was required to report back to the TBU about pricing and design issues which arose after the allocation of the business.
>
> [337] The TBU continued to have ongoing responsibility in relation to pricing decisions so far as the relationship with TMCA was concerned. Furthermore, the TBU continued to have regular input in relation to pricing matters even after the allocation of business. AAPL might "restack" the data provided by the TBU in making its submission to TMCA, but it would not depart from it because it knew that the TBU was coordinating a global business. There was a person who acted as a liaison person between the TBU and AAPL. For example, Mr Okumura acted in that position between 23 August 2002 and 15 September 2007.
>
> [338] The relationship between Yazaki and AAPL was different in the case of the business of TMCA from the business of GMH and Mitsubishi Australia. In the case of the business of TMCA, the marketing and supply of WHs to TMCA was initially managed by Yazaki through the TBU because the product was based on a global design and globally sourced through TMC in Japan. The TBU was responsible for bids for Toyota WH tenders for the Toyota Camry manufactured in Australia. The TBU was responsible for setting global prices for the Toyota WH business for the Toyota Camry. This was for all of its

> overseas companies, including AAPL. Yazaki reviewed and approved AAPL's short and long term business plans. AAPL's Sales and Marketing Department managed Australian aspects of the global tender such as providing local cost information to Yazaki.
>
> [339] After the award of the global tender, AAPL's Sales and Marketing Department was responsible for the preparation of quotations to TMCA which were based on the global tender but may have price adjustments due to local design requirements, exchange rate adjustments, input price variations etc. AAPL's Sales and Marketing Department was responsible for local design customisation and customer management with TMCA after the primary global business was awarded.
>
> [340] In the case of the business of GMH and Mitsubishi Australia, the position was as follows. The marketing and supply of WHs was primarily the responsibility of AAPL's Sales and Marketing Department. In relation to GMH, this was the case because the Holden Commodore vehicle was a local vehicle platform. In relation to Mitsubishi Australia, this was the case until it closed its operations in Australia in March 2008. The preparation of bids for tenders was also the responsibility of AAPL's Sales and Marketing Department. Finally, AAPL formulated the prices for WHs and electronic products and these prices were reviewed by Yazaki before AAPL submitted the bid or the quote to the customer.
>
> [341] In relation to the supply of WHs, TMCA issues an RFQ which is "the opportunity for AAPL to confirm the unit prices which have been submitted as part of a global business quotation or submit a revised price if necessary due to local TMCA requirements". The separate RFQ issued by TMCA or TMAP (Toyota Motor Asia Pacific) is issued "to formalise the process at a local level".
>
> [342] AAPL was also required to seek Yazaki's approval to submit price down reductions to TMCA as part of the VE process.
>
> [343] AAPL's senior executives had frequent and regular communications with Yazaki executives concerning the Toyota business and AAPL provided Yazaki with financial information about its activities on a regular basis.

The court lifted the corporate veil by concluding.

> I think that Yazaki's involvement in the supply of WHs to TMCA was such that, in relation to that business, Yazaki and AAPL were carrying on business in Australia.[364]

The circumstances of the current case

The exporter questionnaire response notes that:

CSW Korea exports the wind towers to Australia. CSW Korea is a global distributor of the GUC around the world, including Australia and Vietnam.

The wind towers are manufactured by CS Vietnam in Vietnam. CSW Vietnam is a one-member limited company (wholly foreign owned), registered in Vietnam. CSW Vietnam is 100% owned and controlled by its parent company, CSW Korea.

The business name used for exports and sale of the goods by both CSW Korea and CSW Vietnam is "CS Wind.

CSW Korea is responsible for the functions of:

- marketing;
- contract negotiation;
- sales (globally including Australia and Vietnam); and
- production arrangement.

CSW Vietnam performed the following functions in relation to the GUC:

- commercial arrangement in relation to GUC exported to Australia
- sales and manufacture of wind towers in the Vietnamese domestic market in its own right.

Another of CSW Korea's subsidiary companies, PNC Global Co., Ltd was also involved in commercial arrangements.

The exporter verification report noted:

The role of each entity in the production and sale of the goods was determined by the verification team as follows:

> 1. CS Wind Korea, the marketer and beneficial owner of the goods (from raw materials to finished goods), until such time as ownership is transferred to the buyer of the wind towers.
> 2. CS Wind Vietnam, which assembles/manufactures the wind towers on an arm's length toll processing basis on behalf of CS Wind Korea.
> 3. PNC Global Korea, a related company which sources, coordinates and supplies certain wind tower internals on an arm's length transaction basis to CS Wind Korea. (p.3)

The Australian industry considered the USA investigation relevant for the disclosure of the roles of the different companies in the CS Wind group and the decision to treat them as a single entity.

In its application and response to the SEF the industry noted:

> The applicants consider it is appropriate to use the consolidated accounts of CS Wind Corporation as the majority of its business is the manufacture and sales of Wind Towers. An overview of companies in the CS Wind group is at Public File Attachment 10.
> In addition, the USA treated CS Wind Corporation and CS Wind Vietnam as a single entity noting.
> *In response to the Department's questionnaire responses, CS Wind Group reported that CS Wind Corporation is the Korean parent company of CS Wind Vietnam. According to CS Wind Group, CS Wind Corporation controls and owns the majority of shares of CS Wind Vietnam. Additionally, CS Wind Corporation plays an integral role in the sale and production of wind towers during the POR. For example, CS Wind Corporation negotiates the prices of wind towers directly with its U.S. customers, invoices the U.S. customer, and determines and retains profits. Moreover, CS Wind acts as a toller for its parent company, CS Wind Corporation, which, in turn, also purchased raw materials used by CS Wind Vietnam to produce the wind towers sold to the United States during the POR. Accordingly, the Department preliminarily determines that significant potential for manipulation of production and sales decisions exists between CS Wind Corporation and CS Wind Vietnam*

> *because CS Wind Corporation effectively controls and indirectly manages CS Wind's operations with respect to subject merchandise. Consistent with the investigation, we preliminary determine that CS Wind Vietnam and CS Wind Corporation are affiliated pursuant to sections 771(33) of the Act and that these companies should be treated as a single entity in this proceeding.*
> The findings from the USA investigation demonstrate that CS Wind Corporation effectively control and indirectly manages CS Wind of Vietnam operations in regard to Wind Towers.
> This control effectively means that CS Wind Corporation is likely incurring costs relating to sales and production of Wind Towers that may not be reflected in CS Wind of Vietnams accounts.

Pertinent points from the USA findings are:

- CS Wind Corporation is the Korean parent company of CS Wind Vietnam.
- CS Wind Corporation plays an integral role in the sale and production of wind towers during the POR.
- CS Wind Corporation negotiates the prices of wind towers directly with its U.S. customers, invoices the U.S. customer, and determines and retains profits.
- CS Wind acts as a toller for its parent company, CS Wind Corporation, which, in turn, also purchased raw materials used by CS Wind Vietnam to produce the wind towers sold to the United States during the POR.
- significant potential for manipulation of production and sales decisions exists between CS Wind Corporation and CS Wind Vietnam because CS Wind Corporation effectively controls and indirectly manages CS Wind's operations with respect to subject merchandise.

The period of investigation for the USA case was the calendar year 2011.

The available information on the EPR in regards to the CS Wind group for the current investigation that details the roles of the various associated companies supports the conclusions reached in the USA case of the integral role by the parent company over its subsidiaries.

The Australian industry submits that the nature of the corporate relationships between companies in the CS Wind Group meets the requirement of the very rare circumstances that the "corporate veil" can be lifted and that the companies in the CS Wind Group should be treated as a single entity.

Paragraph 336 of the relevant Federal Court judgment notes that Yazaki's Toyota Business Unit (TBU) in Japan was responsible for Yazaki's relationship with Toyota Motor Corporation (TMC) and for dealing with Yazaki's subsidiaries in respect of their supply of WHs to TMC's subsidiaries. The TBU was responsible for the awarding of business, and AAPL was required to report back to the TBU about pricing and design issues which arose after the allocation of the business.

> The exporter response in the current case notes that CSW Korea is responsible for the functions of: marketing; contract negotiation; sales (globally including Australia and Vietnam); and production arrangement.
>
> This also reflects the USA findings that CS Wind Corporation negotiates the prices, purchases the raw materials and effectively controls and indirectly manages CS Winds (Korea and Vietnam) operations.

Paragraph 337 notes that the TBU continued to have ongoing responsibility in relation to pricing decisions so far as the relationship with TMCA was concerned. Furthermore, the TBU continued to have regular input in relation to pricing matters even after the allocation of business.

> This reflects the ongoing role of CS Korea in the current case in contract negotiation and sales.

Paragraph 338 notes that the TBU was responsible for bids for Toyota WH tenders for the Toyota Camry manufactured in Australia. The TBU was responsible for setting global prices for the Toyota WH business for the Toyota Camry. This was for all of its overseas companies, including AAPL.

> This reflects the role of CS Wind Korea in setting global prices in Vietnam and Australia.
>
> Global pricing is referred to in Siemen's submission "prevailing global market prices" (EPR 004,p.7), GE's submission "GE has a global network of suppliers who price according to volume, rather than to specific projects," " supply is based on a global GE negotiated price rather than an export destination" (EPR 005 p.4-5) and the GE verification Report "price-competitiveness in the global market" (EPR 019, p.6).

Paragraph 339 notes after the award of the global tender, AAPL's Sales and Marketing Department was responsible for the preparation of quotations to TMCA which were based on the global tender but may have price adjustments due to local design requirements, exchange rate adjustments, input price variations etc.

> This reflects the roles between CS Wind Korea and CS Wind Vietnam, where CS Wind Korea would negotiate a global price with companies such Siemens and GE likely in US Dollars and CS Vietnam would likely prepare the tenders for local contracts based on the global price in the local currency with price adjustments to account for local design requirements.

Paragraph 341 notes in relation to the supply of WHs, TMCA issues an RFQ which is "the opportunity for AAPL to confirm the unit prices which have been submitted as part of a global business quotation or submit a revised price if necessary due to local TMCA requirements".

> Again, this reflects the operations of CS Wind Korea that sets the global price and CS Wind Vietnam that confirms the global pricing at local level.

Paragraph 342 notes AAPL was also required to seek Yazaki's approval to submit price down reductions to TMCA as part of the VE process.

> This reflects the role of CS Wind Korea in setting prices globally and being ultimately responsible to approve any deviations to that price as in the case of CS Wind Vietnam.

Paragraph 343 notes AAPL's senior executives had frequent and regular communications with Yazaki executives concerning the Toyota business and AAPL provided Yazaki with financial information about its activities on a regular basis.

> This reflects the relationship between CS Wind Korea and CS Wind Vietnam, where CS Wind Korea owns 100% of CS Wind Vietnam, sources and supplies all the raw materials, engages in contract negotiation and ultimately sets the sales prices. CS Wind Korea would require regular contact with CS Wind

> Vietnam as to its activities given CS Winds Vietnam's role as the manufacturer of wind towers CS Wind Korea exported. CS Wind Korea would require financial information on a regular basis.

The industry submits that the above demonstrates the very rare circumstance where the corporate veil can be lifted

10.2 The decision of the Commissioner to treat CS Wind Vietnam as a other seller and producer of like goods in the Vietnamese domestic market is not the correct or preferable decision.

The Commission has not at any point examined whether CS Wind Vietnam was a seller in its own right. Such an examination should include the roles of each company in the sales and production process and the arms length nature of transactions between the parties.

The exporter questionnaire response notes that CS Wind Vietnam is a seller and producer of wind towers in the Vietnamese domestic market in its own right.

However, in the exporter visit report the Commission found that all of CS Winds Korea domestic sales were at a loss and not in OCOT. The Commission concluded

> As the verification team was unable to determine a profit based under any of the options available under the Regulation, the verification team considers it appropriate to use a zero rate of profit in the calculation of normal value.

The relevant regulation for determining a profit is regulation 45 of *Customs (International Obligations) Regulation 2015.*

Regulation 45(3)(c) states:

> identifying the weighted average of the actual amounts realised by other exporters <u>or producers</u> from the sale of like goods in the domestic market of the country of export;

The Commission clearly did not identify CS Wind Vietnam as a other producer and seller of like goods in the Vietnam domestic market. There is no mention in the verification report of CS Wind Vietnam's role in the domestic market.

The Australian industry responded to the findings in the verification report submitting that an appropriate rate of profit should be calculated using the consolidated accounts of the CS Wind Group noting that:

> The Consolidated Comprehensive Income Statements best reflect the cost and sales data of the CS Wind Companies involved in the production and sales of Wind Towers. EQR025, p.10

There have been no submissions from the exporter regarding CS Wind Vietnam as a seller of Wind Towers in Vietnam, the Industry submission was placed on the EPR on 5 December 2017, the only exporter submission since that date was in reference to the Australian industry.

The Commission in response to the Australian industry submission regarding profit then determined that:

> The Commission notes that CS Wind Vietnam is a producer of wind towers in its own right and it sells into the Vietnamese domestic market. SEF 405, p.35

The Commission then calculated a rate of profit using the average rate of profit of CS Wind Vietnam and CS Wind Korea sales in the Vietnamese domestic market.

The Commission did not reference any findings or information from the verification report and submissions, rather the Commission's sole point of reference was the exporters statement in the EQR.

The Australian industry response to the SEF noted that the finding of CS Wind Vietnam being a seller in its own right contradicts the information in the EQR, the exporter verification visit and the application.

The Australian industry noted the role of each entity in the production and sales of wind towers, the overarching role of CS Wind Korea, the relevant findings in the USA case, that the exporter verification visit appropriately appeared to treat the CS Wind Group as a single entity and questioned whether calculation of the profitability of CS Wind Vietnams sales take into account a fully absorbed CTMS. EQR.032, p.21-23.

The Commissions response in TER034 was as noted above that it had regard to ADRP REP034.

None of the issues raised by the industry regarding the roles of the companies and the calculation of profitability were addressed by the Commission.

The Commission has not at any point examined whether CS Wind Vietnam was a seller in its own right. Such an examination should include the roles of each company in the sales and production process and the arms length nature of transactions between the parties.

As noted above CS Wind Korea is responsible for marketing, contract negotiation, sales (globally, including Vietnam) and production arrangements. CS Wind Korea negotiates and sets the global price (including Vietnam) of wind towers and sources and provides all the raw materials for the manufacture of wind towers manufactured and sold by CS Wind Vietnam. Another CS Wind subsidiary PNC Global arranges logistics and supplies the internals for the wind towers manufactured by CS Wind Vietnam.

The level of control over the operations of CS Wind Vietnam by CS Wind Korea does not support the contention of CS Wind Vietnam being a seller in its own right but rather that of a subsidiary acting and operating at the direction of its parent company CS Wind Korea.

The Commission has not examined whether the sales of wind towers by CS Wind Vietnam took into account a fully absorbed CTMS as submitted by the industry. Given the relationships between the companies in the CS Wind Group in sourcing and providing raw materials and other support services these "sales" of materials and services should have been examined to consider whether they were at arms length.

Industry submits that CS Wind Vietnam cannot be considered as a other seller of wind towers in the Vietnam domestic market as it is not a seller in its own right.

10.3 The Commissioners decision to treat related party transactions between companies in the CS Wind Group as arms length transactions is not the correct or preferable decision.

The Commissioner has not complied with the legislation by not properly testing the arms length nature of related party transactions between the companies in the CS Wind Group.

The exporter questionnaire response notes that CS Wind Vietnam is a seller and producer of wind towers in the Vietnamese domestic market in its own right.

For related party purchases the exporter report noted.

> The verification team identified that a raw material supplier (PNC Global Korea) and a finished goods constructor (CS Wind Vietnam) were subsidiaries of, and therefore related to, CS Wind Korea.
>
> The verification team observed that generally the input prices for the purchases made by CS Wind Korea were generally the fully absorbed cost to make from the relevant parties.
>
> The verification team therefore considers that where the price paid for the material and services by CSWind Korea reflects the fully absorbed cost to make to be at arms length and suitable to use in constructing the normal value. **Where the price paid was not reflective of fully absorbed costs, the verification team has used the actual fully absorbed costs.**

For the cost to make the exported goods the report noted.

> As noted in the Manual, the cost to make will normally be based on the information in the exporter's records where they are kept in accordance with the generally accepted accounting principles in the country of export and reasonably reflect the competitive market costs of production.
>
> As discussed in section 4 above, the verification team observed that the input prices for the purchases made by CS Wind Korea **were the fully absorbed cost to make from the relevant parties.**
>
> The verification team therefore considers the prices paid for the material and services by CS Wind Korea to be the cost of production or manufacture of the goods and are suitable to use in constructing the cost to make of the goods pursuant to subsection 269TAC(2)(c)(i)P.

In SEF 405, the Commission advised that it took the higher of the price under the tolling arrangements (where profitable), or the actual fully absorbed cost in respect of the sale of internals from PNC Global Korea where these were made at a loss. These fully absorbed cost included SG&A expenses for PNC Global Korea. As such, the Commission confirms that all relevant SG&A costs have been accounted in the normal value. TER034, p.34

The relevant sections of the Act dealing with arms length transactions in relation to the CS Wind Group of companies are set out below.

269TAA Arms length transactions

> (1) For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:
>
> (b) the price appears 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

(4)For the purposes of this Part, 2 persons shall be deemed to be associates of each other if, and only if:

(a) both being natural persons:

(i) they are members of the same family; or

(ii) one of them is an officer or director of a body corporate controlled, directly or indirectly, by the other;

(b) both being bodies corporate:

(i) both of them are controlled, directly or indirectly, by a third person (whether or not a body corporate); or

(ii) both of them together control, directly or indirectly, a third body corporate; or

(iii) the same person (whether or not a body corporate) is in a position to cast, or control the casting of, 5% or more of the maximum number of votes that might be cast at a general meeting of each of them; or

(c) one of them, being a body corporate, is, directly or indirectly, controlled by the other (whether or not a body corporate); or

(d) one of them, being a natural person, is an employee, officer or director of the other (whether or not a body corporate); or

(e) they are members of the same partnership.

Note: In relation to the reference to member of a family in subparagraph (4)(a)(i), see also section 4AAA.

The companies in the CS Wind Group can be considered associates of each other under subsection (4)(b)(iii) given that CS Wind Korea owns 100% of the shares of CS Wind Vietnam. The consideration of the roles of the various companies examined in the previous section also make it likely that they can be considered associates of each other under subsection (4)(c).

Subsection (1)(b) states that "For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if the price appears 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;"

The companies in the CS Wind Group buy and sell materials and services from each other. Such transactions include:

- CS Wind Korea buys wind towers from CS Wind Vietnam.
- CS Wind Korea sources and sells raw materials to CS Wind Vietnam, either via PNC Global or directly.
- PNC Global sells internals to CS Wind Vietnam, either directly or via CS Wind Korea.
- CS Wind Korea sells services to CS Wind Vietnam that includes marketing, contract negotiation and sales.
- PNC Global sells logistic services to CS Wind Korea and CS Wind Vietnam.

The Commission's anti-dumping Manual provides guidance on how transactions between related parties should be treated, relevant points include:

- Even if none of the circumstances in s. 269TAA exist, the Commission examines the relevant information in order to determine whether there has been genuine bargaining between buyer and seller.
- In assessing whether these transactions between related parties are at arms length, the Commission looks beyond the legal or functional relationship

between the parties and determines whether they deal with each other as arms length parties would have and arrived at an outcome that is the result of real bargaining.

- In assessing the arms length nature of transactions, the commercial or other relationship between the principal parties is examined. There must be clear evidence that the price is influenced by the commercial or other relationship. To demonstrate this, the Commission seeks to compare the price paid or payable for the goods where there is a relationship between a buyer and a seller with the price paid or payable for the goods between a buyer and a seller where there is no relationship.

There is a range of identified factors that are relevant when assessing whether a transaction is the result of real bargaining, and these can vary between cases because of different circumstances. Relevant factors can include:

- whether or not negotiation has taken place between the buyer and seller;
- the manner in which the prices were determined as a result of that negotiation;
- whether those prices are comparable to those arrived at by parties that are at arms length;
- whether the margins made by the parties to the transaction are comparable to those made by parties that are at arms length.
- Where for example it is not possible to assess whether those prices are comparable to those set by parties that are at arms length because no such benchmark exists at that level of trade and circumstances, the decision will be made having regard to all of the evidence.

The purchasing behaviour of the exporter may be examined to determine whether the input has been supplied at a competitive market price. For example, if the exporter buys “on-the-spot” from an external unrelated supplier in another country that will mean that it is a normal competitive market price.

An exception arises, however, where the company supplying the input is related to the exporter concerned. When considering competitive market costs the Commission will examine inputs more carefully when the input supplier is a subsidiary of the exporting company or part of the same holding company that owns the exporter. In such cases it is reasonable for that company to cooperate with dumping inquiries.

The Australian Securities and Investments Commission (ASIC) provides regulatory guidelines regarding related party transactions.

> Specifically, *ASIC v Australian Investors Forum* at [456] indicates that, in determining the objective standards that would characterise arm’s length terms, courts should consider the transaction terms that would result if:
> (a) the parties to the transaction were unrelated in any way (e.g. financially, or through ties of family, affection or dependence);
>
> (b) the parties were free from any undue influence, control or pressure;
>
> (c) through its relevant decision-makers, each party was sufficiently knowledgeable about the circumstances of the transaction, sufficiently experienced in business and sufficiently well advised to be able to form a sound judgement as to what was in its interests; and

> (d) each party was concerned only to achieve the best available commercial result for itself in all the circumstances.
> ASIC RG 76 Related party transactions p.16

There is no evidence that the Commission considered or undertook any assessment of the factors outlined in the legislation and the manual. In addition, the exporter verification report, the SEF and termination reports contain contradictory statements on the fully absorbed cost to make being used, prices where profitable or the fully absorbed cost where made at a loss to the statement in the termination report that transaction contained an “embedded profit”.

There is no assessment of the services provided by the related companies, CS Wind Korea provides marketing, contracting and sales services and PNC Global provides logistics services.

There is no testing of the “prices” between the related companies as to whether such prices represent a competitive market price whether prices are comparable to prices charged to external customers.

A statement that transactions may contain an “embedded” profit is not sufficient for arms length testing. A related party may sell to another related party with an “embedded” profit of 0.1% whilst it sells to external customers with a realised profit of 10%.

There is no assessment of the range of identified factors that are relevant when assessing whether a transaction is the result of real bargaining.

Such an assessment of the arms length transactions are relevant not just in determining whether the “prices” are competitive market prices but also whether the related companies are acting as separate entities or should be treated as a single entity.

The assessment is also relevant in determining whether CS Wind Vietnam’s domestic sales were profitable and were sales by another seller in the domestic market.

The lack of assessment of arms length transactions means it is likely that such transactions are transfer prices set by CS Wind Korea, do not reflect a competitive market price and understate the constructed normal value and dumping margin.

10.4 The Commissioner’s decision to use the by using the weighted average profit of CS Wind Vietnam and CS Wind Korea to determine a profit for the normal value is not the correct or preferable decision.

The Commissioner has improperly determined a profit to be applied to the normal value by considering CS Wind Vietnam as a other seller and by using the weighted average profit of CS Wind Vietnam and CS Wind Korea.

As noted at sections 10.1 and 10.2 CS Wind Vietnam could not be considered a other seller of like goods in the Vietnamese domestic market.

Section 10.3 notes a lack of proper arms length testing of the nature of the transactions between the related parties in the CS Wind Group.

Industry submits that proper arms length testing would likely result in all of the domestic sales of CS Wind Vietnam not being in the ordinary course of trade as was found for all of the sales of CS Wind Korea in the Vietnamese domestic market.

As there are likely no profitable sales of wind towers in the Vietnamese domestic market profit should then be determined under Regulation 45(3)(c) using any other reasonable method and having regard to all relevant information.

Industry submitted such a reasonable methods in its responses to the exporter report and the SEF, (**Attachment SEF Response PUBLIC RECORD**, p.21-24).

A rate of profit based on CS Winds global sales, which reflects is global pricing was calculated at 13.5%. (**Conf Att 1 CS Wind Corporation profit**.)

10.5 The Commissioner's decision to calculate an export price without properly considering whether additional items to the export represented a consideration other than the price is not the correct or preferable decision.

The Commissioner has improperly calculated an export price by failing to address whether flange bolts and additional items were provided at a price that represents a consideration payable for the goods other than the price.

Other items provided, including the flange bolts, as part of the goods exported form part of the export and the pricing has not been properly examined to ensure that there is not a benefit to the importer.

TER405 noted that:

> As noted in SEF 405, the flange bolts do not fall within the definition of the goods. As such they have been excluded from the normal value, export price and dumping margin calculations.
>
> The Commission understands that while the Australian industry accepts that the flange bolts do not form part of the goods, it contends that the provision of flange bolts by the exporter to the importer at a price less than the fully absorbed CTMS plus profit represents a consideration payable for the goods other than the price. P.31

The Commission has misrepresented the Australian industry submission on the flange bolts. In its submission to the SEF industry stated.

> Regardless of whether or not flange bolts fall outside the goods description the Commission has not address the industry submission on whether "The provision of flange bolts by the exporter to the importer at a price less than the fully absorbed CTMS plus the profit worked out represents a consideration payable for the goods other than the price."
>
> The industry also disagrees with the Commission view that the flange bolts were supplied outside of the tender process for Ararat as [redacted] (*commercially sensitive*) EPR 032, p.15
>
> Industry does not accept that flange bolts do not form part of the goods.

Industry also noted in its submission that

> Clearly flange bolts are an additional item required to satisfy the project requirements. EPR032, p.15.

Industry also referred to other additional items that may have been excluded.

> The industry is also concerned that if flange bolts are excluded from the export price what other additional items have been excluded.

> An example of this is the xxx but essential additional items to satisfy the project requirements. KPE xxx (KPE Conf Att 3 to the application refers), CS Wind would have [redacted]. (*commercially sensitive*)
>
> KPE also [redacted], whether [redacted] for the CS Wind towers and were billed at CTMS plus profit to GE needs to be taken into account. (*commercially sensitive*)

The exporter verification report also noted for additional items that:

> The verification team used invoices and other source documents relating to these sale items to add the relevant value of these sales to the Australian export sales listing, since the wind towers under consideration required the additional items to satisfy the project requirements. (emphasis added). EPR 023, p.15.

TER034 notes that:

> The Commission examined the cost of the flange bolts and compared that cost to the price paid for the flange bolts between the importer and exporter. Based on this analysis the Commission does not consider there to be any consideration payable for, or in respect of, the wind towers other than their price.
>
> The Commission has examined the other additional item raised by the Australian Industry in its confidential submission and has reached the same conclusion.
>
> The Commission's analysis of the quantum of the loss involved is included in Confidential Appendix 11 – Analysis on flange bolts. (emphasis added) TER034, p.32

Industry contends that the cost of the flange bolts and the price paid should be referenced to the price paid and profit to the goods exported to include an amount of profit, however the above statement on the quantum of the loss indicates that such items may have been provided to the importer below cost.

10.6 The Commissioner's decision to calculate a normal value that excludes relevant SG&A costs is not the correct or preferable decision.

The Commissioner has improperly calculated a normal value by failing to include SG&A costs from 2015.

As noted in submissions and supporting evidence the wind towers may only have been invoiced in 2016 but all the sales effort in relation to the contract occurred in 2015. In addition, a large part of SG&A costs in regard to production would have been incurred in 2015 in sourcing raw materials and suppliers with production most likely commencing in 2015. Excluding such costs would result in lower SG&A costs and not a fully absorbed CTMS for the goods.

The Commission noted in TER034 that:

> The Australian industry submitted that the discussion of SG&A expenses in the exporter visit report (particularly the lack of data available for the 2015 year) was ambiguous and it was concerned since a large part of the SG&A costs in regard to production would have been incurred in sourcing raw materials and suppliers. P.35

The Commission concluded that it:

> wishes to clarify that the domestic sales on which SG&A was constructed occurred in 2016 and that all work associated with these sales was undertaken in 2016. On this basis, the Commission considers that SG&A expenses from 2016 are appropriate to use in the construction of normal value. P.36

The Commission has failed to address the points raised by the industry in its submission to the SEF.

In that submission EPR032 industry noted:

> *CS Wind Korea submitted that given all domestic and Australian sales of the goods were made in 2016 only SG&A expenses from 2016 should be considered when determining the CTMS for these sales. CS Wind Korea also submitted that it would be practically impossible to calculate the SG&A for 2016 sales based on 2015 data, due to the lack of basis for attribution and allocation.*
> *For the purpose of this verification report and for constructing normal value under subsection 269TAC(2)(c) of the Act, a rate of SG&A for 2016 only has been adopted.*
> Industry submits that the above statement is ambiguous in terms of Australian sales only being made in 2016. The wind towers may only have been invoiced in 2016 but all the sales effort in relation to the contract occurred in 2015.
>
> In addition, a large part of SG&A costs in regard to production would have been incurred in 2015 in sourcing raw materials and suppliers with production most likely commencing in 2015.
> Excluding such costs would result in lower SG&A costs and not a fully absorbed CTMS for the goods. p. 19-20.

Using SG&A expenses only from 2016 may be sufficient for domestic sales where those sales were negotiated, production started and completed and sales finalised in 2016.

However, SG&A expenses related to production of the wind towers exported to Australia in 2016 a large part of SG&A costs in regard to production would have been incurred in 2015 in sourcing raw materials and suppliers with production most likely commencing in 2015.

As production commenced in 2015 it is likely that the allocation of overheads are also understated.

The contracts for both the Ararat and Hornsdale I wind farm were awarded in [redacted]

10.7 The Commissioner's decision to calculate a normal value that excludes an adjustment for non-market costs for electricity is not the correct or preferable decision.

The Commissioner has improperly calculated a normal value by failing to adjust the exporters electricity costs for the market situation found in regard to electricity in Vietnam.

The Commissioner justified not adjusting for electricity costs on the basis that electricity costs were a less significant cost component, the adjustment would result in a minor increase in the dumping margin and the purchase of electricity was an arms length transaction.

The significance or effect of an item on a dumping margin is not a factor for consideration in calculating a dumping margin. That a purchase was arms length is not the relevant test in determining whether a cost represents a competitive market cost.

In its SEF submission the industry noted:

> The Commission noted in regard to Australian industry's submission that:
>
> > *The Australian industry stated that there was no indication in CS Wind Korea's verification report that costs were examined to ensure that they reasonably reflect market costs as required by subsection 43(2)(ii) of the Customs (International Obligations) Regulation 2015 (the Regulation).*
> > *The Australian industry notes that the Commission has recently found, with respect to steel rod in coil (SEF 416) that the price of electricity in Vietnam is subject to such a degree of government control that it does not reflect a competitive market cost.*
> > *On this basis, the Australian industry submits that the conclusions reached in SEF 416 should also apply in regard to the cost of electricity for wind towers produced in Vietnam.*
> > *The Australian industry noted that the benchmark being requested by the applicant in SEF 416 would see CS Wind Vietnam's electricity costs in Vietnam uplifted by 243 per cent.*
>
> The Commission response notes that:
>
> > *electricity is a less significant cost component for the production of wind towers in Vietnam. despite being of the view in SEF 416, that the domestic prices of electricity may be distorted in Vietnam, this was not sufficient to find that a particular market situation exists for the domestic sales of rod in coil due to the conditions of competition evident in the market.*
>
> The significance of a cost item is not a factor for consideration of whether costs reasonably reflect market costs.
>
> Whether a particular market situation exists for domestic sales of rod in coil is irrelevant as the issue under consideration is whether costs reasonably reflect market costs.
>
> The Commission also noted that:
> *an uplift of CS Wind Vietnam's electricity costs, at a rate of 243 per cent, would result in a minor increase in the dumping margin,*
>
> It is not clear whether this uplift has been included in the dumping margin stated in the SEF of 8%.
> Industry requests that the "minor increase" be taken into account in any final calculation of the dumping margin. EPR032, p17.

The Commission stated in TER034 that:

> Electricity is sourced by CS Wind Vietnam on arms length terms. Moreover, and as noted by the Commission in SEF 405, electricity costs are not a significant cost component in the production of wind towers in Vietnam.

> In applying subsection 43(2) of the Regulation, the Commission is satisfied that the exporter's records reasonably reflect competitive market costs associated with the production or manufacture of like goods.
>
> This contrasts with investigation 416, where electricity is a major cost component for the production of steel billet, which is the main input to steel rod in coil. In investigation 416, the applicant has proposed that Vietnamese electricity prices be adjusted to make them equivalent with the price of electricity in the Philippines. This benchmark is the highest among selected ASEAN power companies.
>
> As noted at SEF 405, the Commission's sensitivity analysis indicated that an adjustment to the exporter's records to increase the electricity costs incurred by reference to a Philippines benchmark price would result in a minor increase to the dumping margin. P.36

The Commission also noted that that:

> dumping inquiries have to be conducted against a timetable that imposes limits on how much time can be spent verifying data.

SEF416 was placed on the EPR on 27 October 2017, the CS Wind verification report was placed on the EPR on 28 November 2017. The industry response to the verification report noting that electricity prices should be uplifted to take account of the market situation was placed on the EPR on 5 December 2017.

The findings in SEF416 are relevant as the investigation periods overlapped, the investigation period for INV416 was 1 April2016 to 31 March 2017, for Wind Towers the investigation period was 1 January 2015 to 31 December 2016.

SEF416 also noted that:

> The article also stated that the price of electricity had not been increased since March 2015, and that the Prime Minister of Vietnam had recently ordered the tariffs to stay the same. P.32

There was no constraint on the Commission to use the findings from SEF416 and apply those findings to the Wind Tower investigation.

In its application the Australian industry noted that Vietnam Electricity (EVN), the country's power utility, is a state-run firm that determines electricity prices in Vietnam.

The application further noted that Vietnam Electricity (EVN), the country's power utility, does not have any plan to increase electricity prices in 2016 and as a state-run company, EVN stated it was due to be responsible for balancing the national economy and keeping it stable, especially at this time when the development of the country should be sustained at a steady pace and the citizens' life needs easing,".

The market situation found by the Commission in SEF416 could not have changed for the wind tower investigation given the overlapping investigation periods and the government control of electricity prices dating back to before the investigation periods.

The reference to the Philippines benchmark being the highest price is again an irrelevant consideration, the proper test is whether the Philippines price is an

appropriate price to use. If the Philippines price is not appropriate then reasons should be given including as to what the Commission considers an appropriate price.

The Commission has erred in not including the uplift in electricity prices in the calculation of the dumping margin.

The Commission has found that *the price of electricity in Vietnam is subject to such a degree of government control that it does not reflect a competitive market cost as noted in SEF416.*

The significance of a cost component is not a factor for consideration in determining whether the cost should be adjusted to ensure that they reasonably reflect market costs as required by subsection 43(2)(ii) of the *Customs (International Obligations) Regulation 2015 (the Regulation).*

There is nothing in the regulations or the legislation that states less significant costs items should be disregarded.

The Commission has erred in its finding that electricity costs reflect competitive market costs because the purchase was on arms length term.

Whether a purchase was on arms lengths terms is not the determinative factor in assessing whether costs reasonably reflect market costs.

The effect of a minor increase in the dumping margin is not a factor for consideration by the Commission in calculating a dumping margin.

There is nothing in the legislation that states items that result in a minor increase in the dumping margin should be disregarded.

10.8 The Commissioner's decision that the size of the dumping margin had not materially impacted the Australian industry's economic performance is not the correct or preferable decision.

The errors identified in the sections above have affected the Commissioner's calculation of the dumping margin and the subsequently the Commissioner's decision that the size of the dumping margin has not materially impacted the Australian industry's economic performance.

The Commissioner found that the size of the dumping margin had not materially impacted the Australian industry's economic performance. Australian industry considers that this finding is flawed as the margin is understated due to the reasons stated in the previous sections above and that a properly calculated dumping margin would result in a finding that the size of the dumping margin had materially impacted the Australian industry's economic performance.

TER405 noted:

> The Commissioner is not satisfied that the size of the dumping margin was determinative in decisions to award tenders for goods from Vietnam during the investigation period. Consequently, the Commission considers that the size of the dumping margin has not materially impacted the Australian industry's economic performance, including volumes, prices or profits. p.55
>
> At SEF 405 the level of undercutting was calculated on wind towers in the order of 10-23 per cent (on the basis of adding back to export price a dumping margin of 8.0 per cent). The Commission has recalculated the level of

> undercutting, on the basis of the revised dumping margin of 4.8 per cent (section 5.8 refers), in the order of 12-25 per cent.

Australian industry considers that a properly calculated dumping margin, taking into the range of factors and errors identified in the above sections would result in a dumping margin of 15-16%.

This is based on the dumping margin of 2.6% found in the exporter report with zero profit with a level of profit of 13% added. It does not take into account the adjustment for non-market electricity costs, the exclusion of SG&A costs from 2015 and the additional items provided as part of the exported goods.

Such a margin would reduce the level of undercutting prices where Australian industry would have been competitive on price with the dumped exports.

In its response to the SEF the industry noted that.

> The Australian industry has provided evidence to support its submissions that price was the determinative factor in awarding the contracts for the Ararat and Hornsdale projects.
>
> In determining the price competitiveness of Australian industry to an undumped price from CS Wind the industry submits that the Commission needs to take into account other price related factors that were provided in the application, discussed at the industry visits and in submissions.
>
> Price competitiveness should also be compared with bids at the same times on equal terms as previously noted.
>
> Information regarding other price related factors and supporting evidence is at **Confidential Attachment 2.**

The Commission addressed the industry submission on other price related factors noting:

> A confidential submission was received from the Australian industry regarding non-price considerations, which included material suggesting that the undercutting analysis should be modified on the basis of submissions it provided in a confidential attachment to its 8 January 2018 submission.
>
> The Australian industry was unable to provide a summary of the confidential submission it made regarding price undercutting given the highly sensitive nature of the information provided. TER405, p58-59
> **[Redacted text: Commission's consideration of confidential information submitted by the Australian Industry regarding undercutting]**
> In these circumstances, the Commission does not propose to alter its undercutting analysis.

Due to the understated dumping margin found by the Commission it is likely that the other factors did not need to be addressed, however where the margin increases these factors become more relevant.

In regard to Hornsdale [redacted]

In regard to Ararat [redacted]

TER405 noted in regard to Industry's submission on material injury.

> The Australian industry submitted that material injury caused by the dumped imports from Vietnam should be assessed on the basis of KPE having a proven ability to supply a minimum of 51 towers for the Ararat wind farm and OF having a proven ability to supply a minimum of 16 towers for both stage 1 and stage 2 of the Hornsdale project.
>
> As noted in section 7.9.4, the Commission is of the view that non-price factors were determinative in the award of the Ararat and Hornsdale projects. The Commission further considers that the claims made regarding the calculation of material injury cannot be sustained on the basis of information that it has in its possession regarding Australian industry's capacity and run-rates.

The Commission claim that industry did not have the capacity and run rates to supply a minimum of 16 towers for each stage of the Horndale projects and 51 towers for the Ararat project is contrary to the verified and other information provided to the Commission during the course of the investigation.

The Commission should have provided its assessment of what it considered were the capacity and run rates of OF and KPE to supply the projects before coming to such a conclusion.

Such an analysis is crucial to the investigation and any such conclusion should have been provided to the industry members for comment and discussion. It is tantamount to the Commission determining a dumping margin for an exporter and not providing any analysis or reasoning for its decision to the exporter before the final decision is made.

In regard to Hornsdale it is also relevant that [redacted]

In regard to Ararat the Commission has not had consideration of KPE's submissions that GE had requested it to quote for the full number of 67 towers for Boco Rock, that it had supplied 51 towers for the Taralga project and that it had the demonstrated capacity and run rates to meet the project requirements.

[redacted]

There is no [redacted]

The injury caused to the Australian industry is material in terms of lost volumes and revenues.

In regards to Hornsdale I the lost volumes of 16 towers account to a loss of market share of 6% in an available market of 247 towers. For Ararat the lost volumes of 16 towers account to a loss of market share of 6% in an available market of 247 towers. Either loss of volumes taken in isolation is material.

In regards to Hornsdale I the lost revenue from 16 towers is approximately [redacted], total industry revenue for the period was [redacted], this represents loss revenue of [redacted]%. For Ararat the lost revenue from 16 towers is approximately [redacted]%, total industry revenue for the period was [redacted], this represents loss revenue of [redacted]%. Either loss of revenue taken in isolation is material.

10.9 The Commissioner's decision that non-price factors were determinative in the decisions to award projects to CS Wind Korea during the investigation period is not the correct decision or preferable decision.

The Commissioner has not had regard to evidence from the applicants that demonstrate that whilst non-price factors were a consideration, price was ultimately the determinative factor in awarding the number of wind towers.

Ararat wind farm

TER405 notes:

> GE made the decision (in consultation with the project developer and project sponsors) to involve local industry in order to provide community benefits and increase support for wind farm developments and renewable energy generally.
>
> [redacted]
>
> GE stated that quality and the ability to deliver on time were more important than price in tender decisions and that the price related negotiations that it had with Australian industry, were based on a comparison with its "should-cost" model and not a comparison with a price from CS Wind Korea.

Note that the should cost model could only be based on global pricing referred to in submissions which is based on prices from CS Wind Korea.

> In response to these submissions, the Australian industry advised that its negotiations with GE focused on price rather than non-price factors. KPE responded to GE's claim that local manufacturers require longer lead times, which creates timeliness concerns, by advising that the 35 towers that it produced for Ararat were produced ahead of the required deadline. p.61
>
> In addition, correspondence referred to in section 7.9.2 demonstrates the OEM's concern relating to the qualification of KPE in a short time frame while producing only 35 of the towers.

Note: This is a misleading statement, the number of towers [redacted] *in regards to capacity or any other matter.*

> The Commission's analysis of this information indicates that KPE did not have the capacity to fulfil the entire Ararat contract according to the timeframes set out as part of the tender negotiation process by GE and based on the information that KPE provided to GE regarding its capacity at that time.
>
> In view of the above, and given the nature of the product, the unique requirements of OEMs and the time required to qualify a new supplier, GE's claim that it would not award the full Ararat contract to KPE in view of the risk of working with a new supplier is reasonable and logical.
>
> The Commission has reviewed the correspondence between GE and KPE regarding the Ararat project that it has in its possession. The Commission remains of the view that non-price factors were determinative in GE's decision not to award the whole of the Ararat contract to KPE. p.67

There is no evidence that supports the statement that "correspondence referred to in section 7.9.2 demonstrates the OEM's concern relating to the qualification of KPE in a short time frame while producing only 35 of the towers."

> correspondence confirming as a new industry supplier KPE was being asked to bid for roughly half the number of Ararat towers by GE; and
>
> correspondence demonstrating the splitting of tenders to accommodate Australian industry bids and run-rates during the investigation period, which support OEMs contentions that supplying large wind tower projects to new, previously unqualified supplier is an unacceptable commercial risk.
>
> As supporting evidence of this GE provided correspondence from KPE indicating that it was only asked to bid for 30-33 towers in January 2015. p.60-61

There is no mention of [redacted]. There is no further discussion over the number of towers to be awarded [redacted]

It would be expected that there would be [redacted]. There is no [redacted].

The industry submission addressed this point in EPR032, p.3-4.

> The Commission has placed undue weight on a single piece of correspondence from KPE indicating that it was only asked to bid for 30-33 towers in January 2015.
>
> The Commission does not appear to have had regard to the KPE submissions demonstrating that the focus of negotiations between GE and KPE on Ararat was on costs and price reductions.
>
> KPE notes that there is no correspondence indicating where the number of towers specified may have come from and can only speculate that it was a carryover from budget estimates given on other quotations.
>
> More importantly there is no correspondence before or after this date specifying any figure for KPE (except the final figure based on price).
>
> KPE considers that too much emphasis on been placed on this one email, taken out of context, when there is no other evidence to support it.
>
> On the contrary all the previous correspondence to this date, such as [redacted] for Ararat and the quotations for Boco Rock point to KPE quoting on the full quantity of towers with no suggestions of any lesser volumes. *(commercially sensitive)*

The Commission has not addressed whether KPE would have won more than the 35 towers if the imported towers were at an undumped price rather it has only addressed whether KPE would have secured the whole contract.

In its response to the SEF industry noted:

> There is no evidence showing that GE had predetermined numbers during the Ararat tender process on splitting the tower supply. The only number GE provided to KPE on towers it was to supply was based on KPE meeting a price, not on KPEs capabilities.
>
> There is evidence showing that GE asked KPE to quote throughout the process for the full supply of towers as there is for Boco Rock.
>
> There is evidence showing that KPE could supply the full number of towers within the required timeframe for Ararat.

> The most recent evidence of KPEs capabilities as the sole supplier of towers for a large project was for the Taralga Wind farm comprising 51 towers. The Taralga Wind Farm is within the injury period.
>
> KPE submits that price was the determinative factor in GEs decision to limit the number of wind towers it awarded KPE.
>
> KPE submits that material injury caused by the dumped imports from Vietnam should be assessed on KPE having a proven ability to supply a minimum of 51 wind towers for the Ararat wind farm. EPR032, p.7-8

Hornsdale wind farm

TER405 stated:

> The Commission wishes to clarify that:
>
> - email correspondence regarding the financial health of OF's parent company occurred during the course of negotiations on Hornsdale 2; and
> - publicly available information regarding contract difficulties and losses E&A Limited was experiencing were announced to the ASX and reported in the media from before the conclusion of the Hornsdale 1 tender.
>
> Australian industry has claimed that all delivery, quality and qualification issues had been resolved and that it had shown it could meet the qualification and run-rate requirements of Siemens so that these issues could not have impacted the consideration of bids by Siemens for the Hornsdale project.
>
> The Commission wishes to clarify that the documentary evidence regarding delays, quality and run-rates includes an audit document provided by Siemens detailing the previous performance of OF at the conclusion of the Snowtown project.
>
> [**Redacted text: confidential business information regarding Siemens' internal processes]**
>
> The Commission has re-reviewed the material provided by the Australian industry and Siemens and remains of the view that non-price factors were determinative in Siemen's decision not to award both stages of the Hornsdale project to OF. p.67-68.

The redacted text appears to reference the Snowtown II project.

Industry submitted that issues with Snowtown were resolved during the Snowtown project, noting that:

> The Commission assessment of the quality issue appears to be misdirected in the implication that OF could not make a product to the quality Siemens required.
>
> This is plainly wrong as the evidence shows that OF delivered wind towers to Siemens exacting quality specifications.
>
> The Commissions assessment of Siemens submissions suggests a view that Siemens would never consider OF as a viable supplier again due to past issues that had been resolved. EPR032, p.12
>
> This is a narrow view, issues arise with suppliers during the course of supply.
>
> Those issues were resolved and those suppliers continue to provide to the wind tower market.

> There is no information to support that non-price issues were an issue of concern, if they were such issues of seriousness then Siemens would have informed OF that such issues were disqualifying it from consideration for tenders until they had been resolved.
>
> What is the point of Siemens engaging OF in the Hornsdale projects requesting multiple quotations that involve a great deal of time, effort and cost by OF and time, effort and cost by Siemens in assessing such quotations.
>
> That Siemens engaged OF in the Hornsdale projects which involved a great deal of time effort and costs by both parties evidences that Siemens had no great concerns over OFs abilities to meet its requirements as a supplier.
>
> All of the information in the tenders submitted by OF to Siemens points to price being the determinative factor with the emphasis in the tenders on cost and price reductions. EPR032, p.12

In assessing the information provided by Siemens and OF the Commission does not appear to have moved on from issues relating to Snowtown to those issues being resolved and subsequent events.

Industry provided a [redacted] and the relevant issues in its submission to the SEF in the Confidential Attachment Hornsdale.

[redacted]

Industry was asked by the Commission in regard to the [redacted]

Industry responded noting:

[redacted]

After further discussions with [redacted]

The Commission was contacted by phone and advised that [redacted]. The Commission was also informed that the wind towers [redacted]. This demonstrated that quality issues regarding Snowtown had been resolved. The Commission was also informed that they could [redacted].

The Confidential Attachment “Hornsdale “ also addresses the issues regarding capacity, run rates and delivery.

Especially relevant is that [redacted].

[redacted]

Of relevance is the [redacted]

[redacted]

The quotation for [redacted] demonstrates the primacy of price as the determinative factor as noted in **Confidential Attachment Hornsdale.**

As noted in the submissions the focus of negotiations was on price and cost reductions, OF considered that it had the capacity and run rate to supply the full project.

The reference to the ASX announcement in regard to Hornsdale 1 has not been brought up in any submissions to the investigation or any contact between Siemens and OF during Hornsdale 1. There is no discussion of the relevance or claims regarding the article. Of relevance is the fact [redacted].

As noted in the previous section it is also relevant that [redacted]

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10

11.1 The Commissioner should treat the related companies in the CS Wind Group as a single entity.

At section 10.1 it was shown that circumstance existed where the CS Wind companies could be treated as a separate entity.

The Australian industry submits that there is no impediment under Australia's anti-dumping law to treating the CS Wind Group of companies as a separate entity.

ADRP REP034 noted that:

> WTO law may allow for the collapsing of legal entities or rather for the treating of separate companies as a single exporter and subject to a single dumping margin. I note that the WTO Appellate Body has not ruled on the issue. WTO jurisprudence may assist in interpreting Australia's anti-dumping law.

ADRP REP025 noted that:

> In any event, it would seem that the ADC's decision to treat the Guilin Group companies as a single entity is reasonable and in accordance with World Trade Organisation (WTO) jurisprudence. The Panel in Korea - Paper stated: We consider the commonality of management among these three companies, coupled with the fact that they were all owned by the same parent company, to be indications of a close legal and commercial relationship between these three companies. Given these similarities, one might, in our view, expect that commercial decisions for the three companies could be made in substantial part by the same closely interlocked group of individuals, and the management of all three companies could ultimately be answerable to their majority shareholder.... We note that the record also indicates that one of these companies ... sold the subject product to the other two during the POI. This also indicates that these companies could harmonize their commercial activities to fulfil common corporate objectives. The ability and willingness of the three companies to shift products among themselves is, in our view, of some importance to the consideration of whether the three companies should be treated as a single exporter and subject to a single margin determination.
> *Korea-Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, *WT/DS312/R*

The situation of the companies considered by the Panel is similar to that of the companies in the CS Wind Group.

The companies are all owned by the same parent company, one company sold the subject product to another company, the exporter questionnaire response and verification report highlights the degree of control that CS Wind Korea has over CS Wind Vietnam. The exporter response notes the prime role of CS Wind Korea in marketing, negotiating contracts, sales globally and in Vietnam and production management.

11.2 The Commissioner should not treat the CS Wind Vietnam as a other seller in the Vietnamese domestic market.

At section 10.2 it was shown that due consideration had not been had to whether CS Wind Vietnam was a other seller in the Vietnamese domestic market and that the evidence did not support such a finding.

The domestic sales of CS Wind Vietnam should be treated as part of the domestic sales of CS Wind Korea's sales in the Vietnamese domestic market, examined to see whether the costs reflected a fully absorbed cost to make and sell and tested for ordinary course of trade.

11.3 The Commissioner should properly test the arms length nature of the transactions between the related parties in the CS Wind Group.

At section 10.3 it was shown that the related party transactions had not been properly tested to ensure that they represented a competitive market price.

This testing should be done to ensure such prices are reflective of a competitive market price. Where the parties sell to external customers a comparison of those prices can be used. Where such sales are not available the consolidated results of the group should be examined in reference to the profit achieved at a consolidated level.

11.4 The Commissioner should determine a rate of profit under Regulation 45(3)(c) using any other reasonable method and having regard to all relevant information.

The Australian industry in its submissions to the exporter report and the SEF submitted that relevant information is that contained in the financial records of CS Wind Corporation and in its Annual Reports.

The rate of profit is based on CS Winds global sales and reflects the profit that CS Wind Corporation achieves on its global sales.

The importer submissions of GE and Siemens refer to global pricing of Wind Towers, such global pricing also indicates a global rate of profit. To assume and apply a lesser rate of profit for Australia than the global indicates price differential practices for exports to Australia.

To use a lesser rate of profit, including a zero rate, is effectively concluding that Wind Towers exported to Australia should include a lesser rate of profit on Wind Towers exported and sold in other countries.

Such use of a lesser rate in not in accordance with the stated principle of the Government reforms of ensuring Australian manufacturers and producers are competing on a level playing field.

The rate of profit so worked out is in accordance with Regulation 45(3)(c) using a reasonable method and relevant information is the rate that should apply to the constructed normal value.

The Commission also considered that the rate of profit over the whole of the investigation period should be used instead of the excluding the abnormal results of the last six months.

Industry disagrees with this approach and considers that the abnormal results from the last six months should be excluded, noting in its submission.

Industry has not applied a rate of profit worked out for the whole investigation period as the last six months of 2016 show a comparable loss of -28.8%. The loss for these six months is not reflective with the previous achieved results and should be disregarded.

These results are also reflected in the gross profit results of 14.3% for the period, 30% for 2014, 22% for 2015 and -4% for the last six months of 2016.

The Annual Report of CS Wind Corporation notes that the seven companies and subsidiaries were included in the 2016 consolidated financial statements which likely accounts for the abnormal result for the period. Such companies included CS Rail Inc and PT. Daekyung Indah Heavy Industry which are not involved in the production and sales of Wind Towers.

The Commission has not addressed the issue of the abnormal results of the last six months compared to previous periods.

The Customs (International Obligations) Regulation 2015 (the Regulations) at Regulation note for Regulation 43 (5) and (6) in relation to manufacturing costs and Regulation 44 (6) and (7) both refer to non-recurring costs and start up costs the Minister must take account of.

Industry submits that a similar approach must be taken when assessing and excluding the abnormal results of the last six months, especially given the inclusion of seven subsidiaries in the results, two of whom businesses did not relate to wind towers.

Industry further considers that a more equitable assessment and application of a rate of profit would be that over the injury period, from January 2013 to June 2016, the last six months being excluded.

This period is reasonable as it is comparing the performance of the exporter over the injury period as the performance of the Australian industry is likewise compared over the injury period.

Industry has calculated a rate of profit over this period, excluding other comprehensive income.

The rate calculated is **13.5%.**

11.5 The Commissioner should re-examine the other items exported with the wind towers to ensure that such items were not provided at a price that represents a consideration payable for the goods other than the price.

Industry submits that the other items provided, including the flange bolts, form part of the export and the pricing needs to be properly examined to ensure that there is not a benefit to the exporter.

11.6 The Commissioner should properly calculate a normal value by including SG&A costs from 2015.

Inclusion of such costs will likely result in a higher normal value and dumping margin, as noted at section 10.6 the allocation of overheads is likely understated by only relying on 2016 data. A proper allocation of overheads by including the 2015 data would also likely result in a higher normal value and dumping margin.

11.7 The Commissioner should adjust the exporters electricity costs in the normal value for the market situation found in regard to electricity in Vietnam

Electricity costs in the constructed normal value should be adjusted up wards as submitted by the Australian industry.

11.8 An increased dumping margin from proper consideration of the matters raised in the previous sections would demonstrate that industry's prices were competitive with the undumped export prices. This would result in a finding that the dumping margin had materially impacted the Australian industry's economic performance.

Industry submits that the price undercutting and causal link analysis needs to be re-examined in the light of an increased dumping margin.

11.9 The evidence supports that non-price factors were not determinative in the decisions to award projects to CS Wind Korea during the investigation period.

Industry has provided evidence to support its contention that price was the prime focus and determinative factor in awarding the contracts for the projects.

Material injury caused by dumping should be calculated and assessed on the evidence supporting the industry's submission's of KPE having a proven ability to supply a minimum of 51 towers for the Ararat wind farm and OF having a proven ability to supply a minimum of 16 towers for both stage 1 and/or stage 2 of the Hornsdale project.

PUBLIC RECORD

Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

Customs Act 1901 – Part XVB

ANTI-DUMPING NOTICE NO. 2018/20

Certain Wind Towers

Exported to Australia from the Socialist Republic of Vietnam

Termination of Investigation

Public notice under subsection 269TDA(15) of the Customs Act 1901

On 8 June 2017, I, Dale Seymour, the Commissioner of the Anti-Dumping Commission, initiated an investigation into the alleged dumping of certain wind towers ('wind towers or sections thereof' or 'the goods') exported to Australia from the Socialist Republic of Vietnam (Vietnam), following an application lodged by Keppel Prince Engineering Pty Ltd (KPE) and Ottoway Fabrication Pty Ltd (OF), under subsection 269TB(1) of the *Customs Act 1901* (the Act).

Public notice of my decision to not reject the application and to initiate the investigation was published on the Anti-Dumping Commission's (Commission) website on 8 June 2017 (Anti-Dumping Notice (ADN) No. 2017/78 refers). This ADN is available at www.adcommission.gov.au.

As a result of my investigation, I am satisfied that:

- CS Wind Corporation was the only exporter of the goods to Australia from Vietnam during the investigation period;
- exports of the goods to Australia from Vietnam by CS Wind Corporation were dumped at a rate of 4.8 per cent during the investigation period; and
- the injury, if any, to the Australian industry that has been, or may be, caused by the goods exported from Vietnam to Australia at dumped prices is negligible.

Accordingly, I have terminated the investigation in accordance with subsection 269TDA(13) of the Act.

Termination Report No. 405 (TER 405), which sets out reasons for the termination decision, including the material findings of fact or law upon which the decision is based, has been placed on the Commission's public record at www.adcommission.gov.au .

In terminating the investigation, I have considered the application lodged by KPE and OF, the *Statement of Essential Facts No. 405* and submissions received from interested parties and other relevant information received throughout the course of the investigation as set out in TER 405.

KPE and OF (as applicants) may request a review of this decision to terminate the investigation by lodging an application with the Anti-Dumping Review Panel in the approved form and manner within 30 days of the publication of this notice.

Enquiries about this notice may be directed to the case manager on telephone number +61 2 6213 6387 or email at investigations3@adcommission.gov.au.

Dale Seymour
Commissioner
Anti-Dumping Commission

5 February 2018