Australian Government
Anti-Dumping Review Panel

APPLICATION FOR REVIEW OF A DECISION BY THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR A COUNTERVAILING DUTY NOTICE

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City
ACT 2601
P: +61 2 6275 5868
F: + 61 2 6275 6784
E: ADRP_support@customs.gov.au

INFORMATION FOR APPLICANTS

WHAT DECISIONS ARE REVIEWABLE BY THE ANTI-DUMPING REVIEW PANEL?

The role of the Anti-Dumping Review Panel (the ADRP) is to review certain decisions made by the Minister responsible for the Australian Customs and Border Protection Service (ACBPS), or by the Anti-Dumping Commissioner (the Commissioner).

The ADRP may review decisions made by the Commissioner:

- to reject an application for dumping or countervailing measures;
- to terminate an investigation into an application for dumping or countervailing measures;
- to reject or terminate examination of an application for duty assessment; and
- to recommend to the Minister the refund of an amount of interim duty less than the amount contended in an application for duty assessment, or waiver of an amount over the amount of interim duty paid.

The ADRP may review decisions made by the Minister, as follows:

Investigations:

- to publish a dumping duty notice;
- to publish a countervailing duty notice;
- not to publish a dumping duty notice;
- not to publish a countervailing duty notice;

Review inquiries, including decisions

- to alter or revoke a dumping duty notice following a review inquiry;
- to alter or revoke a countervailing duty notice following a review inquiry;
- not to alter a dumping duty notice following a review inquiry;
- not to alter a countervailing duty notice following a review inquiry;
- that the terms of an undertaking are to remain unaltered;
- that the terms of an undertaking are to be varied;
- that an investigation is to be resumed;
- that a person is to be released from the terms of an undertaking;

Continuation inquiries:

- to secure the continuation of dumping measures following a continuation inquiry;
- to secure the continuation of countervailing measures following a continuation inquiry;

- not to secure the continuation of dumping measures following a continuation inquiry;
- not to secure the continuation of countervailing measures following a continuation inquiry;

Anti-circumvention inquiries:

- to alter a dumping duty notice following an anti-circumvention inquiry;
- to alter a countervailing duty notice following an anti-circumvention inquiry;
- not to alter a dumping duty notice following an anti-circumvention inquiry; and
- not to alter a countervailing duty notice following an anti-circumvention inquiry.

Before making a recommendation to the Minister, the ADRP may require the Commissioner to:

- reinvestigate a specific finding or findings that formed the basis of the reviewable decision; and
- report the result of the reinvestigation to the ADRP within a specified time period.

The ADRP only has the power to make **recommendations to** the Minister to affirm the reviewable decision or to revoke the reviewable decision and substitute with a new decision. The ADRP has no power to revoke the Minister's decision or substitute another decision for the Minister's decision.

WHICH APPLICATION FORM SHOULD BE USED?

It is essential that applications for review be lodged in accordance with the requirements of the *Customs Act 1901* (the Act). The ADRP does not have any discretion to accept an invalidly made application or an application that was lodged late.

Division 9 of Part XVB of the Act deals with reviews by the ADRP. Intending applicants should familiarise themselves with the relevant sections of the Act, and should also examine the explanatory brochure (available at www.adreviewpanel.gov.au).

There are separate application forms for each category of reviewable decision made by the Commissioner, and for decisions made by the Minister. It is important for intending applicants to ensure that they use the correct form.

This is the form to be used when applying for ADRP review of a decision of the Minister whether to publish a dumping duty notice or countervailing duty notice (or both). It is approved by the Commissioner pursuant to s 269ZY of the Act.

WHO MAY APPLY FOR REVIEW OF A MINISTERIAL DECISION?

Any interested party may lodge an application for review to the ADRP of a review of a ministerial decision. An "interested party" may be:

- if an application was made which led to the reviewable decision, the applicant;
- a person representing the industry, or a portion of the industry, which produces the goods which are the subject of the reviewable decision;
- a person directly concerned with the importation or exportation to Australia of the goods;
- a person directly concerned with the production or manufacture of the goods;
- a trade association, the majority of whose members are directly concerned with the production or manufacture, or the import or export of the goods to Australia; or
- the government of the country of origin or of export of the subject goods.

Intending applicants should refer to the definition of "interested party" in s 269ZX of the Act to establish whether they are eligible to apply.

WHEN MUST AN APPLICATION BE LODGED?

An application for a review must be received within 30 days after a public notice of the reviewable decision was first published in a national Australian newspaper (s 269ZZD).

The application is taken as being made on the date upon which it is received by the ADRP after it has been properly made in accordance with the instructions under 'Where and how should the application be made?' (below).

WHAT INFORMATION MUST AN APPLICATION CONTAIN?

An application should clearly and comprehensively set out the grounds on which the review is sought, and provide sufficient particulars to satisfy the ADRP that the Minister's decision should be reviewed. It is not sufficient simply to request that a decision be reviewed.

The application must contain a full description of the goods to which the application relates and a statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision (s 269ZZE).

If an application contains information which is confidential, or if publication of information contained in the application would adversely affect a person's business or commercial interest, the application will be rejected by the ADRP unless an appropriate summary statement has been prepared and accompanies the application.

If the applicant seeks to bring confidential information to the ADRP's attention (either in their application or subsequently), the applicant must prepare a summary statement which contains sufficient detail to allow the ADRP to reasonably understand the substance of the information, but the summary must not breach the confidentiality or adversely affect a person's business or commercial interest (s 269ZZY).

While both the confidential information and the summary statement must be provided to the ADRP, only the summary statement will be lodged on the public record maintained by the ADRP (s 269ZZX). The ADRP is obliged to maintain a public record for review of decisions made by the Minister, and for termination decisions of the Commissioner. The public record contains a copy of any application for review of a termination decision made to the ADRP, as well as any information given to the ADRP after an application has been made. Information contained in the public record is accessible to interested parties upon request.

Documents containing confidential information should be clearly marked "Confidential" and documents containing the summary statement of that confidential information should be clearly marked "Non-confidential public record version", or similar.

The ADRP does not have any investigative function, and **must** take account only of information which was before the Minister when the Minister made the reviewable decision (s269ZZ). The ADRP will disregard any information in applications and submissions that was not available to the Minister.

HOW LONG WILL THE REVIEW TAKE?

The timeframes for a review by the ADRP will be dependent on whether the ADRP requests the Commissioner to reinvestigate specific findings or findings that formed the basis of the reviewable decision.

If reinvestigation is not required

Unless the ADRP requests the Commissioner to reinvestigate a specific finding or findings, the ADRP must make a report to the Minister:

- at least 30 days after the public notification of the review;
- but no later than 60 days after that notification.

In special circumstances the Minister may allow the Review Panel a longer period for completion of the review (s 269ZZK(3)).

If reinvestigation is required

If the ADRP requests the Commissioner to reinvestigate a specific findings or findings, the Commissioner must report the results of the reinvestigation to the ADRP within a specified period.

Upon receipt of the Commissioner's reinvestigation report, the ADRP must make a report to the Minister within 30 days.

WHAT WILL BE THE OUTCOME OF THE REVIEW?

At the conclusion of a review, the ADRP must make a report to the Minister, recommending that the:

- Minister affirm the reviewable decision (s 269ZZK(1)(a)); or
- Minister revoke the reviewable decision and substitute a specified new decision (s 269ZZK(1)(b)).

After receiving the report from the ADRP the Minister must:

- affirm his/her original decision; or
- revoke his/her original decision and substitute a new decision.

The Minister has 30 days to make a decision after receiving the ADRP's report, unless there are special circumstances which prevent the decision being made within that period. The Minister must publish a notice if a longer period for making a decision is required (s 269ZZM).

WHERE AND HOW SHOULD THE APPLICATION BE MADE?

Applications must be EITHER:

- lodged with, or mailed by prepaid post to:

  Anti-Dumping Review Panel
  c/o Legal Services Branch
  Australian Customs and Border Protection Service
  5 Constitution Avenue
  Canberra City ACT 2601
  AUSTRALIA

- OR emailed to:

  ADRP_support@customs.gov.au

- OR sent by facsimile to:

  Anti-Dumping Review Panel
  c/o Legal Services Branch
  +61 2 6275 6784

WHERE CAN FURTHER INFORMATION BE OBTAINED?

Further information about **reviews by the ADRP** can be obtained at the ADRP website (www.adreviewpanel.gov.au) or from:

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City ACT 2601
AUSTRALIA

Telephone: +61 2 6275 5868
Facsimile: +61 2 6275 5784

Inquiries and requests for **general information about dumping matters** should be directed to:

Anti-Dumping Commission
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA CITY ACT 2601

Telephone: 1300 884 159
Facsimile: 1300 882 506
Email: clientsupport@adcommission.gov.au

FALSE OR MISLEADING INFORMATION

It is an offence for a person to give the ADRP written information that the person knows to be false or misleading in a material particular (Penalty: 20 penalty units – this equates to $3400).

PRIVACY STATEMENT

The collection of this information is authorised under section 269ZZE of the *Customs Act 1901*. The information is collected to enable the ADRP to assess your application for the review of a decision to publish a dumping duty notice or countervailing duty notice.

APPLICATION FOR REVIEW OF

DECISION OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR COUNTERVAILING DUTY NOTICE

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

to publish : ☒ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

OR

not to publish : ☐ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application;
- provides reasonable grounds for the decision not being the correct or preferable decision; and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

See Attachment A and other Attachments

☒ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

☒ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

☒ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

☒ Full description of the imported goods to which the application relates.

☒ The tariff classification/statistical code of the imported goods.

☒ A copy of the reviewable decision.

☒ Date of notification of the reviewable decision and the method of the notification.

☒ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.

☒ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Signature: 

Name: Daniel Moulis

Position: Principal, Moulis Legal

Applicant Company/Entity: Win&P., Ltd

Date: 16 May 2014

윈앤피주식회사
Win&P Win&P., Ltd.
• 137-890 서울특별시 서초구 바우뫼로 178 Tel. (02) 2051-5800 Fax.(02) 2051-5804 Web. www.winnp.co.kr
• 178, Baumoe-Ro, Seocho-Gu, Seoul, Korea (137-890) Tel. +82-2-2051-5800 Fax. +82-2-2051-5804

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra
Australian Capital Territory 2601
AUSTRALIA

Ref. No : WNP-AU-150513
Date : May 13, 2014

Power Of Attorney

Dear Review Panel

Application for review
Alleged dumping of wind towers from Korea and China

We confirm that we have retained the law firm of Moulis Legal to represent the interests of the Win&P., Ltd ("Win&P") in this matter.

Please give Moulis Legal the same assistance and consideration in relation to the provision of information and cooperation in this matter as you would Win&P.

The lead contact person at Moulis Legal is Daniel Moulis. His email address is daniel.moulis@moulislegal.com, and he can be contacted by telephone on +61 2 6163 1000.

Please contact him directly with any inquiries.

Sincerely yours,

Yongsun John
President & CEO

YSJ / Ross

Australian Government

Anti-Dumping Commission

Customs Act 1901 – Part XVB

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

Findings in relation to a Dumping Investigation

Public notice under subsections 269TG(1) and (2) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of wind towers ("the goods"), exported to Australia from the People's Republic of China (China) and the Republic of Korea (Korea).

The goods may be classified to subheading 7308.20.00 (statistical code 02) in Schedule 3 to the *Customs Tariff Act 1995*. This applies to complete towers, unassembled or assembled and applies to a basic tower that includes doors, ladders, landings and embed or tower foundation.

Steel tower sections, including sections with doors etc, are classified to 7308.90.00/49, assembled or disassembled, providing there aren't enough in a shipment to be judged to be a complete tower.

Combinations of towers and tower sections may vary on a case by case basis for assessment of tariff classification. Classification may vary when there is more of one thing than another, for example a tower section and lift or a tower section with lift, electrical junction boxes and other equipment.

An assembled complete wind powered generator is a composite machine consisting of two or more machines fitted together to form a whole, e.g. wind engine, generator, gearbox, yaw controls etc. fitted in a steel tower and nacelle, classification is to subheading 8502.31.10/31.

A full description of the goods is available in Anti-Dumping Notice (ADN) No. 2012/68 (relating to the initiation) and is available on the internet at **http://www.adcommission.gov.au**

The Commissioner reported the findings and recommendations to the Parliamentary Secretary to the Minister for Industry (the Parliamentary Secretary) in Anti-Dumping Commission Report No. 221 (REP 221) which outlines the investigation carried out by the Commission and recommends the publication of a dumping duty notice in respect of the goods.

The Parliamentary Secretary has considered REP 221 and has accepted the Commission's recommendations and reasons for the recommendations, including all material findings of fact or law on which the Commission's recommendations were based, and particulars of the evidence relied on to support the findings.

Particulars of the dumping margin established and an explanation of the method used to compare export prices and normal values to establish each dumping margin are set out in the following table:

Country	Manufacturer / exporter	Dumping margin	Method to establish dumping margin
China	Shanghai Taisheng	15.0%	Weighted average export prices were compared with weighted average corresponding normal values over the investigation period in terms of subsection 269TACB(2)(a) of the *Customs Act 1901*.
	All other Chinese exporters	15.6%	
Korea	Win&P	17.2%	
	All other Korean exporters	18.8%	

I, ROBERT CHARLES BALDWIN, Parliamentary Secretary to the Minister for Industry, have considered, and accepted, the recommendations of the Commission, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 221.

I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those goods and because of that, material injury to the Australian industry producing like goods might have been caused if the security had not been taken. Therefore under subsection 269TG(1) of the *Customs Act 1901* (the Act), I **DECLARE** that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

(i) the goods; and

(ii) like goods that were exported to Australia after 6 December 2013 (when the Commissioner made a Preliminary Affirmative Determination under paragraph 269TD(4)(a) of the Act that there appeared to be sufficient grounds for the publication of a dumping duty notice) but before publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been caused, is being caused, or maybe caused in the future. Therefore under subsection 269TG(2) of the Act, I **DECLARE** that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from China and Korea.

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports on prices in the Australian market in the form of price suppression and price depression and the consequent impact on the Australian industry including loss of sales volume, loss of revenue, reduced market share, loss of profits and profitability, reduced production capacity, reduced employment and reduced return on investment.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export prices, non-injurious prices, and normal values of the goods (as ascertained in the confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how measures are applied to 'goods on the water' is available in Australian Customs Dumping Notice 2012/34, available at **www.adcommission.gov.au**

REP 221 and other documents included in the public record may be examined at the Anti-Dumping Commission office by contacting the case manager on the details provided below. Alternatively, the public record is available at **www.adcommission.gov.au**

Enquiries about this notice may be directed to the case manager on telephone number (02) 6245 5434, fax number 1300 882 506 or +61 2 6275 6888 (outside Australia) or **ops1@adcommission.gov.au**.

Dated this 14th day of April 2014

ROBERT CHARLES BALDWIN
Parliamentary Secretary to the Minister for Industry

A9821

ATTACHMENT E

16 May 2014

In the Anti-Dumping Review Panel

Application for review
Wind towers from Korea and China

Win&P., Ltd

NON-CONFIDENTIAL

1 Applicant

Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

The applicant is Win&P., Ltd (hereinafter "Win&P").

The address of the applicant is 178 Baumoe-Ro, Seocho Gu, Seoul, Korea.

Win&P is a limited liability company registered in Korea.

2 Applicant's contact details

Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation

The contact person at Win&P is Ross Baek, Team Leader, Tower Project Sales.

His contact details are:

- telephone +82 2 2040 1812
- fax +82 2 8649 0740
- email: wjbaek@winnp.co.kr

3 Applicant's representative

Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

Win&P is represented in this matter by Daniel Moulis, Principal, Moulis Legal.

The contact details of Moulis Legal are:

- address - 6/2 Brindabella Circuit, Brindabella Business Park, Canberra International Airport ACT 2609
- telephone +61 2 6163 1000
- fax +61 2 6162 0606
- email - daniel.moulis@moulislegal.com

NON-CONFIDENTIAL

A copy of the authorisation of Moulis Legal is at **Attachment B**.

Please address all communications relating to this application to Moulis Legal.

4 Description of imported goods

Full description of the imported goods to which the application relates.

This Application applies to wind towers imported from Korea. These goods are referred to by the Anti-Dumping Commission ("the ADC") in its Report No. 221 ("REP 221") 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.*

5 Tariff classification of imported goods

The tariff classification/statistical code of the imported goods.

The imported goods are classified to sub headings 7308.20.00 (statistical code 02) in respect of complete towers, and to 7308.90.00 (statistical code 49) in respect of steel tower sections, under Schedule 3 to the *Customs Tariff Act* 1995 ("the Tariff Act").

6 Reviewable decision

Copy of the reviewable decision, date of notification of the reviewable decision and the method of the notification

A copy of the decision is at **Attachment C**.

The reviewable decision was notified on 16 April 2014. It was published in *The Australian* on that day.

On that day the ADC also caused to be published:

- Australian Dumping Notice ADN 2014/33 – *Wind Towers Exported from the People's Republic of*

China and the Republic of Korea ("ADN 2014/33");[1] and

- *Report to the Minister No. 221 – Dumping of wind towers exported from the People's Republic of China and the Republic of Korea* ("REP 221").[2]

7 Applicant's reasons

A statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision

A Introduction

A.C.N. 009 483 694 Pty Ltd and Keppel Prince Engineering Pty Ltd ("the Australian industry") applied for a dumping investigation into imports of wind towers from Korea and China. The investigation was initiated on 28 August 2013.

As a result of this investigation, the Parliamentary Secretary to the Minister for Industry ("the Parliamentary Secretary") decided on 14 April 2014 to impose dumping duties on wind towers exported to Australia from Korea and China. Specifically, the Parliamentary Secretary decided to publish notices in relation to dumping under Sections 269TG(1) and (2) of the *Customs Act 1901* ("the Act").

Win&P seeks review of this decision by the ADRP under Sections 269ZZA(1)(a) and 269ZZC of the Act.

Specifically, Win&P seeks review of a number of findings which led to the decision by the Parliamentary Secretary that the margin of dumping by Win&P was 17.2%. Win&P notes the following key findings which led to the ADC's recommendations in relation to the determination of the dumping margin in respect of the goods under consideration ("the goods"), and ultimately to the reviewable decision to impose dumping duty against the goods when imported into Australia from Win&P by the Parliamentary Secretary, who accepted those recommendations:

- the finding that the "embed" for the goods under consideration was to be included and could be included as being within the goods under consideration, and that "embeds" were

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1 http://www.adcommission.gov.au/cases/documents/041-ADN-No201433-Findingsinrelationtoadumpinginvestigation.pdf

2 http://adcommission.gov.au/cases/documents/040-Report-FinalReport221.pdf

thereby to be included in the determination of the normal value of those goods ("Finding 1");

- the finding that the exchange rate used for currency conversion purpose should be determined at the "*date of sales revenue recognition in Win&P accounts*" ("Finding 2");
- the finding that the amounts of the administrative, general and selling ("SG&A") costs should be those amounts based on the export of the goods under consideration, instead of being those based on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export ("Finding 3");
- the finding that the SG&A costs to be used for the purposes of determining the normal value of the goods under consideration was **[CONFIDENTIAL TEXT DELETED – number]**% of the cost to make those goods ("Finding 4"), specifically:
    - the finding that the SG&A should be determined based on a revenue allocation method, regardless of whether such costs were associated with the sale of the goods under consideration ("the SG&A calculation issue");
    - the finding that certain research and development ("R&D") expenses should be allocated to and included in the SG&A of the goods under consideration, where they were not associated with the sale of the goods under consideration ("the R&D expense issue");
    - the finding that certain foreign exchange gains and losses should be allocated to and included in the SG&A of the goods under consideration, or should not be adjusted out of the normal value determined under Section 269TAC(2)(c) of the goods, where they were not associated with the export sale of the goods under consideration ("the forex gains and losses issue");
- the finding that the amount of profit for the purpose of determining the normal value of the goods under consideration was to be determined using the profit rate of the *"Fabricated and Processed Metal Products (excludes machinery and furniture)"*, as published by the Korean Statistical Information Service in 2010 ("Finding 5").

Win&P submits that the all of the above findings are manifestly flawed, rendering the decision to impose a dumping duty of 17.2% on the importation of wind towers from Win&P not the correct or preferable decision.

The grounds supporting Win&P's request for a review of each of Findings 1 to 5 are discussed separately as follows.

B Finding 1 – "embeds" as the goods under consideration, or as part thereof

During the investigation, Win&P submitted to the ADC that Win&P's exports of "embeds" (also referred to as "foundations") should not be considered to be either the goods under consideration or part of the goods under consideration. Consequently, Win&P submitted that data relating to the production and sale of embeds should not be considered relevant, and should not be used, in the ADC's dumping margin considerations. A submission from the Government of the Republic of Korea also addressed this issue. Win&P respectfully refers these submissions to the ADRP for the purpose of this review.[3]

REP221 states:

> *The Commission does not agree with Win&P's interpretation of the goods description. It is clear based on the information in the application, the consideration report and the initiation notices that the goods subject of the application are wind towers and 'sections thereof'. The goods description also explains that embeds are a 'tower foundation section'.*
>
> *The Commission also disagrees with the argument that embeds do not meet the definition of a section. The definition of a section referred to in Win&P's submission clearly relates to the wind tower sections only. The description of the goods makes clear that the embed is considered to be a tower foundation section and therefore there is little relevance in the wind tower section definition to be applied to the embed foundation sections.*

With respect, Win&P does not think that these statements accurately reflect the description of the goods under consideration in the Australian industry's application and in Consideration Report No.221 ("CON221"). Further, we do not know how goods that are separately contracted, separately exported, and separately invoiced can be "bundled" for price comparison purposes. We respectfully submit that this runs counter to the principles on which a "dumping" finding is meant to be based. In effect, this approach seeks to compare the combined prices of different things that are supplied to a "project" in one country with the combined prices of those things supplied to a "project" in another country. It does not apply to a consignment of goods as required by Sections 269TG(1) and (2).

The goods were described in ADN 2014/33 as:

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[3] These are submission by Moulis Legal on behalf of Win&P dated 12 December 2013; submission by Moulis Legal on behalf of Win&P dated 24 January 2014; submission by Moulis Legal on behalf of Win&P dated 19 February 2014; and comments of the Government of the Republic of Korea dated 26 February 2014.

> *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.*

If "embed" was considered to be a section of a wind tower, either for the purpose of this investigation, or in the technical/commercial sense, then there would have been no need to specifically mention that the wind towers subject to investigation were wind towers *"whether or not including an embed"*. The explanation that follows – being a tower foundation *"section"* – cannot alter the fact that an embed is not ordinarily considered as being part of the "sections thereof" of a wind tower.

Win&P does not understand an embed to be a wind tower nor is it *"sections [ ]of"* a wind tower. The linguistic device of calling an embed a tower foundation *"section"* does not overcome that understanding. A connection is attempted to be drawn by the linguistic naming method alone. The fact is that the embed, however called, is not a wind tower, nor is it a section of a wind tower.

The distinctions between a wind tower and its sections, the goods subject to the investigation and embeds are more clearly set out in the Australian industry's Application. In that Application the goods the subject of the application are described as follows:

> *The goods the subject of this application are 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.*
>
> *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.*

REP221 seeks to justify that an embed is a wind tower by stating:

> *The Commission considers that where towers are contracted and sold with embeds they can be considered as one product for the investigation as could towers where they were contracted and sold without embeds.*

Win&P does not agree that the structure of a commercial agreement that might sometimes comprise the sales of two different products under one head sales agreement can determine what the like goods are, or how they are to be compared in price terms. Nor does such information assist in the interpretation of the scope of the goods described in the Australian industry's Application, or that scope in the investigation that was initiated by way of accepting that Application, as was set out in the particulars of goods the subject of the application in ADN2013/68 (under Section 269TC(4) of the Act).

We submit that the words should have been interpreted as meaning that the investigation concerns wind towers. The words do not mean that the separate product known as an embed is also under investigation. The interpretation that embeds are actually part of the goods under consideration is also denied by the proviso in the definition of the goods under consideration, to the effect that *"external components that are not attached to the wind towers or sections thereof"* are excluded. It can equally be said that embeds are components which are external to a wind tower and which are not attached to the wind towers at the time of importation, although they and other external components would later become so attached.

The interpretation we have advanced of the description of the goods is supported by the further descriptions of the goods under consideration in ADN2013/68. There it is stated that:

> *Further the applicants detailed that 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. where 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 or external 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.*
>
> *Goods specifically excluded from the scope are nacelles and rotor blades, regardless of whether they are attached to the wind tower. Also excluded are any internal or external components which are not attached to the wind towers or sections thereof.*

We make the following observations:

1 This elaboration of the meaning of the words "wind tower" contains no reference to foundations or embeds.

2 Embeds, which typically incorporate one steel plate, cannot satisfy the definition of a "wind tower section" because the description clearly states that a section consists of, at a minimum, multiple steel plates that are rolled, cylindrical and welded together. Embeds do not satisfy that description.

3 The specification of the goods under consideration as having a minimum height when fully assembled (and we emphasise the words "fully assembled") excludes any consideration of embeds. The specification states that the wind towers under consideration have a minimum

height of 50 metres measured from the base of the tower to the bottom of the nacelle. In this context the base of the tower is the upper face of its embed or other foundation, meaning that the embed is not included.

4 The above description expressly excludes any internal or external components which are not attached to the wind towers or sections thereof. We believe that this further confines the goods under consideration to the wind towers or sections thereof.

The goods that are subject to the investigation can only be those goods that are described in the application and that are announced to interested parties under Section 269TC(4). The ADC's policy is that it is not at liberty to narrow or broaden the scope of an investigation, and that it is restricted to the claim made by the applicant. If that is correct, then we maintain that it cannot be correctly stated that "*embeds [are] part of the goods*".

Our primary submission remains that only wind towers can be the subject of this investigation, and that embeds cannot be, because embeds are not wind towers, and the further description of the goods does not disrupt this meaning. However, even if the ADRP does not agree with that submission, we would further submit that the words *"wind towers... whether or not including an embed"* could not be read more extensively than to include, as the goods the subject of the application:

- wind towers including an embed; and
- wind towers not including an embed.

In relation to this reading of the description, we wish to point out that Win&P did not export and sell *"wind towers including an embed"* to any Australian customer/s. Instead, Win&P entered into separate contracts with its Australian customer/s for the sales of wind towers (on the one hand) and for the sale of embeds to be used for those wind towers (on the other hand). **[CONFIDENTIAL TEXT DELETED – Win&P's commercial arrangements]** At no point in time did Win&P export *"wind towers including an embed"* to Australian customer/s. Win&P sold and exported consignments of goods to Australia that were either wind towers not including an embed, or embeds.

To put it another way, there is no suggestion that embeds are under investigation. On this reading of the description, only wind towers "including" or "not including" an embed are under investigation. Win&P has exported wind towers to Australia, and has separately exported different products called "embeds" to Australia. If the applicant wished to complain about the alleged dumping of embeds, it could have made an application to that effect. However, it has not done so.

We fully recognise that the ADC considers that it knows what was meant when it issued ADN2013/68. However we respectfully submit that the question of what the goods under consideration actually are is an exercise of interpretation, and not of assertion.

In summary, Win&P submits to the ADRP that:

- that embeds are not to be included in the description of the goods under consideration; or, in the alternative
- that Win&P did not export any wind towers including embeds.

In either case "embeds" should not be combined with wind tower sections in working out the normal value of the wind tower sections exported to Australia by Win&P.

C Finding 2 – conversion of currency on the date of sale

Section 269TAF(1) of the Customs Act 1901 provides as follows:

> *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.*

This directly reflects and implements the obligation to the same effect which is contained in the WTO Anti-Dumping Agreement ("the ADA"). Article 2.4.1 (in part) and footnote 8 to that Article state:

> *When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used.*

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8 Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

During the original investigation, Win&P made several submissions to the ADC regarding this issue. In summary, Win&P submitted that:

- in the circumstances of this case, the comparison does require a conversion of currencies, because the export sales were denominated in Australian dollars ("AUD") and the corresponding normal values were denominated in Korean won ("KRW");
- subsection (2) of Section 269TAF, to which subsection (1) is subject, does not apply, as that

relates to the utilisation of a forward rate of exchange by an exporter, and Win&P did not utilise such a rate;[4]

- the material terms of the sale of the exported goods were established on the date of the contract (the "transaction or agreement") that Win&P entered into with its export customer, **[CONFIDENTIAL TEXT DELETED – name of customer]** for that sale;
- the conversion of the AUD export price to KRW for the purposes of the comparison called for by the Act must be undertaken using the exchange rate between the two currencies on the date of the contract with **[CONFIDENTIAL TEXT DELETED – name of customer]**, because that was the date on which the material terms of the transaction were established;
- the contract and purchase order were fully verified.[5]

Contrary to the facts, and contrary to Win&P's submissions, REP 221 states as follows:

> *The Commission considers that the date that best establishes the material terms of sale is the date of sales revenue recognition in Win&P accounts. This is the date that WIN&P recognised the amount as a sale as stated in the audited accounts.*[6]

We find this to be wrong and unsupportable.

In REP221, the ADC stated that for *"certain types of tender and capital equipment sales, the date of contract may be the more appropriate and preferred date"* for determining the date of the sale concerned. In relation to this, we can only say that it would have to be only in the most exceptional cases that the material terms of a sale of capital equipment procured under a contract awarded to a successful tenderer at the conclusion of a tender process would not be established on the date of that contract. There would not seem to be much point for a seller to embark on the costly path of manufacturing massive capital goods, to order, at huge expense, for supply to a buyer at a future date, without the security of a contract which clearly and irrevocably sets out the material terms that apply to the sale in

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4 REP221, page 35

5 The specific terms of the transaction with **[CONFIDENTIAL TEXT DELETED – name of customer]** for the sale of the wind towers for the Mt Mercer project and the accompanying Framework Supply Agreement that set out the contractual terms applicable to the sale were presented, verified and explained.

6 REP221, page 36

his back pocket.[7]

The relevant purchase order issued by **[CONFIDENTIAL TEXT DELETED – name of customer]** to Win&P that enlivens the contractual terms for the supply of the wind towers under the **[CONFIDENTIAL TEXT DELETED – name of customer]** Framework Supply Agreement 2008 was dated **[CONFIDENTIAL TEXT DELETED – commercial contract date]**.

The authors of REP221 have fastened on a set of words from a Trade Measures Review Officer ("TMRO") report[8] ("the HSS Report") in an attempt to justify a finding that the material terms of Win&P's export sale to REpower were not established on the date of the contract between the two parties. In summary, REP221 mentions that the TMRO considered that in the context of an order for hollow structural sections:

> *The time and terms of delivery may also be considered to be material.*

REP221 then argues that the circumstances of the delivery of the wind towers mean that the date of Win&P's contract with **[CONFIDENTIAL TEXT DELETED – name of customer]** (the date of the order which formally activated that contract) was not the date that established the material terms of the sale.

These observations are pertinent:

1 REP221 fails to quote the entirety of the relevant extract from the HSS Report. We now do so:

> *177. It is clear that s 269TAF(1) requires application of the exchange rate as it applied on the date on which the material terms of the sale were fixed. Price is a material term, but other terms are also material, for example, the type and quantity of the goods subject to the order. The time and terms of delivery may also be considered to be material. It seems reasonable to assume that these terms are fixed at the time the offer is accepted. Although price may not be fixed, it seems very likely that the mechanism by which the price is to be determined will be set out in the contract. I therefore consider that the contract date is the relevant date for the purpose of the currency conversion.*
>
> *178. I accept, however, that this conclusion may lead to an incongruity where a contract is entered into on a certain date, but an invoice is not issued until 6 months later. The*

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7 Or, more likely, the contract would be in the desk drawer of the manufacturer's financier, who presumably would find it very strange to be advised that the contract whose performance the financier is financing does not establish not only the material terms of the production they are financing, but all of the terms.

8 http://www.adreviewpanel.gov.au/site/documents/HollowStructuralSections-Report.pdf

above conclusion means the invoice price will then need to be converted to the relevant currency based on the currency value as at the contract date 6 months earlier. There may, of course, be significant currency fluctuations during a period of such length. Nevertheless, in my view, this is what the s 269TAF(1) of Customs Act requires. It is not clear to me from Alpine's submission whether and to what extent, this would impact on the dumping margin calculated for Alpine.

REP221 says that for *"certain types of tender and capital equipment sales, the date of contract may be the more appropriate and preferred date"*. The HSS Report does not relate to capital equipment. Moreover, the outcome of the HSS Report was that the contract date (found to be the order date) was accepted as being the date on which the material terms of that sale were established.

2 Win&P's contract with **[CONFIDENTIAL TEXT DELETED – name of customer]** set out all of the terms – not just the material terms – of the transaction between them. For reasons that are unknown to us, the authors of REP221 undertake a kind of surgical dissection of the delivery of the goods in a misguided attempt to find justification for denying that the contract established the material terms of the parties' agreement. This fails:

(a) the facts said to be sufficient to divert from acceptance of the contract as establishing the material terms of the export sale concerned relate only to the *performance* of the contract, and only to one aspect of that *performance* – namely, delivery;[9]

(b) we find the factual "evidence" set out in REP221 to be strangely misstated, or repeatedly overstated, because in relation to the 24 wind towers exported to Australia by Win&P during the investigation period:

- the contractual order was for **[CONFIDENTIAL TEXT DELETED – number]** wind towers for **[CONFIDENTIAL TEXT DELETED – price information]** for each tower;
- the scheduled delivery date was **[CONFIDENTIAL TEXT DELETED – commercial details]**;
- an invoice was issued on **[CONFIDENTIAL TEXT DELETED – commercial details]**;

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9 These are mentioned in the dot points on page 36 of REP221.

- the wind towers were shipped on board on **[CONFIDENTIAL TEXT DELETED – commercial details]**;
- **[CONFIDENTIAL TEXT DELETED – commercial details]** scheduled to be delivered in **[CONFIDENTIAL TEXT DELETED – commercial details]**, was not exported before the end of the investigation period (30 June 2013) with the other **[CONFIDENTIAL TEXT DELETED – number]** wind towers;
- **[CONFIDENTIAL TEXT DELETED – name of customer, numbers and commercial details]**;

(c) the "evidence" cited in REP221 does not go to the establishment of the material terms of the agreement between Win&P and **[CONFIDENTIAL TEXT DELETED – name of customer]**, it simply goes to an aspect of the performance of the contract;

(d) the price, specification and the quantity of the wind towers subject to the contract of sale were all fixed and – if it be relevant – were all honoured by the parties; and

(e) if it be relevant - the contract includes terms that specifically deal with a delay in delivery.

We submit that the ADC has fallen into error. With respect, it cannot reasonably be denied that the purchase order with **[CONFIDENTIAL TEXT DELETED – name of customer]** constituted the date of the transaction that established the material terms of the sale of the exported goods. There was no other transaction. REP221 mistakenly considers that the delivery schedule and the way the goods were shipped changes the date on which the material terms were established to a later date.[10]

Further, REP221 does not provide any reasons as to why, in light of the changes to delivery schedules identified by the ADC, the *"date of sales revenue recognition"* – an accounting activity that is internal to Win&P and is not known to or agreed with **[CONFIDENTIAL TEXT DELETED – name of customer]**– is then to be regarded as *"best establish[ing] the material terms of contract"*.

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[10] REP221 does not provide any reasons as to why, in light of the actual delivery schedule, the "date of sales revenue recognition" – an accounting activity that is internal to Win&P and is not known to or agreed with **[CONFIDENTIAL TEXT DELETED – name of customer]**– is then to be regarded as best establishing the material terms of Win&P's contract with **[CONFIDENTIAL TEXT DELETED – name of customer]**.

The importance of the date on which the material terms of sale are established is that the conversion of the foreign currency-denominated export price into KRW is to take place using the relevant exchange rate on that date. This is a "fair comparison" requirement of the ADA and of Australian law.[11]

We submit that the date of contract between Win&P and its Australian customer is the only suitable date under Section 269TAF(1) of the Act and must be used for this purpose. Neither the "revenue recognition date" nor the later "shipment date"[12] are the dates of the sale. With respect, the revenue recognition date in the accounting system cannot plausibly establish the terms of a contract between Win&P and its Australian customer. The shipment information relied upon by REP221 to discredit the proposition that the material terms were established by the purchase order relate to minor aspects of the *performance* of the existing contract, and do not establish the material terms of that contract.

Win&P submits that, when all circumstances and the sales arrangements were considered, it was the contract date (the date of the order) that established the material terms of its agreement with **[CONFIDENTIAL TEXT DELETED – name of customer]**. That is the date that should be used for currency conversion purposes.

D Finding 3 – the incorrect SG&A was used under Section 269TAC(2)(c)

Section 269TAC(2)(c)(ii) of the Act involves the determination of amounts for the administrative, selling and general costs associated with the sale, and profit on the sale, which are to be used for the purposes of "constructing" a normal value *"on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export"*.

REP221 states, in relation to Win&P's normal values:

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[11] In this context we beg to differ with the TMRO's view in the HSS Report that *"this conclusion may lead to an incongruity where a contract is entered into on a certain date, but an invoice is not issued until 6 months later"*. The objective of the ADA is to compare the exporter's price behaviour in relation to its export and domestic sales at the same time. One of the factors that impacts on that behaviour is the exchange rate to be applied to its export sale. The ADA accepts that the exporter is entitled to assume that the exchange rate at the date of the binding contract is the proper measure of its price. In that way the exporter can adjudge whether it is contracting for a sum which is more or less than its domestic sale.

[12] The shipment date was used by the ADC as the date for determining currency conversion rate in the visit report and SEF, and the revenue realisation date was used in REP221.

Pursuant to s.269TAC(2)(c), normal values were constructed for the investigation period 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*

The statement that the selling, general and administrative costs incurred in the domestic sale of wind towers during the investigation period were used is incorrect. The ADC used its calculation of the selling, general and administrative costs incurred in the export sales of wind towers to Australia during the investigation period.

In the final margin calculation spreadsheets, two worksheets were provided for SG&A calculation, one named "SG&A Mar 14", showing "SG&A grossed up on costs" of **[CONFIDENTIAL TEXT DELETED – number]**%. The other worksheet was entitled "SG&A Mar 14 domestic", showing "SG&A grossed up on costs" of **[CONFIDENTIAL TEXT DELETED – number]**%.

The **[CONFIDENTIAL TEXT DELETED – number]**% ratio was applied to calculate the Australian (ie export) cost to make and sell ("CTMS") of the goods. The **[CONFIDENTIAL TEXT DELETED – number]**% ratio was applied to calculate the domestic CTMS of the goods.

In the dumping margin calculation worksheet entitled "WINP EP NV DM", where the ADC calculated the normal value in the step described as "Add domestic Sales, General and Administration costs", the **[CONFIDENTIAL TEXT DELETED – number]**% ratio was applied, not the domestic ratio of **[CONFIDENTIAL TEXT DELETED – number]**%. 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 also no separate adjustment applied to account for the differences between domestic SG&A and Australian export SG&A as required by Section 269TAC(9).

Technically speaking, this methodology – of working out an export SG&A and adding it to the cost of production of the exported goods under Section 269TAC(2)(c)(i) – does not follow the methodology under Section 269TAC(2)(c). This is because Section 269TAC(2)(c)(ii) refers to an assumed domestic SG&A, not an export one.

It might have been in the ADC's mind that the amount of the export SG&A could be used for normal value purposes because a domestic SG&A would be brought back to an export SG&A by way of adjustment under Section 269TAC(9). Win&P is happy to present its arguments on the same basis, by way of correction of the Australian export SG&A used.

Nonetheless Win&P does maintain the position that the step-by-step methodology using the domestic SG&A first and then adjusting the constructed value is the correct or preferable way in which the ADC should have approached the task.

However, if the ADRP feels that the step by step methodology under the Act must be followed – even though theoretically it should arrive at the same end-point as using the Australian export SG&A in the first place - then Win&P asks that its submissions be considered as submissions directed towards the correction of the margin calculation from the domestic SG&A starting point and by way of adjustments to that constructed normal value.[13]

E Finding 4 – the finding that the SG&A amounted to [CONFIDENTIAL TEXT DELETED – number]% was incorrect

First of all, we note that SG&A, in the context of an anti-dumping investigation, generally refers to selling, general and administrative expenses making up the "cost to sell" component of the cost to make and sell the goods that is sometimes required to be determined by the Minister under Section 269TAC(2)(c) of the Act. This normally would include finance expenses as well. In Win&P's case, the ADC worked out a total "SG&A" ratio for normal value purposes at [CONFIDENTIAL TEXT DELETED – number]% of the "cost to make" or [CONFIDENTIAL TEXT DELETED – number]% of the total revenue of the subject wind towers which was comprised of two parts:

- "selling and general" expenses, referred to as "SG&A",[14] determined to be [CONFIDENTIAL TEXT DELETED – number]% of revenue; and
- "finance"[15] expenses, determined to be [CONFIDENTIAL TEXT DELETED – number]% of revenue.

We will use the same terminology in addressing the issues relating to SG&A in this submission. Issues relating to the determination of "selling and general" expenses are addressed under 7E Issues 1 and 2 below. Issues relating to "finance" expenses are addressed under 7E Issue 3 below.

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13 The relevant adjustment is referred to in 7E Issue 3. The other SG&A issues raised by this application – 7E Issues 1 and 2 – relate to the quantum of the SG&A relating to wind towers, whether exported to Australia or not.

14 The part of the total SG&A not related to finance expenses– see REP221, pages 36 and 37.

15 The part of the total SG&A relating to interest expenses, other income and foreign exchange gains and losses – see REP221, pages 38 and 39.

As a general comment, we observe that REP221 appears to suggest that the differences between the method used by the ADC and that submitted by Win&P concerning these issues relate to the allocation method to be adopted. This shows a misunderstanding of the issues. The key error with the ADC's calculation of the various SG&A cost items is that the ADC used costs unrelated to the production and sales of the goods under consideration in working out the SG&A and the resultant dumping margin.

Issue 1 - SG&A (selling and general expenses) calculation issue

REP221 states that the SG&A for the purpose of constructing normal value was worked out as follows:

> *In calculating and assessing SG&A costs it is the Commission's preferred method to use costs as a percentage of sales revenue unless the exporter can demonstrate a different allocation should apply.*
>
> *The SG&A costs as presented by Win&P comprised direct costs and company common costs. The company common costs were allocated to wind towers based on the company business plan and not actual revenue. Win&P also provided a company structure showing the different divisions within the company. The Commission considers that costs from those divisions would be shared across the wind tower and non-wind tower businesses.*[16]

Further

> *The Commission calculated SG&A costs based on its understanding of SG&A expenses and the allocation as presented at the visit. The calculation showed that wind towers were allocated what the Commission considers a reasonable share of SG&A costs based on the information available.*
>
> *The Commission notes that the SG&A allocation method preferred by Win&P results in SG&A expenses allocated to the non-wind tower businesses at over double the allocation to that for wind towers.*
>
> *Win&P did not provide evidence to justify why the allocation was weighted more heavily to one sector of the company than the other. As a result, the Commission considers that the allocation of SG&A expenses as presented by Win&P is not reasonable.*
>
> *The Commission considers that SG&A expenses based on an allocation of actual revenue share and the Commission's understanding of such expenses as presented at the verification visit reasonably reflects the SG&A expenses for wind towers.*[17]

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16 REP221, page 37

17 REP221, page 38

Win&P submits that these statements do not accurately reflect the information that was provided and explained to the ADC in detail during the investigation. Rather, there appears to have been a major misunderstanding of the facts presented to the ADC, and the implementation of a clearly inaccurate method in the calculation of SG&A.

SG&A is relevant to the determination of a dumping margin in terms of:

- applying the "ordinary course of trade" tests under Section 269TAAD; and
- determining the normal value under Section 269TAC.

Despite the different legislative contexts, SG&A is meant to be *"the administrative, general and selling costs associated with the sale of the like goods"*. Costs or expenses that are not associated with the sale of the goods are not relevant for the purposes of the Act.

Now we turn to the information provided by Win&P in relation to SG&A. Win&P considers that there is no dispute that the SG&A *associated with the goods* comprises two parts:

1 The SG&A expenses incurred directly in relation to the sale of wind towers, which in turn includes two components of cost:

[CONFIDENTIAL TEXT DELETED – composition of costs]

2 **[CONFIDENTIAL TEXT DELETED – composition of costs]** which should be allocated to the sales of wind towers.

There is no disagreement between Win&P and the ADC in relation to the determination of the first part of the SG&A (1(a) above). **[CONFIDENTIAL TEXT DELETED – composition of costs]**Win&P's SG&A was used, being KRW**[CONFIDENTIAL TEXT DELETED – number]** for 2012 and KRW**[CONFIDENTIAL TEXT DELETED – number]** for 2013. Again, there is no dispute about this part of the cost calculation.

In respect of **[CONFIDENTIAL TEXT DELETED – composition of costs]** costs (1(b) above), the ADC verified that:

> **[CONFIDENTIAL TEXT DELETED – corporate business structure]**.[18]

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18 Win&P visit report, page 7

Therefore, the only SG&A expenses associated to the goods of a direct kind ("direct" meaning the actual costs recorded to those sales and not "indirect" costs which might need to be allocated to those sales) is **[CONFIDENTIAL TEXT DELETED – composition of costs]**, being KRW**[CONFIDENTIAL TEXT DELETED – number]** for 2012 and KRW**[CONFIDENTIAL TEXT DELETED – number]** for 2013. Accordingly, Win&P and the ADC do not differ in finding that the direct SG&A expenses are:

- for 2012, KRW**[CONFIDENTIAL TEXT DELETED – number] [CONFIDENTIAL TEXT DELETED – corporate business structure]** KRW**[CONFIDENTIAL TEXT DELETED – number] [CONFIDENTIAL TEXT DELETED – corporate business structure]**; and
- for 2013, KRW**[CONFIDENTIAL TEXT DELETED – number] [CONFIDENTIAL TEXT DELETED – corporate business structure]** plus KRW**[CONFIDENTIAL TEXT DELETED – number] [CONFIDENTIAL TEXT DELETED – corporate business structure]**.

The issue in dispute arises in relation to the second part of the SG&A calculation (2 above) – **[CONFIDENTIAL TEXT DELETED – corporate business structure]** how they should be appropriately allocated to the sale of the wind towers. These company common expenses are required to be allocated because they are the company common expenses that are left over after the attribution of the relevant direct costs to the wind towers (directly, and not by way of allocation). They are costs which cannot be specifically traced **[CONFIDENTIAL TEXT DELETED – corporate business structure]**. Therefore, for SG&A purposes, company common expenses need to be shared **[CONFIDENTIAL TEXT DELETED – corporate business structure]**, by way of an appropriate allocation of expenses indirectly associated with the sales of the goods. Determining the SG&A to be allocated to different business activities as indirect expenses in this way is a standard requirement for these purposes.

At the stages of the Exporter Questionnaire ("EQ") response and the verification, Win&P considered that such expenses should be allocated according to its business plan. This is the method which is referred to as the *"method preferred by Win&P"* in REP221. This method was verified but rejected by the ADC in its visit report and in the SEF. The ADC advised that it considered that the company common expenses should be allocated in accordance with **[CONFIDENTIAL TEXT DELETED – corporate business structure]**. This view was maintained in REP221.

Win&P accepted this "actual revenue" method, and did not insist that the company common expenses be calculated in accordance with its business plan. Therefore it is clear that the statements in REP221:

- that Win&P "preferred" the common costs to be allocated according to business plan; and

- that Win&P requested that the allocation *be "weighted more heavily to one sector of the company than the other"*;

are misrepresentations of Win&P's ultimate position. These were not the issues contested by Win&P in the final stages of the investigation which took place before REP221 was provided to the Minister.

More relevantly, the making of these statements reinforces the view that the ADC misunderstood the clear information and advice provided by Win&P. The confusion on the ADC's part is further demonstrated by the fact that REP221 talks about the need to allocate the company common expenses, but does not then allocate the correct company common expenses.[19]

In its submissions during the investigation, Win&P identified that **[CONFIDENTIAL TEXT DELETED – corporate business structure]** expense that the ADC had used for allocation was the incorrect amount.

Throughout the investigation, Win&P presented account information showing that **[CONFIDENTIAL TEXT DELETED – corporate business structure]** expense was KRW**[CONFIDENTIAL TEXT DELETED – number]** for 2012 and KRW**[CONFIDENTIAL TEXT DELETED – number]** for 2013. This information is clearly identified in **[CONFIDENTIAL TEXT DELETED – corporate business structure]** SG&A account, which shows these amounts under the "company common" account ledger.[20] This is the source document **[CONFIDENTIAL TEXT DELETED – corporate business structure]** SG&A information, and was requested and examined during the on-site verification. The SG&A costs shown therein were recorded in the account *according to actual expenditure*. The accounts were (and are) maintained and audited in accordance with generally accepted accounting principles in Korea. They are not expenses calculated by way of allocation in any manner.

Despite providing **[CONFIDENTIAL TEXT DELETED – corporate business structure]** expense information to the ADC – and explaining it to the ADC - the ADC calculated the indirect SG&A by allocating an amount of KRW**[CONFIDENTIAL TEXT DELETED – number]** (instead of KRW**[CONFIDENTIAL TEXT DELETED – number]**) for 2012, and KRW**[CONFIDENTIAL TEXT DELETED – number]** (instead of KRW**[CONFIDENTIAL**

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19 The ADC allocated non-common expenses specifically incurred **[CONFIDENTIAL TEXT DELETED – composition of costs]**.

20 Please see the SG&A account information at **Attachment D**. This is the information emailed to the ADC after the meeting on 26 February 2013, which is referred to below.

TEXT DELETED – number]) for 2013, to the goods. This mistake was made in relation to both the dumping margin at the SEF stage and at the stage of REP221.

There is no apparent reason why such amounts were selected. After reviewing the calculation, Win&P identified that the ADC had not only used the company common expenses **[CONFIDENTIAL TEXT DELETED – corporate business structure]** for the allocation, but instead had also allocated the expenses **[CONFIDENTIAL TEXT DELETED – corporate business structure]** which are unrelated to the goods under consideration.

Win&P identified this issue in its submissions dated 24 January 2014 and 19 February 2014. Further, in order to clear up any confusion, Win&P met with the ADC in Canberra to further explain the issue on 26 February 2014. The ADC's mistake and the correct calculation method were explained in minute detail. During the meeting Win&P expressed the view that the confusion might have arisen from translations or the lack of translations of the headings to the various accounts and the differences in the use of words such as "direct expenses" and "indirect expenses". In particular, Win&P clarified that **[CONFIDENTIAL TEXT DELETED – corporate business structure]** expenses being incurred as **[CONFIDENTIAL TEXT DELETED – corporate business structure]** expenses did not mean that they were available for allocation, or that they could or should be allocated, to **[CONFIDENTIAL TEXT DELETED – corporate business structure]** expenses – which the ADC allocated to wind towers in its SG&A calculation – are expenses incurred **[CONFIDENTIAL TEXT DELETED – corporate business structure]**.

Win&P demonstrated to the ADC again that **[CONFIDENTIAL TEXT DELETED – corporate business structure]** SG&A account showed that the expenses were recorded for each department separately:

> **[CONFIDENTIAL TEXT DELETED – composition of costs]**[21]

For the purpose of determining the SG&A for wind towers, Win&P informed the ADC that all expenses under "tower" should be used in order to account for the direct SG&A, and that all expenses under "company common" should be allocated in accordance with revenue, to account for the indirect SG&A **[CONFIDENTIAL TEXT DELETED – corporate business structure]**. We also informed the ADC that costs which were incurred in business units clearly unrelated to the goods must not be allocated as SG&A for

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21 Issues relating to R&D are further discussed below.

wind towers because they were not SG&A associated to the sales of wind towers, either directly or indirectly.

Win&P considers that the issue here is very straight forward. There may have been a misunderstanding in the early stage of the investigation, due to translation or to the complexity of the data. However this was addressed and clarified again and again as the investigation continued. Win&P's straight forward submissions continued to be ignored by the ADC. The ADC continued to allocate expenses **[CONFIDENTIAL TEXT DELETED – corporate business structure]** departments as "company common" expenses to the goods in calculating indirect SG&A.

What is even more disappointing is that REP221 blames Win&P for the ADC's own mistake in the SG&A determination. In light of this situation, Win&P wishes to recite the communications which took place between Win&P and the ADC at the meeting on 26 February 2014.

1 When the detailed **[CONFIDENTIAL TEXT DELETED – corporate business structure]** information was presented at the meeting (a spreadsheet), the ADC officer initially disagreed that it had been presented by Win&P prior to the meeting. Win&P advised that the spreadsheet had been shown to the ADC during the verification. The ADC officer then accepted that it was presented during the verification but that it was not provided with written/printed translations of the headings included in the spreadsheet. The ADC officer also said that the spreadsheet previously provided did not include any worksheets other than the detailed **[CONFIDENTIAL TEXT DELETED – corporate business structure]** information spreadsheet that was presented at the meeting.

2 Win&P's financial consultant explained to the ADC officer that those other worksheets were not relevant for the purpose of explaining **[CONFIDENTIAL TEXT DELETED – corporate business structure]**to the ADC, and of showing where the company common expenses were clearly stated in the account. After seeing the translation, one of the ADC officials remarked *"well, that [Win&P's explanation] seems to make sense"*.[22] Win&P then offered to provide a copy of the detailed **[CONFIDENTIAL TEXT DELETED – corporate business structure]**information with the account ledger headings translated, if that would help the ADC to have a clear understanding of the issue. The ADC thanked Win&P for the offer and said that would be helpful. Most importantly,

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22 There were six other people in this meeting, and this statement was audible to all.

Win&P submitted that only the company common expenses should be allocated to the wind towers as indirect SG&A, and that **[CONFIDENTIAL TEXT DELETED – composition of costs]** expenses are not company common related expenses and should not be allocated to the wind towers.

3 The ADC officers commented that they did not have difficulties with the information presented and that they would update the margin calculation and provide the updated spreadsheet for Win&P's review.[23] This, Win&P was told, would be done, and the spreadsheets would be provided to Win&P before REP221 was provided to the Minister. We asked whether that would be done in time for Win&P to check the updated spreadsheets and provide any further comments. The ADC officials said that there would be that opportunity, but that Win&P should not expect that there would be further changes after the point that the updated spreadsheets were provided to us.

4 As agreed, immediately after the meeting we emailed to the ADC the detailed **[CONFIDENTIAL TEXT DELETED – composition of costs]** information with further explanation as to the issues involved.[24] In the email, we further confirmed the matters that had been discussed - for the ADC's benefit – as follows:

[CONFIDENTIAL TEXT DELETED – confidential communication]

5 The response from the ADC to this email was **[CONFIDENTIAL TEXT DELETED – confidential communication]**.[25] There were no further questions or requests for documents by the ADC regarding this issue. At no time did the ADC contact Win&P to express concerns that the ADC had not seen some "associated worksheet" that was essential to understanding Win&P's costs and allocation – which REP221 now claims to have been the case.

6 The updated spreadsheets were provided to Win&P on 21 March at 5:03 pm. This was the last day for the ADC to provide its report to the Minister. We immediately called the ADC but there was no answer. An email sent by us at 6:29pm that evening said the following:

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[23] This never happened, despite Win&P's consistent communication with ADC requesting to see updated calculation correcting the error.

[24] Sent 4:05pm, 26 February 2014.

[25] Received 9:55am 27 February 2014.

[CONFIDENTIAL TEXT DELETED – confidential communication]

The fact is, contrary to what is stated in REP221, Win&P did provide the worksheets essential to evidencing and understanding the SG&A costs **[CONFIDENTIAL TEXT DELETED – composition of costs]** allocating the company common expenses. Win&P provided **[CONFIDENTIAL TEXT DELETED – corporate business structure]** account book spreadsheet. There is no worksheet that can be provided for the ADC to understand the "allocation" of such costs. All of the costs in that spreadsheet were recorded on an actual basis. None of the costs were costs allocated from somewhere else.

The complaint by the ADC in REP221 that:

> *Win&P undertook to email the workbook to the Commission with all associated worksheets. Two single work sheets were emailed with translations for the separate department headings however the requested associated worksheets were not included in the workbook.*
>
> *The Commission considers that the associated worksheets were essential to understanding Win&P's costs and allocations. Therefore the Commission has relied on its understanding of the original worksheets by Win&P at the verification visit and allocated SG&A using actual revenue.*

is untrue. We find it to be farcical for the ADC to express a view about the essential nature of "associated worksheets" when:

- the ADC officials had the detailed **[CONFIDENTIAL TEXT DELETED – corporate business structure]** information that was provided fully explained to them;
- the ADC officials were told that the worksheets did not have the relevance later claimed by the ADC;
- the ADC officials did not see the associated worksheets in order to form that view about them;
- the ADC officials thanked Win&P for providing the detailed **[CONFIDENTIAL TEXT DELETED – corporate business structure]** information and did not ask for the associated worksheets.

We also point out that the second paragraph quoted above continues to maintain the view that the issue related to the allocation of SG&A using actual revenue. That was not an issue, as Win&P agreed with that approach. The issue was the amount of SG&A that should be allocated because it was associated with the goods. The ADC allocated **[CONFIDENTIAL TEXT DELETED – corporate business structure]** SG&A in the construction of the normal value, when it should not have done so.

We are specifically instructed to make it known to the ADRP that Win&P's concerns were inflamed by the knowledge that after Win&P had met with the ADC officials to explain the information to them the government-sponsored Australian Industry Group wrote to the ADC urging the ADC to conclude that

Win&P's information was unreliable and should be disregarded.[26] It was never suggested to Win&P by the ADC that its information was unreliable.

In summary, Win&P is perplexed:

- as to why the ADC would continue to present the issue concerning the SG&A calculation as if it turned on a "preference" of allocation methods between a "revenue basis" or a "business plan basis" – this was not an issue;
- as to why the ADC would insist on calculating the SG&A *"on an understanding of the information presented at the visit"*, when such understanding was proven to be wrong and when the correct understanding was repeatedly pointed out and patiently explained by Win&P;
- as to why the ADC would ignore the translated, detailed SG&A account – which is an audited account book verified by the ADC during the on-site visit and was not prepared for the purpose of this investigation;
- as to why the ADC would reject the information shown **[CONFIDENTIAL TEXT DELETED – corporate business structure]**, on the basis that some "associated worksheets" that the ADC claims to have never seen nor examined, and which Win&P explained as not being relevant to an understanding of the issue, were so "essential" that the ADC could instead revert to an incorrect understanding of the facts.[27] [28]

In simple terms, Win&P submits that the information provided to the ADC during the investigation clearly demonstrated **[CONFIDENTIAL TEXT DELETED – corporate business structure]** were required to be allocated for the purposes of determining the SG&A associated with the goods ("the company common expenses **[CONFIDENTIAL TEXT DELETED – corporate business structure]** allocated to the sales of wind

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[26] Visit report, page 37. For further detail, please refer to submission made by AIG dated 28 February 2014

[27] If the ADRP has any difficulty at all in locating information provided, presented or explained to the ADC please seek our assistance.

[28] Effectively, in relation to the rejection of Win&P's evidence, REP221 says that because of what we didn't know we decided to ignore what we were provided with. There was no finding that Win&P was uncooperative, nor could there have been. Win&P participated in a strict five day verification. Because of the severe effect of the incorrect dumping margin that was advised to Win&P during the investigation Win&P and its representatives – including ourselves – have had a very strong focus on providing the clear explanations and information to make things right.

towers") were the company common expenses **[CONFIDENTIAL TEXT DELETED – corporate business structure]** in the spreadsheet showing these costs as provided to the ADC.

Indeed, the ADC had already agreed with this proposition, well before REP221 was provided to the Minister. In the Win&P visit report, the ADC said:

> *SG&A expenses consist of direct expenses and allocated expenses, direct expenses are those directly incurred by the Tower department and allocated are common expenses* **[CONFIDENTIAL TEXT DELETED – internal business arrangement]**.
>
> ....
>
> *We consider that the common expenses should be allocated based on actual turnover and have recalculated the allocations to reflect actual turnover for the investigation period.*[29]

The **[CONFIDENTIAL TEXT DELETED – corporate business structure]** company common expenses were KRW**[CONFIDENTIAL TEXT DELETED – number]** for 2012 and KRW**[CONFIDENTIAL TEXT DELETED – number]** for 2013. The ADC erred in allocating expenses other than the company common expenses - which cannot be said to be directly or indirectly associated to the sales of the goods under consideration - to the SG&A of the goods. The ADC's method resulted in an inflated SG&A that included costs unrelated to the production and sales of the goods under consideration. This ultimately resulted in a wrongfully inflated dumping margin.

Win&P requests the correction of the calculations to rectify this error. The ratio of the SG&A for the goods should be calculated using the direct SG&A expenses **[CONFIDENTIAL TEXT DELETED – corporate business structure]** and the company common expenses **[CONFIDENTIAL TEXT DELETED – corporate business structure]**. The SG&A ratio should therefore be stated as **[CONFIDENTIAL TEXT DELETED – number]**%, not **[CONFIDENTIAL TEXT DELETED – number]**% of the revenue.

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[29] Win&P visit report, at page 26

Issue 2 – the R&D expense issue

Regarding the inclusion of R&D expenses in the SG&A, Win&P advised the ADC that **[CONFIDENTIAL TEXT DELETED – composition of costs]** designing of wind towers is undertaken by Win&P's customers. These designs are determined by the commercial requirements of the customer, by the geographical, climatic and atmospheric conditions of the site concerned, and by the turbine to be deployed. Customers issue tenders which clearly set out the design and the specifications required by the customer, and the successful tenderer will then manufacture in accordance with those specifications. **[CONFIDENTIAL TEXT DELETED – corporate business structure]** engage in any wind tower related R&D during the POI.[30]

Therefore, it should have been abundantly clear to the ADC that there were no R&D expenses associated with the sale of the goods concerned, and that they should not be included in any SG&A expenses for those goods. Win&P also advised that almost all of the R&D expenses **[CONFIDENTIAL TEXT DELETED – corporate business structure]**.[31] **[CONFIDENTIAL TEXT DELETED – corporate business structure]** R&D for the purposes of production and sale.

In support of this fact, Win&P also provided the ADC with its Business Plan applicable to the POI, both during and after the verification. All of the R&D projects shown in that business plan were **[CONFIDENTIAL TEXT DELETED – corporate business structure]** shows that a very small proportion, **[CONFIDENTIAL TEXT DELETED – number]**, is allocated to "other" projects, the point is that none of the R&D projects related to wind tower sales.

During Win&P's meeting with the ADC on 26 February 2014, it was further pointed out that the R&D expenses **[CONFIDENTIAL TEXT DELETED – corporate business structure]** not wind towers.[32]

In response to the information and submission provided by Win&P regarding this issue, REP221 states:

> *The Commission notes that documents relevant to wind towers state that the purchaser and provider undertake to work together to develop lower cost solutions. The Commission also notes a wind tower project that was being developed in conjunction with the purchaser. The*

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30 Visit report, page 26

31 Draft margin calculation submission, page 5.

32 This point is also made clear in Win&P's email to the ADC dated 26 February 2014, which says, "*As you can also see in the summary chart, the cost centre for R&D is* **[CONFIDENTIAL TEXT DELETED – corporate business structure]**

> *Commission considers that these documents evidence that research and development work is applicable in relation to wind towers.*
>
> *The Commission considers that the documentation provided does not support the contention by Win&P that R&D is division specific to the on-wind [sic.] tower segment only and that R&D expenses should be allocated based on revenue share.*

With respect, the logic for rejecting the facts and proposition presented by Win&P is not clear from this statement, or from any other statement in REP221. Win&P submits that the documents and account information provided to the ADC during the investigation *do* support the fact that R&D costs were not incurred or related to wind tower. This excuse to ignore all of the direct evidence - *that the purchaser and provider undertake to work together to develop lower cost solutions* – came completely out of left field. It was not mentioned in the SEF and was never put to Win&P.

In any case, the documents and the accounting information presented to the ADC clearly shows that most of the R&D expenses were incurred **[CONFIDENTIAL TEXT DELETED – corporate business structure]** that the remainder ("others") was in respect of projects unrelated to wind tower. Even if the observation that "*documentation provided does not support the contention by Win&P that R&D is division specific to the [n]on-wind tower segment only*" is correct – which Win&P disagrees with strongly - it cannot be said to be correct or reasonable to then allocate all of the R&D expenses to wind towers according to revenue, thereby resulting in **[CONFIDENTIAL TEXT DELETED – number]**% of those expenses being incorporated into the alleged SG&A costs of the wind towers.

The decision is incorrect and Win&P respectfully requests that this be recognised and rectified.

Issue 3 – the forex gains and losses issue

For the purpose of constructing normal value under Section 269TAC(2)(c), the Minister is required to determine the SG&A that would have been incurred for the sales of the goods under consideration in the domestic market:

> *on the assumption that 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 the administrative, selling and general costs associated with the sale and the profit on that sale*

The differences between the domestic-based SG&A and that incurred for the export would then be subject to adjustment to ensure fair comparison in accordance with Section 269TAC(9):

> *...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.*

In the calculation of the total SG&A, the ADC allocated the amount of foreign exchange gains and losses incurred **[CONFIDENTIAL TEXT DELETED – composition of costs]** during the investigation period. REP221 regarded these as part of SG&A and allocated them to the goods under consideration as part of the "finance" expenses.

In the visit report for Win&P, the ADC rejected Win&P's claim that such expenses should not be included in the allocation of SG&A for wind towers. This rejection was on the basis that they were *related* to the cost of production of the goods:

> *We consider that foreign exchange gains [sic.] are related to the cost of production of the goods. Win&P purchase [sic.] raw materials such as plate in US dollars and exports in Australia [sic.] dollars, the values are booked to the accounts using the rate of exchange applying on invoice date and any foreign exchange gains and losses result in differences in the exchanges [sic.] rates from the invoice date and payment date [sic.].*[33]

In its submission to the ADC in response to the visit report and the preliminary margin calculation, Win&P advised that the foreign exchange gains and losses in 2012 were *not related* to the goods:

> *However, as indicated in Win&P's EQ response, there were no exports of the goods under consideration to Australia during 2012. All exports of the goods to Australia were during 2013. Therefore, there could not be any foreign exchange gain/loss for 2012 in relation to the export sale of the wind towers to Australia. This accounts for any exchange gain/loss which might be relevant in the case of Win&P at the sales level.*

Win&P maintains the correctness and relevance of this submission. The 2012 foreign exchange gains and losses of Win&P have no relevance to the exercise so far as it concerns the SG&A for the wind towers exported to Australia. This is because, **[CONFIDENTIAL TEXT DELETED – corporate business structure]**, any exchange gains or losses incurred by Win&P in 2012 would have had no relationship with Win&P's exports to Australia – which all occurred in 2013.

REP221 states:

> *It is noted that Win&P argues that foreign exchange gains and losses are not relevant to wind towers, as in their view, there were no exports to Australia during 2012. However foreign exchange gains and losses are relevant to both domestic and export sales.*

This is incorrect. Win&P *does* recognize that foreign exchange gains and losses can be relevant for both

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33 Win&P visit report, page 26

domestic and export sales, at both the sales level (currency movement between invoice and payment) and the production level (materials purchasing). As already mentioned, Win&P's submission is that, at the sales level, the 2012 foreign exchange gains and losses cannot be relevant for the SG&A which is ultimately included in the normal value, because there were no Australian sales in 2012.

Further, in relation to production, Win&P told the ADC – and proved to the ADC - that the foreign exchange gains and losses relevant to the wind towers exported to Australia in 2012 were all incurred **[CONFIDENTIAL TEXT DELETED – composition of costs]**:

> **[CONFIDENTIAL TEXT DELETED – corporate business structure, composition of costs and numbers]**

Therefore for the purpose of determining the SG&A which is ultimately included in the normal value, the relevant 2012 cost to be used is the **[CONFIDENTIAL TEXT DELETED – composition of costs, corporate business structure]** are unrelated to the goods exported to Australia and therefore should not be included in the normal value.

We note that REP221 states that:

> *Whilst the Commission accepts that foreign exchange gains and losses from export sales should not be allocated to the domestic goods, foreign exchange gain and losses from imported inputs would be relevant to the domestic goods and should therefore be included in the domestic cost to make and sell.*

Again, Win&P does not disagree with this comment. However, by the same token, foreign exchange gains and losses from sales activities not related to the Australian sales of the goods should not be allocated to the Australian SG&A. Further, foreign exchange gains and losses from imported inputs unrelated to the goods exported to Australia also should not be allocated to the Australian SG&A.

More importantly, the key issue under dispute here is that, if the domestic SG&A calculated by the ADC contains a cost that is irrelevant to the Australian sales of the goods (ie. **[CONFIDENTIAL TEXT DELETED – composition of costs]**), then this needs to be accounted for in the calculation of the normal value in the correct way.

- If a normal value is worked out by the step-by-step methodology under Section 269TAC(2)(c), by using domestic SG&A[34] and then adjusting the constructed value, then:
    - there should be no export-related foreign exchange gains and losses in the constructed value;
    - the Australian export related foreign exchange gains and losses should be added to the constructed value;
    - the domestic-related foreign exchange gains and losses should be deducted from the constructed value.
- If the ADRP believes it is acceptable to construct the normal value by moving directly to such a construction by using the Australian export-related SG&A, then:
    - no domestic-related foreign exchange gains and losses should be captured;
    - only Australian export-related foreign exchange gains and losses should be included.

In REP221, the ADC states:

> *The Commission originally allocated foreign exchange gains and losses based on actual revenue share. Win&P subsequently provided information on what it claimed were foreign exchange gains and losses relevant to the purchase of imported inputs and to be allocated to the domestic cost to make and sell.* [underlining added]

There appears to be a misunderstanding in the underlined text. As already explained above, Win&P's claim was that foreign exchange gains and losses unrelated to the goods exported to Australia should not be allocated to the Australian cost to make and sell. Win&P's claim is not about *domestic cost to make and sell,* provided that relevant adjustment is made to suit the calculation methodology.

The confusion here may have been caused by the ADC's own margin calculation – in which it calculated a single SG&A and did not differentiate the Australian SG&A and domestic SG&A. By reviewing the dumping margin calculation spreadsheet provided by the ADC for the margin calculated in the SEF, Win&P observes that only a single SG&A was calculated by the ADC for *both* domestic and the Australian SG&A, and that such SG&A was used for normal value purposes.[35] Win&P was under the

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34 Instead of jumping directly to export SG&A – see Finding 3 above.

35 The confusion is not solved in the final margin calculation either. In the final margin calculation spreadsheets, two worksheet was provide for SG&A calculation, one named "SG&A Mar 14", stating a "SG&A grossed up on costs" at **[CONFIDENTIAL TEXT DELETED – number]**%. The other worksheet was entitled "SG&A

impression that this was done to avoid the separate mathematical procedure of adjustment based on the difference between Australian SG&A and the domestic SG&A to ensure a fair comparison pursuant to Section 269TAC(9).

Therefore, Win&P disagrees with the ADC's conclusion that:

> *The Commission does not accept Win&P's claim. It is clear that not all imported raw material for 2012 have [sic.] been provided that would be clearly relevant to domestic and exported goods. Additionally, Win&P provided no explanation for how relevant expenses have been allocated.*
>
> *The Commission rejects Win&P's claim and calculates foreign exchange gains and losses by allocating it using actual revenue as was originally done.*

For the purpose of identifying what was relevant to the exported wind towers, Win&P provided information showing that **[CONFIDENTIAL TEXT DELETED – cost composition]** provides the only relevant information for the calculation of any amount of foreign exchange-related SG&A to be allocated to the Australian sales. In relation to **[CONFIDENTIAL TEXT DELETED – composition of costs]**, it is enough to say that they are *not* relevant to the Australian sales. Win&P does not object to the method of allocating such costs to the domestic SG&A according to actual revenue.

In relation to how the foreign exchange gain and losses *relevant* to the Australian sales should be allocated – this can be done by any appropriate manner of allocation. Win&P has already provided accurate and reliable cost information to enable such a determination to be made.

Again, Win&P submits that the issue here is not about how foreign exchange gains and losses should be allocated. Whichever way the ADC decides to allocate the cost, the issue is whether the costs so determined are indeed costs associated with the production and sales of the goods. It is clear that:

> **[CONFIDENTIAL TEXT DELETED – corporate business structure, composition of costs]**

Mar 14 domestic", stating a "SG&A grossed up on costs" at **[CONFIDENTIAL TEXT DELETED – number]**%. It was the **[CONFIDENTIAL TEXT DELETED – number]**% ratio that was applied to calculate the *Australian CTMS*. This ratio was also used in the calculation of normal value as in the step described as "*Add domestic Sales, General and Administration costs*". However in the determination of ordinary course of trade of the domestic sales, ADC used **[CONFIDENTIAL TEXT DELETED – number]**% as the SG&A ratio. Further, Win&P notes that the domestic SG&A ratio of **[CONFIDENTIAL TEXT DELETED – number]**% is less than the SG&A ratio applied as Australian SG&A, because foreign exchange gains and losses were removed from the domestic SG&A. However, as discussed in this section, it is the Australian SG&A that should not include an allocation of certain foreign exchange gain and losses – on the basis that they are not costs associated with the goods exported to Australia. There appears to be some confusion on the ADC's part.

Win&P respectfully requests that the ADRP accounts for the foreign exchange gains and losses that are unrelated to the goods exported to Australia during the POI in the calculation of dumping margin either through their exclusion from the SG&A ultimately used or through adjusting out any differences between domestic-related and Australian export-related foreign exchange gains and losses to ensure a fair comparison.

As neither was done in REP221, the decision made was not the correct and preferable one.

F Finding 5 – Profit used in the construction of normal value

REP221 determined the normal value of the wind towers exported by Win&P during the investigation using a constructed method. This method was described as follows:

> *The Commission found that all sales of wind towers were at a loss and there were no sales made in the ordinary course of trade. As a result, a normal value is unable to be determined under s.269TAC(1).*
>
> *Given the unique nature of wind towers in terms of their technical specifications, exports to third countries are not considered appropriate for establishing normal values under s.269TAD(2)(d).Pursuant to s.269TAC(2)(c), normal values were constructed for the investigation period 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*

As mentioned above, Win&P considers that there are mistakes in the calculation of the SG&A. Further, if such errors are corrected, then some of Win&P's domestic sales of the like goods would appear to have been made in the ordinary course of trade, therefore enabling the determination of normal value under Section 269TAC(1).

In Win&P's case, the normal value may only be determined under Section 269TAC(2)(c) if it is found that the relevant domestic sales – being the domestic sales of like goods in the ordinary course of trade in arms-length transactions - were "absent" or of "low volume".[36] Alternatively, Section 269TAC(2)(c) may

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[36] It appears that the ADC formed the view that *"all sales of wind towers were at a loss and there were no sales made in the ordinary course of trade"*. However this is not the case, because the ADC has miscalculated

apply, not because of the absence of a low volume of domestic sales of like goods in the ordinary course of trade, but because the domestic sales made in the ordinary course of trade and in arms-length transactions were not "*identical*" or did not have *"characteristics that closely resembl[ed]*" the exported goods. In other words, a constructed normal value may be used where "like goods" were not sold in Win&P's domestic market.[37]

In either scenario, it must follow that Regulation 181A(2) does not apply, as there will be no available *"data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade".*

Regulation 181A (3) provides:

> *If the Minister is unable to work out the amount by using the data mentioned in subregulation (2), the Minister must work out the amount:*
>
> *(a) by identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export; or*
>
> *(b) by identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or*
>
> *(c) subject to subregulation (4), by using any other reasonable method and having regard to all relevant information.*

REP221 states that the ADC applied Regulation 181A(3), but found that:

> *None of Win&Ps sales were in the ordinary course of trade, and the Commission does not have information to identify a profit using actual amounts realised in the same general category of goods or information to identify a profit using amounts from other exporters or producers.*

As mentioned above, Win&P submits that wind towers sold in the domestic market in the ordinary course of trade did exist during the investigation period - if the correct SG&A is calculated.

In any case, information prescribed under Regulation 181A(3)(a) – being the information that was verified by ADC and that is most relevant to Win&P's dumping margin - is indeed available to the ADC. Win&P reported its domestic sales of wind towers and the relevant price and cost information in order to

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Win&P's costs associated with the production and sale of the goods under consideration, as outlined in this application to the ADRP.

37 Section 269T, definition of "like goods"

work out the amount realised by Win&P from the sales of the wind towers, being the "same general category" of goods in its domestic market. The ADC's calculation suggests that the actual amount realised by Win&P from the sales of the same general category of goods in the domestic market was zero. Accordingly, if this remains the case after the ADRP's review of the other findings, this amount should be included for the purpose of constructing the normal value under Section 269TAC(2)(c) and (5A) accordingly.

In Win&P's submission in response to the SEF, we drew the ADC's attention to the legislative context surrounding this issue. We recalled that before Section 269TAC(13) was repealed, the Act explicitly precluded the inclusion of any profit in calculating normal value under Section 269TAC(2), if the operation of the constructed normal value method were to be triggered by the ordinary course of trade test under Section 269TAAD. Even after Section 269TAC(13) was repealed, it was not substituted with a Section to mandate that a positive "amount realised" should always be added into a constructed normal value, or that this was "desirable", or that it was "to be had regard to" by the Minister.

Even it was decided not to be possible to work out the amount of profit by using the data relating to Win&P's domestic sales of wind towers – a proposition with which Win&P does not agree – then it is still not the case that the methodology referred to in REP221 is a *"reasonable method having regard to all relevant information"* as the words of Regulation 181A(3)(c) would require. With the utmost respect, we say that the adoption of a 2010 profitability statistic, for the metal fabrication industry, does not comply with a proper standard of reasonableness of which we are aware. If resort is had to Regulation 181A(3)(c), then the task must be to adopt a profitability for the POI for producers or exporters of the same general category of goods as wind towers. Given that the KOSIS metal fabrication industry data is three years old, and that the classification includes manufacturers of doors, central heating boilers, reservoirs, nuclear reactors and steam generators, we submit that the method is not reasonable.[38] Indeed. Section 269TAC(4) provides that any method used under Regulation 181A(3)(c) must not exceed:

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[38] Please be reminded that this is not an exercise in seeking out what is euphemistically referred to as "relevant information" in other parts of the legislation. In our experience the "relevant information" permission is adversely and unreasonably applied. Also, we see no indication that the applicants have made any submissions on this matter at all.

> *the amount of profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export*

In this regard, we note REP221 states that:

> *...the Commission does not have information to identify a profit using actual amounts realised in the same general category of goods or information to identify a profit using amounts from other exporters or producers.*[39]

It is not clear to Win&P whether the requirement under Regulation 181A(4) was considered by the ADC during the investigation. However, the failure or inability to find the information required under Regulation 181A(4) does not obviate the obligations imposed upon the ADC/the Minister under the Regulation. If the condition imposed on the application of Regulation 181(3)(c) cannot be satisfied, then it follows that the method prescribed under Regulation 181(3)(c) cannot be used, and certainly not in a way that makes unfavourable presumptions that adversely inflict the interest of Win&P.

8 Conclusion

The decisions to which this application refers are reviewable decisions under Section 269ZZA of the Act. Where references are made to the ADC and its recommendations, it is those recommendations which were accepted by the Minister/Parliamentary Secretary and form part of the reviewable decision that Win&P seeks to have reviewed.

Win&P is an interested party in relation to the reviewable decision.

Win&P's application is in the approved form and has otherwise been lodged as required by the Act.

We submit that the Win&P's application is a sufficient statement setting out Win&P's reasons for believing that the reviewable decisions are not the correct or preferable decisions, and that there are reasonable grounds for that belief for the purposes of acceptance of its application for review.

This application contains confidential and commercially sensitive information. An additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information is at **Attachment E**.

On behalf of Win&P, we respectfully request that the ADRP:

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- undertake the review of the reviewable decision as requested by this application under Section 269ZZK of the Act; and
- recommend that the Minister revoke the reviewable decision and substitute a new decision to be specified by the ADRP on the basis of a corrected dumping margin calculation, rectifying the errors identified in this application.

Lodged for and on behalf of Win&P., Ltd

Daniel Moulis
Principal

Charles Zhan
Lawyer

Moulis Legal