PUBLIC FILE VERSION

THE ANTI-DUMPING REVIEW PANEL

REVIEW OF A DECISION OF THE PARLIAMENTARY SECRETARY TO PUBLISH A DUMPING DUTY NOTICE IN RESPECT OF WIND TOWERS EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF KOREA

SENVION AUSTRALIA PTY LTD and WIN& P., Ltd

Applicants for Review

AND

A.C.N. 009 483 694 Pty. Ltd. (trading as *Haywards Steel Fabrication and Construction*) and Keppel Prince Engineering Pty. Ltd.

The Domestic Industry

RESPONSE OF THE DOMSTIC INDUSTRY TO THE APPLICATION FOR REVIEW

This submission is made on behalf of the Australian industry producing utility scale wind towers in Australia, specifically the applicants to *Dumping Investigation ADC 221*, namely A.C.N. 009 483 694 Pty. Ltd. (trading as *Haywards Steel Fabrication and Construction*) (**Haywards**) and Keppel Prince Engineering Pty. Ltd. (trading as *Keppel Prince*) (**Keppel Prince**).

The Australian domestic industry makes this submission in response to the applications of Senvion Australia Pty Ltd (**Senvion**) and Win& P., Ltd (**Win&P**) to the Anti-Dumping Review Panel for review of the decision of the Parliamentary Secretary to publish a Dumping Duty Notice in respect utility scale wind towers exported from China and Korea (**the goods**).

In response to the applicant Senvion's reasons for application for review, the Australian industry responds as follows (to borrow from the paragraph numbers of the applicant's reasons):

2. The ADCs failure to carry out currency conversion on the Date of Sale

For the avoidance of doubt, subsection 269TAF(1) of the *Customs Act 1901* (**the Act**) provides that:

> "(1) If, for the purposes of this Part, comparison of the export prices of goods exported to Australia and corresponding normal values of like goods requires a

> conversion of currencies, that conversion, subject to subsection (2), is to be made using the rate of exchange on the date of the transaction or agreement that, in the opinion of the Minister, best establishes the material terms of the sale of the exported goods."

In this case, the evidence before the Commission did not support a finding that the conditions of subsection 269TAF(2) had been satisfied.

In *Report Number 221* (**Report 221**), the Anti-Dumping Commission (**Commission**), noted the following:

- the submission of Win&P that:
  - the material terms of sale were established at the date of contract and this date should be used for converting the currency of exports into Korean Won,
  - the "Change to the Purchase Order" is not a "change" in any relevant sense and not a change to the material terms of sale;
- the submission of the Government of Korea that the contract date should be used as date of conversion;
- the submission of Senvion that:
  - the material terms of sale were established at the date of contract, and
  - the Commission could not assert a sale was lost for assessing injury on the date the contract was awarded but the material terms of sale were not established until the delivery had taken place for determining export prices.

In Investigation 221, the Commission had regard to the following evidence concerning Win&P's commercial and shipping documents supporting the export consignments that showed, actual:

- delivery terms, and
- payment terms,

varied from the terms contained in the purchase orders and contracts of sale.

For these reasons, the Commission considered that the purchase orders did not provide a suitable date to use as the date that best establishes the material terms of sale. Instead, the Commission considered that the date of sales revenue recognition in Win&P accounts is the date that best establishes the material terms of sale. This is the date that WIN&P recognised the amount as a sale as stated in the audited accounts.

The Australian industry acknowledges that Senvion's application for review attempts to challenge the factual accuracy of the Commission's reasons for recommending the date of

revenue recognition as the date that "best establishes the material terms of the sale of the exported goods".

However, applied here there is no evidence contained in paragraphs 2.10 - 2.12 in the *Applicant's Reasons*, that suggests that the Commission was either incorrect or unreasonable for concluding that given the uncertainty around the delivery and payment terms until "the date of transaction" is preferable to the "date of agreement" (as possibly contained in the purchase order or such earlier document), for the purpose of establishing the material terms of the sale of the exported goods.

In so far as the Senvion application for review attempts to reconcile the quantities of goods the subject of a purchase order and invoice (paragraph 2.10), it does nothing to displace the variation to the timing of delivery of those quantities, and payment thereunder.

Further, to the extent that the Senvion application for review points to a delivery term that entitles the importer to vary the date of delivery from the purchase order (paragraph 2.11), then that only further serves to support the view that the "date of the transaction", the date of delivery and invoicing, is the correct and preferable approach in this case, as the ***material/fundamental term*** of delivery is not known until the goods are dispatched for delivery and the recognition of revenue (i.e. invoice issued) occurs.

Therefore, the Australian industry submits that the Commission was correct to calculate a conversion of currencies using the rate of exchange on the date of the transaction, namely the date on which the sales revenue was recognised in Win&P accounts, being the date of dispatch for delivery and the creation of the commercial invoice.

3. Embedments should be excluded from the Dumping Investigation

Haywards and Keppel Prince lodged an application pursuant to section 269TB of the Act for action under the *Dumping Duty Act*. In that application, the Australian industry identified a "consignment of goods… [that have] been imported into Australia" under paragraph 269TB(1)(a) of the Act. In that application, the Australian industry defined the goods as:

> "Certain utility scale wind towers, whether or not tapered, and sections thereof (whether exported assembled or unassembled), and whether or not including an embed being a tower foundation section. Certain wind towers are designed to support the nacelle (an enclosure for an engine) and rotor blades for use in wind turbines…"
>
> *Source:* *Application for the publication of a dumping duty notice: Certain utility scale wind towers exported from China and Korea, Non Confidential version, p. 8*

Haywards and Keppel Price had standing under section 269TB of the Act, as producers of "like goods" as defined subsection 269T(1) of the Act. The applicants comprising the Australian industry had standing to make the application because they produced goods in Australia, that they asserted and the Anti-Dumping Commissioner accepted were like goods to the goods the subject of the application, including, but not limited to the production of all parts of the utility scale wind tower, including the production of tower foundation sections, also known as embeds (refer Anti-Dumping Commission, *Visit Report – Australian Industry: Keppel Prince Engineering*, September 2013).

The consideration of the application, and the decision to not reject the application requires the Anti-Dumping Commissioner (**Commissioner**) to be satisfied "that there appear to be reasonable grounds for the publication of a dumping duty notice… in respect of the goods the subject of the application" under sub-paragraph 269TC(1)(c)(i) of the Act. At issue here is not whether the description of the goods meets a definition as the importer or exporter would necessarily understand it, but rather whether the goods as defined in the application have been imported into Australia, and whether there is an Australian industry producing "like goods".

Indeed, the question of whether the Commissioner is satisfied of the existence of reasonable grounds for the purpose of publishing a Dumping Duty Notice, are discerned by reference to the conditions of subsection 269TG of the Act. Again, here the provisions under subsection 269TG(1) of the Act applies to "any goods that have been exported to Australia, that:

(a) Have been 'dumped', within the definition under paragraph 269TG(1)(a); and
(b) Because of that 'dumping', "material injury to an Australian industry producing like goods has been or is being caused…" [subparagraph 269TG(1)(b)(i)]

Therefore, applied here, the consideration as to whether or not 'initiate' a dumping investigation, or publish a Dumping Duty Notice, are, firstly whether the goods were imported into Australia, as defined in the application, and then whether there is an Australian industry producing 'like goods' to the goods so described. The fact that the Australian industry produces 'like goods', the goods described in the application, is not in dispute. The facts support that the Australian Industry, at all material times, produced in Australia goods that were either identical or closely resembling the goods imported into Australia, including all aspects of the goods described in the application.

Therefore, regardless of whether or not Senvion successfully argues that 'embeds' are, or are not part of the wind tower, the point remains that the definition of certain utility scales wind towers includes the existence of the embed in its definition, and the Australian industry produces 'like goods' to those as so described.

Notwithstanding, the Review Panel's conclusion on this matter of statutory interpretation, the Australian industry rejects Senvion's contention that tower foundation sections, or embeds are a different product to the wind tower. In the course of Investigation 221, the Australian Industry submitted to the Commission that:

> *"A proportion of wind towers are designed with a steel embed or foundation section, whilst others are not. In essence if the design calls upon an embed, it is an additional steel cylindrical section which is used in the design as a foundation to support the other steel cylindrical sections which fundamentally make up the tower. Combined, these components form the tower which has the purpose of supporting the wind turbine generator (nacelle) and blades.*
>
> *"Contingent to both, the embed and tower sections have the following characteristics:*
>
> - *Both are fabricated cylindrical steel tower components produced in the same manner;*
> - *Both are manufactured using identical production processes, facilities, and employee skill sets at each stage of production;*
> - *Both include cylindrical, rolled steel cans, welded together by the same equipment and procedures*
> - *Both require the same generic quality requirements, with regards to reporting procedures and testing."*
>
> *Source: Submission of the Australian Industry dated 26 February 2014, Non-Confidential Version, p. 3.*

Respectfully the Australian industry fails to understand on what basis Senvion seeks to assert that "embedments are not part of the wind tower" [at 3.4], and "an embedment is physically different from the wind tower" [at 3.5]. Where a wind tower design requires a tower foundation section, the embed is simply a cylindrical steel component of the wind tower product which assists with the overall structural integrity of the wind tower. As previously pointed out, an embed is a tower foundation section which is manufactured using the same processes and production skill sets.

That the Australian industry produces tower foundation sections, or embeds, and suffered material injury in the loss of volume of such sales, or value in response to price undercutting in response to the dumped tower section, then the definition of the goods, necessarily includes embeds in the description, where required by the design of the project.

4. ADCs failure to adequately consider factors other than price that influence the choice of wind tower supplier

The Australian Industry rejects Senvion's assertion that in *Report No. 221*, the Commissioner:

- failed to adequately consider and reasonably take into account claims of factors other than price caused material injury to the domestic Australian industry;
- did not assess whether the dumped goods caused material injury to the domestic Australian industry;
- should find that no material injury was caused by dumping.

In accordance with WTO jurisprudence on the issue of satisfying the requirements of Article 3.5 of the Anti-Dumping Agreement, the Commissioner adopted the approach of the WTO Appellate Body laid down in *US — Hot-Rolled Steel* (*Appellate Body Report*, *DS 184*), where:

> "This provision [Article 3.5, Anti-Dumping Agreement] requires investigating authorities, as part of their causation analysis, first, to examine all 'known factors', 'other than dumped imports', which are causing injury to the domestic industry 'at the same time' as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not 'attributed to the dumped imports.' [at para 222]"

Applied here, the Commissioner considered "all known factors other than dumped imports". These are outlined in sections 7.9 and 7.10, *Report No. 221*. In summary:

- domestic currency appreciation;
- fluctuations in domestic market demand for the goods given domestic renewable energy policy (including Renewable Energy Target uncertainty);
- OEM client qualification/accreditation standards;
- Domestic market characteristics;
- Domestic Australian industry production capacity given domestic Australian market size;
- Domestic Australian transport costs;
- Domestic Australian industry economies of scale and related production efficiencies;
- Domestic Australian industry input costs (including material, labour and statutory compliance costs);
- Market fragmentation;
- Domestic Australian industry experience;
- Lack of domestic Australian industry specialization;

- Global supply chain procurement strategy, including compliance with:
  - High quality products and associated services,
  - Internal design certification,
  - Meeting customer deadlines,
  - Production of complete wind towers, and
  - Price.
- Supplier accreditation;
- Reputation/quality;
- Delivery reliability;
- Payment terms.

Contrary to Senvion's assertion, the Commission expressly considered these "known factors other than dumped imports" in light of the evidence presented both by the opposing party and the domestic Australian industry, and *verified* by the Commission. On balance, the Commission concluded as follows":

- "[T]he information shows that the [Australian industry] applicants had the capacity to handle the available tenders" (refer *Report No. 221*, p.51),

- "[T]he Commission accepts that the dynamics of the Australian market are changing due to uncertainty surrounding the *Renewable Energy Target*… [and] notes the various characteristics identified by interested parties in the Australian market that would impact on the Australian industry's competitiveness. However the Commission does not consider that these issues diminish *the strong and specific evidence* in respect of the particular tenders that took place during the investigation period" (refer *Report No. 221*, p.51) [emphasis added],

- "[T]he information showed that price was a critical factor in the decision to award tenders to the suppliers under investigation and that the [Australian industry] applicant's would have been competitive if competing against undumped prices in the market" (refer *Report No. 221*, p.51-2),

- "The Commission considers that price was the predominant factor in the awarding of tenders and choice of supplier. In the case of the [redacted] project, *the Commission notes* [redacted]. Further [redacted] shows that after the tender was awarded to Win&P with the lowest tender price, [redacted] *that it was unsuccessful and its price was significantly higher than the successful tender offer*" (refer *Report No. 221*, p.52) [emphasis added],

- "*At no point during the tender negotiations* did Senvion inform Keppel Prince that it had not met pre-qualification. *In fact, the evidence appears to confirm that pre-qualification was not an issue as previous projects had involved towers being manufactured under supervision whilst the relevant suppliers were undergoing pre-qualification certification"* (refer *Report No. 221*, p.52) [emphasis added],

- "In the case of the Gullen Range project, the *Commission also notes* [redacted] *during the tender process*. In particular, [redacted] (refer *Report No. 221*, p.53) [emphasis added],

- "The Commission is of the view that *the available evidence demonstrates that price was a critical factor in the decision to award the Mt Mercer and Gullen Range projects to dumped imports*" (refer *Report No. 221*, p.53) [emphasis added], and

- "The Commission recognises that factors other than prices were relevant to the decision to award the tender. However, the evidence ultimately showed that price was a critical and determinative factor" (refer *Report No. 221*, p.53).

Contrary to Senvion's suggestion that the Commission failed to adequately consider factors other than price, the domestic Australian industry submits that the analysis of the Commission in light of the verified evidence was complete and reasonable, and reflected an assessment based on the balance of the evidence of all interested parties.

5. *"ADCs failure to adequately consider whether the Australian Industry would have been awarded tenders"*

The domestic Australian industry fails to understand how Senvion seeks to assert that "in the absence of any alleged dumping the Australian industry would have won the tender to supply the Mt Mercer project", in light of the Commission's consideration of the evidence:

> "The Commission considers that price was the predominant factor in the awarding of tenders and choice of supplier. *In the case of the Mt Mercer project, the Commission notes* [redacted] *advising Australian producers that their prices were not competitive and encouraging them to reconsider their offers*. Further [redacted] after the tender was awarded to Win&P with the lowest tender price, Senvion informed Keppel Prince that it was unsuccessful and its price was significantly higher than the successful tender offer (refer *Report No. 221*, p.53) [emphasis added].

The issue of non-attribution of injury from undumped goods relates to the loss of the Snowtown II project. This was specifically analysed by the Commission, and assessed in section 7.11.2 of *Report No. 221*:

> "The Commission considers that the industry has suffered injury as a result of the Snowtown II project through loss of sales volumes, loss of market share, reduced capacity utilisation and reduced revenues and loss of profits and profitability. As a result, none of the injurious effects stemming from this lost tender have been attributed to dumped exports from China or Korea."

In the course of the investigation Senvion sought to assert, in effect, that the loss of the Snowtown II project, completely overwhelmed the injury suffered by the domestic Australian industry during the investigation period (1 January 2012 to 30 December 2013). To successfully argue this position, Senvion would need to establish that in the absence of the Snowtown II project, the domestic Australian industry would have suffered no injury. To put the loss of the undumped Snowtown II project into context, the size of the Australian market during the investigation period needs to be considered.

The evidence before (and accepted by) the Commission was:

> "The Commission estimates that in calendar year 2012, the size of the Australian market for wind towers (based on the date of contracts) was 240 towers. In the first half of 2013 the market comprised one project of 51 towers.
>
> "The contracts awarded in the investigation period that comprise the market for the investigation period are set out below.
>
> "There were four projects totalling 240 towers that were tendered during 2012:
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> • Snowtown II, 90 wind towers;
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> • Gullen Range, 73 wind towers;
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> • Mortons Lane, 13 wind towers; and
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> • Mt Mercer, 64 wind towers.
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> "The one project that was tendered in the first half of 2013 was the Taralga project for 51 wind towers.

In other words, during the investigation period, the size of the Australian market was 291 towers. The number of undumped towers imported for use in the Snowtown II project, amounted to 70 towers (20 towers were supplied by the domestic Australian industry). In

other words, the non-injurious imports attributable to the Snowtown II project were only 24% of the total Australian market. Therefore, it is not open to Senvion to argue that undumped imports that accounts for less than one-quarter of the Australian market at the relevant time are responsible for all the injury found to have been suffered by the domestic Australian industry.

Separately, in response to Senvion's claim that in the absence of dumping the domestic Australian industry would not have won the tender to supply the Mt Mercer project, the Commission acted properly , to examine all 'known factors', 'other than dumped imports', which are causing injury to the domestic industry 'at the same time' as dumped imports. With respect, the depth and scope of the Commission's assessment of this issue has been outlined above. The claims of non-price factors were considered by the Commission and found not to be the "critical factor in the decision to award the Mt Mercer and Gullen Range projects to dumped imports" (refer Report No. 221, p. 53). In other words, the factor of price was "critical", and the fact that the price was dumped, establishes the necessary causal link between the incidence of dumping and injury.

In response to the applicant Win&P's reasons for application for review, the Australian industry responds as follows:

Finding 1 "Embeds" as the goods under consideration, or as part thereof

The industry's response to this issue has been fully covered in the preceding parts of this submission.

Finding 2 Conversion of currency on the date of sale

The industry's response to this issue has been fully covered in the preceding parts of this submission.

Finding 3 The incorrect SG&A [selling, general and administration expenses] was used under s269TAC(2)

The submission from the applicant Win&P argues the ADC used incorrect calculations for Sales and General Administration expenses to be used in the normal value calculation; and …

> "As well as the use of SG&A in a way which did not comply with the step by step calculation method prescribed by section 269TAC(2)(c), there was no separate adjustment applied to account for the differences between domestic SG&A and Australian export SG&A as required by s269TAC(9)." [p. 16]

The industry maintains on the information made available in the public version of submissions, the ADC has made the best interpretation on the SG&A values as it could under the provisions of the Act.

Under subparagraph 269TAC(2)(c)(ii) of the Act, the Minister may make a determination of SG&A values which are reasonable using the information available in the ordinary course of trade. Under subparagraph 269TAC(2)(c)(ii) the SG&A value may be determined where the Minister is satisfied that:

> "… on the assumption of the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export – such amounts as the Minister determines would be administrative, selling and general costs associated with the sale and the profit on that sale."

Furthermore, subsection 269TAC(9) provides:

> "Where normal value of the goods exported to Australia is to be ascertained in accordance with paragraph (2)(c) or (4)(e), the minister must make such adjustments, in determining the costs to be determined under that paragraph, as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods."

Therefore, the Domestic Industry does not concur with the applicant Win&P's interpretation of the domestic law on this issue as outlined above, and supports the approach which has been used by the Commission.

Finding 4 Issue 1 The SG&A calculation issue

The Domestic Industry is not in a position to comment on this issue due to the fact that the areas of disparity with regards to how the SG&A percentage rate (%) was calculated includes confidential visit reports, and other information provided by Win&P, which must remain confidential between the Commission and Win&P. However, the industry would presume that where there is a shared pool of company SG&A expenses across various divisions, the Commission would ensure that an adequate allocation of SG&A expenses has been allocated to the appropriate Wind Tower manufacturing division.

Finding 4 Issue 2 The R&D expense issue

The submission claims that Win&P do not have any R&D expenses associated with the sale of Wind Towers, and therefore there should be no allocation of any R&D expenses in any SG&A

calculations. It is outlined in the submission that the Commission calculated the R&D proportion of expenses that were shown in common business wide accounts using a Tower: Business revenue ratio split calculation.

In the absence of any clear financial records which accurately identify the split in R&D expenses across all business units, the industry supports the ADCs contention that this calculation should be conducted using a revenue proportional split methodology.

Finding 4 Issue 3 – The Forex Gains and Losses Issue

Whilst the industry supports the proper interpretation of the Act in relation to this issue, that is that foreign exchange gains and losses from imported inputs into Tower manufacturing need to be calculated and included in the cost of production of goods for exports and the domestic market, the industry is not in a position to comment on how the Commission interpreted this issue using the information which has been confidentially provided to the Commission throughout this investigation.

Finding 5 Profit Used in the Construction of Normal Value

The industry maintains the Commission has taken a very conservative view on the amount of profit which was allocated in the construction of the normal value. However, supports the Commission's methodology used. Namely, given the Commission found all Wind Tower sales were at a loss and no sales were made in the ordinary course of trade, a normal value was not able to be calculated under subsection 269TAC(1); and quite properly under paragraph 269TAC(2)(c) normal values were constructed using:

- "the verified cost of production for wind towers supplied to the Mt Mercer project;
- the selling, general and administrative costs incurred in the domestic sale of wind towers during the investigation period; and
- a profit of 3.5% which reflects the profit achieved by the steel fabrication industry in Korea in 2010." [*Report 221*]

In any event the industry remains perplexed as to how a profit margin of 3.5% can be viewed as excessive using any calculation methodology, particularly given the significant level of manufacturing plant and equipment investment required to be made by Tower producers.

Conclusion

The Commission correctly found that dumped imported Wind Towers from China and Korea have caused material injury to the Australian domestic industry producing like goods, and recommended to the Parliamentary Secretary that Dumping Duty Notices be published.

The Domestic Industry respectfully submits that a very conservative approach has been maintained by the Commission throughout the investigation, and would be gravely concerned if the dumping margins as recommended by the Commission to the Parliamentary Secretary were to be reduced in any way.

The Domestic Industry wishes to note for the record that they regret having to pursue their rights under Australia's Anti-Dumping provisions, however, they were left with no alternative in the face of severe price undercutting, and loss of sales value, volume, profit and profitability caused by dumped imports. Unless redressed, the jobs of many hundreds of Australians would have been put at risk – noting that the members of the Australian Domestic Industry are major employers in regional Australian centres.

DATED 4 July 2014

SIGNED

International Trade Remedies Advisor

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For the Domestic Industry