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The Director – Investigations 1
Australian Trade Remedies Commission
GPO Box 2013
Canberra ACT 2601

Investigation No. 691 - Aluminium windows and doors exported from the People's Republic of China. Submission in response to the Statement of Essential Facts

Dear Director,

This submission is made on behalf of Supplyhaus Pty Ltd (Supplyhaus), an Australian importer and supplier of aluminium windows and doors (the goods). Supplyhaus responded to the Commission's importer questionnaire in this investigation. It responds to Statement of Essential Facts No. 691 (SEF 691) and requests that the Commissioner have regard to the points raised in making his recommendations and preparing the final report to the Minister.

Supplyhaus confirms that its current provisional securities and future interim dumping duty liabilities stem from sourcing of the subject goods from the following exporters:

Business Name	Chinese Entity	Status
[redacted]	[redacted]	Residual
[redacted]	[redacted]	Residual
[redacted]	[redacted]	Residual
[redacted]	[redacted]	Residual
[redacted]	[redacted]	Residual

Supplyhaus submits that SEF 691 does not yet contain a reasoned basis for the preliminary dumping duty rates or for the finding that the subject imports caused material injury. Its concern is with the foundations of the preliminary findings, and in particular with the matters summarised below. It begins with an understanding of the Australian market and the conditions of competition in it, which the SEF does not adequately examine.

The matter most directly relevant on Supplyhaus' duty liability is the amount for profit in the normal values used for calculating the residual exporter normal value. Those normal values are averages of the selected exporters' normal values. One of the averaged normal values, Yuanjiang's, includes a profit amount worked out under s 45(3)(b) of the *Customs (International Obligations) Regulation 2015* (Cth) from other exporters' sales in the ordinary course of trade only. Section 45(3)(b) contains no such limit, the Commission's own Manual says it will not read one in, and the Commission corrected the same error in 2016. It also shows that the profit in most of the selected exporters' own normal values was measured against recorded costs the SEF had rejected for every other purpose.

The measure of injury rests on tender evidence that the SEF itself describes inconsistently, and on an extrapolation from a sample the SEF accepts is not representative. The finding that the

Australian industry competes across every building class relies on a confidential attachment, against the SEF's own acknowledgement that imports are more prevalent in Class 2 to 9 buildings. Factors other than dumping are identified in the SEF and then set aside without being separated or measured. The volume of "dumped" imports, and the 70.4% rate for uncooperative exporters, are produced largely by presumption. The non-injurious price is built on a finding that Ventora was selling at a loss throughout the injury period, which the next page of the SEF contradicts.

Behind the individual errors sits a broader concern. The system as it operates weighs the injury claimed by the applicant industry and gives no structured weight to the cost of measures to importers, builders and the people who buy what they build. The Productivity Commission identified that imbalance in 2009, and the Act still contains no public interest test. Only two points in the system allow that cost to be weighed, including the Minister's discretion under s.269TL, and the Minister's discretion to apply a lesser duty. The final section asks the Commission to give the Minister a full assessment of the downstream effects of the proposed measures, and to recommend that the Minister consider not imposing them or, at the least, impose a lesser duty based on a properly calculated non-injurious price.

The Australian market and the conditions of competition

This section sets out Supplyhaus' understanding of the Australian market, drawn from its experience as an importer and supplier of the goods. It describes conditions of competition that the SEF does not examine, or treats as secondary. Each is directly relevant to whether imports from China caused the injury the SEF finds.

Two different parts of the construction industry

Supplyhaus acknowledges the substantial investment, manufacturing capability, skilled workforce and production capacity that the Australian window and door industry has built to serve Class 1 residential construction. That industry matters to Australian manufacturing, to employment and to housing construction. Supplyhaus supports the protection of Australian manufacturers from material injury caused by dumping or subsidisation, where that injury is established through the statutory process.

Its concern is that this investigation treats two materially different parts of the construction industry as one, without accounting for the differences in their products, procurement, technical requirements, commercial structures and domestic supply. Conventional residential windows and large, complex facade systems for apartment and commercial buildings are both made of aluminium framing and glass. That shared material does not make them commercially interchangeable. The comparison is closer to that between a passenger car and a commercial bus. Both share basic components and materials, but their design requirements, manufacturing processes, specialist resources, operating conditions and delivery capabilities are materially different. Those differences call for separate consideration in the Commission's assessment of market segmentation, competition, injury and causation.

Separate markets: an example from within one corporate group

Supplyhaus Facades is part of the McNab Group, alongside McNab Constructions. Despite sitting within the same group, Supplyhaus does not supply glazing for Class 1 residential projects, or for

smaller and less complex Class 2 to 9 projects. That is a deliberate commercial choice. It reflects differences in product systems, design capability, organisational resources, project delivery methods, cost structures and contractual risk. Supplyhaus was established to serve larger and more complex multi-residential and commercial facade projects. Its processes, staff, systems and structure are built around those projects, and are not suited to competing for conventional residential window packages.

The point is a practical one. Even within an integrated construction group, the capability and business model needed for one segment cannot simply be turned to the other. Common materials do not make businesses that serve different construction markets interchangeable.

Local capacity is concentrated in Class 1 buildings

The SEF accepts that "some Australian industry members may have greater exposure to Class 1 buildings or generally the residential segment" and that "some imported AWD may be more prevalent in the Class 2 to Class 9 buildings". It nonetheless rejects the proposition that the industry is confined to Class 1 work, stating that "the commission does not consider that the evidence obtained during this investigation supports the broader proposition that the Australian industry is confined to, or, only meaningfully supplies Class 1 buildings".

Supplyhaus does not suggest that no Australian fabricator supplies Class 2 and above projects. Its point is one of scale. Supplyhaus works mainly in the Class 2 to 9 multi-residential and commercial facade market in South East Queensland. Based on its industry experience, its tender participation and its knowledge of existing suppliers, Supplyhaus estimates that glazing fabricators based in South East Queensland have the combined capability and capacity to deliver about 10% to 20% of the Class 2 to 9 glazing work now under contract in that region, most of it on the smaller and less complex projects. This is an indicative industry estimate, not an audited assessment of capacity. Supplyhaus encourages the Commission to investigate actual local delivery capability for itself. Several Australian fabricators serve smaller and less complex Class 2 to 9 developments well. Their capacity to take on larger, highly customised, multi-storey facade packages is much more limited.

The SEF answers the capacity question with spare capacity. It records that "a majority of responding industry members reported available, underutilised or scalable production capacity and the ability to increase production without the need for significant additional capital investment". Spare capacity on lines built for Class 1 windows and doors is not capacity to supply Class 2 and above projects. Those projects call for different systems, engineering, testing and project delivery, as we outline below. In our experience, a local fabricator that turned its lines to Class 2 and above work could do so only by giving up Class 1 production. The supply would move from one segment to the other. It would not be added to the market.

Nor is the limit only one of factory size, equipment or production lines. Delivering a large, customised, multi-storey facade package depends on the capability of the whole organisation, including the following.

- established design, engineering, procurement, production and quality-control procedures.

- experienced project managers, facade designers, engineers, draftspersons and specialist installers.
- document control, technical review, certification and compliance systems.
- the financial resources, contractual capability and appetite for risk that such contracts demand.
- proven experience in managing complex construction interfaces, programmes and defects liability.

Adding factory capacity does not create those capabilities. Building the people, procedures, experience and organisational maturity takes substantial investment and time. It follows that evidence that an Australian manufacturer has supplied windows to a Class 2 to 9 building does not show that it can supply, on competitive terms, the wider market that Supplyhaus serves.

Class 2 and above products are engineered to different codes

The Class 2 and above segment is supplied predominantly by bespoke window wall panels and engineered facade systems. Each project requires its own wind load, structural and acoustic testing and engineering. Within a single building the design values change with the floor on which the panels are installed, because the wind pressures and exposure change with height. A Class 1 window is, by comparison, a standard product selected from tested ranges.

The two categories of building follow separate regulatory pathways. The National Construction Code deals with Class 1 buildings in Volume Two and with Class 2 to 9 buildings in Volume One. In our experience, AS 2047 also applies less onerous and simpler requirements to housing than to residential and commercial applications, and the difference runs through wind load, serviceability and ultimate limit state design, water penetration testing and frame deflection.

For a conventional Class 1 house within the limits of AS 4055, windows can generally be chosen from established housing wind classifications and tested product ratings. For Class 2 to 9 buildings, design wind pressures are determined under AS/NZS 1170.2 by project-specific calculations that qualified and experienced facade engineers must carry out. The results vary between elevations, building levels and individual facade zones. Facade engineering for those buildings must also allow for inter-storey drift, concrete creep and shrinkage, slab deflection, structural movement, construction tolerances, thermal expansion and engineered structural connections.

Facade design also cannot be done apart from the rest of the building. On each project Supplyhaus must review, coordinate and often modify its glazing systems to suit structural reinforcement, concrete geometry and fixing restrictions, mechanical ductwork, ventilation openings and free-air requirements, electrical conduits and penetrations, accessibility requirements such as doorway clearances, thresholds and hardware, waterproofing membranes and substrates, and the interfaces with adjoining structural, architectural and services elements. Those interfaces regularly require the framing, brackets, fixings, seals and installation details to be redesigned. The resulting shop drawings, engineering calculations and certifications form extensive technical submissions across several specialist disciplines.

The building codes treat the two differently. For Class 1 houses, the Housing Provisions allow wind actions to be determined "for wind actions, AS/NZS 1170.2 or AS 4055".[1] AS 4055 is the simplified wind standard for housing. The housing glazing provisions apply to buildings "within the geometric limits set out in clause 1.2 of AS 4055" and "located in an area with a wind class of not more than N3".[2] For Class 2 to 9 buildings, Volume One requires wind actions to be determined under AS/NZS 1170.2, with no AS 4055 alternative,[3] and provides that the "following glazed assemblies in an external wall must comply with AS 2047".[4]

Both Class 1 and Class 2 to 9 buildings carry energy-efficiency obligations, but complex facade projects require far more product-specific modelling. On every project, Supplyhaus engages independent engineering consultants accredited as simulators by the Australian Fenestration Rating Council to model the thermal performance of the actual framing systems, glass configurations and product combinations proposed. The resulting total system U-values and solar heat gain coefficients feed the project's energy-efficiency assessment. They are not generic figures carried from one project to the next, and a change in framing, glass or configuration can require the modelling to be repeated.

Acoustic performance can also require project-specific assessment of road, rail, aircraft and other external noise. Depending on the project, that may involve acoustic modelling, specialised glazing configurations and laboratory acoustic testing. Each of these steps affects design resources, programme, product selection and manufacturing cost.

Product development differs in the same way. Class 1 windows commonly use established aluminium profiles, hardware and tested systems suited to repeat production. Complex commercial projects often require customised profiles, new extrusion dies, specialised glazing assemblies, engineered drainage and, at times, entirely new facade systems and hardware. That development can take months of design, engineering, prototyping and validation. Depending on the compliance pathway and the project specification, testing may be carried out under AS 2047 or AS/NZS 4284, the standard for testing building facades that the SEF itself refers to,[5] together with visual and full-scale performance mock-ups. A manufacturer capable of producing standard residential windows does not automatically possess the technical resources, development processes or experience necessary to manufacture bespoke commercial façade systems.

The SEF accepts the substance of this. It finds that "window wall may incorporate heavier aluminium profiles, higher performance glazing and project specific structural, acoustic, thermal or weather performance requirements". The applicants themselves say that the differences between segments "generally reflect variations in engineering requirements, wind loads, glazing specifications, thermal performance requirements and compliance obligations rather than fundamentally different goods". Whether or not these goods fall within one goods description, the point here is a different one. Products built to different codes, tested project by project and supplied through a different procurement process are sold under different conditions of competition. A Class

[1] Australian Building Codes Board, National Construction Code 2022, ABCB Housing Provisions, Part 2.2, cl 2.2.3(3)(b).
[2] Australian Building Codes Board, National Construction Code 2022, Volume Two, cl H1D8(1)(b)(ii).
[3] Australian Building Codes Board, National Construction Code 2022, Volume One, cl B1D3(3)(b).
[4] Australian Building Codes Board, National Construction Code 2022, Volume One, cl B1D4(8).
[5] SEF 691, s 2.3, p 26, footnote 33.

1 fabricator's spare capacity does not compete for that work merely because both products are aluminium windows.

Class 2 and above projects are won on programme and reliability

Class 2 and above projects are procured predominantly by tender, and in the vast majority of cases only after some form of pre-qualification or pre-approval of the supplier. As the product is made to order, the factors in the award of a tender are many. Price is one of them, but in our experience it is not the primary one.

The two segments are also bought in different ways. A Class 1 window package is usually chosen from a manufacturer's existing range, and its price reflects repeatable designs, standard materials and established fabrication. A large commercial glazing package is procured through a detailed, project-specific competitive tender. That process commonly involves preliminary engineering, technical compliance assessment, development of the construction methodology, review of design responsibility, programme analysis and assessment of substantial contractual risk. The resulting contracts often impose design and construct obligations, performance guarantees, insurance requirements, security, liquidated damages and extensive certification and warranty obligations. A contractor must have the technical expertise, financial resources and organisational experience to accept and manage those obligations before it can realistically compete for the work.

The factor the industry treats as most important is programme, which refers to the sequence of construction stages and the need for each supply to arrive on time so that the project stays on schedule. Late delivery of windows and doors has a concertina effect. Every trade that follows is delayed, and the whole project falls behind. For a builder, the cost of that delay is far larger than any saving on the price of the windows. As far as Supplyhaus is concerned, reliable and consistent supply is the decisive factor in the award of Class 2 and above tenders.

The SEF records and accepts much of this. It found that "the commission also identified compliance, delivery capability, technical suitability, supplier reliability, project capacity and previous supplier performance as important factors in purchaser decision making". It found that supply conditions are influenced by "manufacturing capacity, market consumer (i.e. residential or non-residential), lead times and project specifications". A facade contractor told the Commission that its choice of supplier reflects "manufacturing capacity, technical capability, quality, reliability and the ability to satisfy complex project requirements, rather than price alone".

The SEF nonetheless concludes that "the commission considers that price is a relevant and material factor influencing purchasing decisions". Supplyhaus does not say price is irrelevant. It says that in Class 2 and above work, price is weighed only among suppliers that have passed pre-qualification and can show they will deliver on programme. The SEF has not shown that price decided any Class 2 and above tender.

Installation, safety and defects liability

The differences continue on site. Class 1 windows are commonly installed as discrete products in conventional wall openings, often by carpenters or residential glazing trades. Commercial facades are installed by specialist glazing installers on large multi-storey sites, under working-at-height controls, engineered access, crane lifts and specialist lifting equipment, exclusion zones, detailed

safe work method statements, high-risk work procedures and the principal contractor's compliance systems. In our experience, the safety resources, documentation, supervision and compliance required on its commercial projects are substantially more onerous than those of conventional Class 1 installation.

Commercial facade contracts also require inspection and test records, engineering certification, installation documentation, as-built drawings, maintenance manuals and formal handover. The contractor remains responsible for defects and performance through the defects liability period and any warranty. Rectification on an occupied multi-storey building can require complex investigation, specialist access equipment and significant financial exposure.

The SEF does not show why any Class 2 and above tender was lost

The SEF finds that the industry tendered for projects in Class 1 to 9 buildings and lost tenders worth $350 million to imports. It does not say whether the local bidders for Class 2 and above projects were pre-qualified or pre-approved for those tenders. Offering a price does not show that a fabricator or its product was in contention. It is not uncommon for bids to be set aside before any assessment because the bidder lacks pre-qualification. A tender lost in that way was not lost to dumping.

The SEF relies on quotation and tender evidence to find that the industry competes in every segment. It records that the Commission examined information from Australian industry members "including tender evidence, quotation evidence and commercial data", and that it examined "quotation and tender evidence provided by Australian industry members that demonstrates competition across all market segments".

A quotation shows only that a business has offered to supply a product or to take on a contract. It does not show that the business has the technical qualifications or experience to complete the project, has delivered comparable projects of similar scale and complexity, can meet the engineering, testing, certification and compliance requirements, has the resources to deliver within the construction programme, or can manage the contractual, financial and defects liability risks. A contractor can submit a quotation without having properly assessed the technical requirements or understood the obligations it proposes to take on. Unused factory capacity, likewise, does not show that a business has the wider capability a complex facade contract demands.

A meaningful assessment of domestic competitive capability would distinguish between tender invitations, quotations submitted, tenders competitively assessed, contracts awarded and comparable projects successfully completed. Demonstrated delivery of comparable projects, supported by verified experience and available resources, is far stronger evidence of capability than quotation activity alone.

Where a local bid was considered and rejected, the SEF gives no account of why. In Supplyhaus' experience, where a local fabricator's bid for a Class 2 and above project is considered, it is usually rejected because the fabricator cannot supply the volumes required on the programme required, given the limited local capacity for that work. A tender lost for that reason was lost to a factor other than dumping.

The SEF states that "the commission has only considered lost tenders to dumped and/or subsidised Chinese imports." It does not explain how a tender was identified as lost, whether the local bidder was pre-qualified, whether its bid was assessed on price, or what the purchaser weighed in awarding the project to another supplier. Without that information there is no way to know whether a factor other than dumping was the main or the only reason a tender went elsewhere. Section 269TAE(2A) provides that injury caused by such a factor "must not be attributed to the exportation of those goods". A loss figure that cannot be tested for that purpose cannot support a finding of material injury.

The Commission has carried out this analysis before

The analysis missing from the SEF is analysis the Commission and its predecessor have carried out in other investigations.

In the hot rolled coil investigation, Customs first conducted "a macro-analysis, which looks at imports, market share, prices and industry performance across the Australian market".[6] It then went further noting that "due to the complexities in the market, which include the range of products within the HRC category and the different market sectors, Customs and Border Protection has also conducted a micro-analysis. This micro-analysis examines the injury and the specific effects of dumping within each market sector."[7] Price undercutting was compared by "pricing by market segment" and, "where possible, direct comparison of prices to common customers".[8]

That analysis changed the result in one sector. For automotive steel, Customs found that "no evidence has been provided of contracts lost to exporters in the nominated countries during the investigation period", and concluded "that the loss of sales volume is due to other factors".[9] It then related the sector findings back to the goods as a whole, noting that "the Act requires that an assessment be made on the goods as a whole".[10] That is the sequence the SEF omits and that Supplyhaus request, which is to examine each segment, then relate the results to the industry as a whole.

In the power transformers investigation, where sales were also made by tender, the Commission tested the applicant's lost tenders one by one. The applicant "identified its bid price and the estimated winning bid".[11] The Commission matched each tender against verified export and import data, and recorded that "in seven cases the Commission could not match information submitted by WTC with information collected during the investigation" and that "in 29 cases the Commission confirmed that the price of imports undercut WTC's prices".[12]

It also examined how purchasers decided. It visited purchasers and found that "some purchasers initially evaluate a tender without considering price and determine a short list of suitable suppliers."[13] It obtained tender evaluation reports, and in one project established that the purchaser "developed a request for information for pre-qualification of bidders and invited

[6] CBBPS Report No. 188, Hot rolled coil steel from Japan, Korea, Malaysia and Taiwan, s 8.3, p 40.
[7] CBBPS Report No. 188, Hot rolled coil steel from Japan, Korea, Malaysia and Taiwan, s 8.3, p 41.
[8] CBBPS Report No. 188, Hot rolled coil steel from Japan, Korea, Malaysia and Taiwan, s 8.3, p 41.
[9] CBBPS Report No. 188, Hot rolled coil steel from Japan, Korea, Malaysia and Taiwan, s 8.8.4, p 60.
[10] CBBPS Report No. 188, Hot rolled coil steel from Japan, Korea, Malaysia and Taiwan, s 8.8.5, p 61.
[11] ADC Report No. 219, Power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam, s 7.5.1, p 76.
[12] ADC Report No. 219, Power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam, s 7.5.1, p 77.
[13] ADC Report No. 219, Power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam, s 8.3, p 85.

approved bidders to tender", and that the applicant "was one of the approved bidders".[14] It then confirmed that "in 23 cases the power transformers were supplied by exporters found to have been dumping".[15]

The Commission did say in that report that it need not "establish that WTC would have, in the absence of dumping, won every contract tendered for during the investigation period".[16] Supplyhaus does not ask for that. It asks for the steps the Commission took in that case before reaching that view, which involved identifying which tenders were lost, to whom, whether the local bidder was in contention, and on what basis the purchaser decided.

None of those steps was taken here. The SEF records that "the commission invited over 20 end users and consumers to participate in the investigation via end user questionnaires", and that "the commission received 2 responses". In its tender analysis it records that "no tender data was requested from end users." The builders, developers and facade contractors who award Class 2 and above tenders are the only parties who know why each tender was awarded, and they were not asked.

The interaction between Class 1 and Class 2 and above work was raised from the outset of the investigation as a matter the injury and causation assessment had to address. Without information from the purchasers in that segment, the Commission has no basis to understand that interaction, and no means to separate the effects of dumping from the effects of limited local capacity, programme and pre-qualification. The investigation has not yet gathered the evidence needed to make the finding the SEF proposes.

The question the Commission must answer

Supplyhaus accepts that the residential and commercial window markets overlap to some extent, and that not every Class 2 to 9 project needs bespoke engineering. Limited participation in a building class, however, does not show that a manufacturer has the technical capability, available capacity, specialist resources or appetite for commercial risk to serve that wider market. The relevant question is not whether an Australian manufacturer has ever supplied windows to a Class 2 to 9 building. It is whether that manufacturer can competitively tender, engineer, certify, manufacture, deliver, install and support the whole of a particular commercial glazing contract, at the scale and within the programme required.

Similarity of materials does not establish that the products, the suppliers or the markets are equivalent. Of equal importance is the substantial lack of Australian capability and capacity to serve the large and technically complex Class 2 to 9 market in which Supplyhaus operates.

Profit in the residual normal values

Residual exporters are those that cooperated but were not selected for examination. Their normal value is governed by s.269TACAB(2)(d) of the Act, which provides that it "must not exceed the

[14] ADC Report No. 219, Power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam, s 8.3, p 85.
[15] ADC Report No. 219, Power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam, s 8.3, p 85.
[16] ADC Report No. 219, Power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam, s 8.3, p 86.

weighted average of normal values for like goods of cooperative exporters from the same country of export". The SEF calculated the residual normal value in accordance with that provision. Normal values of exporters found not to be dumping are left out of the average.

Yuanjiang is one of the selected exporters found to be dumping, at 34.8%. Its normal value is therefore one of the normal values averaged into both the residual normal value and the uncooperative normal value. Residual exporters account for approximately 49% of Chinese exports. Any error with Yuanjiang's normal value is carried into the duty payable on about 49% of the goods exported from China, and into the 24.4% rates that importers such as Supplyhaus face.

What the SEF did

Yuanjiang had no domestic sales of like goods, so its normal value was constructed. The SEF summarises the profit element as a weighted average OCOT profit based on the domestic sales of like goods by two other selected exporters.

The profit figures that went into that average are each exporter's profit on its domestic sales in the ordinary course of trade. For one of them the SEF records that "the commission calculated profit using the profit for Foshan AMJ's domestic like goods sales in the OCOT." It describes the other exporter's profit in the same terms.

A domestic sale is outside the ordinary course of trade where it is unprofitable in the sense the Act defines. The SEF's own note explains that domestic sales are not in the ordinary course of trade if arm's length transactions "are unprofitable in substantial quantities over an extended period". The sales filtered by the Commission are the loss-making ones.

Section 45(3)(b) contains no ordinary course of trade test

Section 45 of the Regulation governs the amount for profit in a constructed normal value. Its primary rule carries an express limit. Section 45(2) provides that the Minister must, if reasonably practicable, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade.

Where that cannot be done, s.45(3) offers alternatives. The one used for Yuanjiang requires the Minister to work out the amount 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".

The words "in the ordinary course of trade" appear in s.45(2), but they do not appear in s.45(3)(b). The Regulation places the limit in the primary rule and leaves it out of the alternative, in the same section. What s.45(3)(b) asks for is the "actual amounts realised". A loss on a sale below cost is an amount actually realised, and it belongs in the average.

The Commission's own Manual and its 2016 reinvestigation

The Commission's Manual confirms the correct approach. Of the three alternatives in s.45(3), it states that "there is no requirement to test for ordinary course of trade in any of these three alternatives, nor will the Commission read any ordinary course of trade requirement into them."

The point has also been decided against the Commission's present method. In 2016 the Anti-Dumping Review Panel examined a profit rate worked out under s.45(3)(b) for a Chinese exporter of steel reinforcing bar. The Panel Member reviewed the confidential calculations and "agreed with Hunan Valin that this profit rate has not been established in accordance with section 45(3)(b) of the CIO Regulation".[17] The Panel then required the Commissioner "to recalculate the profit in accordance with regulation 45(3)(b), that is, by including the actual amounts realised by other exporters, without the application of the ordinary course of trade test".[18]

The Commission did so. Its reinvestigation report records that "in recalculating an amount for profit under regulation 45(3)(b), the Commission did not filter out the non-OCOT sales of other exporters."[19]

SEF 691 returns to the method the Commission abandoned in that reinvestigation, without acknowledging the change.

The Federal Court and the Appellate Body read the words the same way

In *Steelforce*, Perram J said of s 45(3)(b), "It seems to me that this provision is focused on the determination of an actual amount realised in an actual defined period."[20] Bromwich J agreed with his Honour's approach of adhering to "the precise terms of the legislative scheme".[21] A filtered average is not the amount actually realised by the other exporters in the investigation period. It is the amount they realised on their more profitable sales.

Section 45(3)(b) follows Article 2.2.2(ii) of the Anti-Dumping Agreement, and the Appellate Body has decided the same question under that Article. In *EC – Bed Linen* it held:

> "It follows that, in the calculation of the "weighted average", all of "the actual amounts incurred and realized" by other exporters or producers must be included, regardless of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not."[22]

Its reasoning rested on the same contrast between the primary rule and the alternative that "the exclusion in the chapeau leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the Anti-Dumping Agreement, no exclusion should be implied."[23]

The text of the Regulation, the Manual, the Review Panel and the Commission's own reinvestigation all point the same way, and on this question the Australian and WTO positions are aligned.

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[17] ADRP Report No. 39, Steel reinforcing bar exported from the People's Republic of China, 2016, para 89.
[18] Anti-Dumping Review Panel, letter to the Anti-Dumping Commissioner dated 14 August 2016, reproduced in Anti-Dumping Commission, Reinvestigation Report No. 369, Steel reinforcing bar from China, 2016, PDF p 1.
[19] Anti-Dumping Commission, Reinvestigation Report No. 369, Steel reinforcing bar from China, 2016, s 4.2, p 8.
[20] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20, Full Court of the Federal Court of Australia, [99] (Perram J).
[21] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20, Full Court of the Federal Court of Australia, [139] (Bromwich J).
[22] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, para 80.
[23] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, para 83.

The correction can only lower the residual and uncooperative rates

Removing the OCOT filter applied moves the profit amount in one direction only. The excluded sales are loss-making sales, and adding them back to a weighted average of profit lowers that average, or leaves it unchanged if nothing was excluded.

A lower profit amount gives Yuanjiang a lower constructed normal value. Given that Yuanjiang's normal value is in the residual dumping margins, the residual normal value should be reduced, and so would the 24.4% residual rate.

The tender evidence does not support the injury figure

What the SEF finds

The SEF's measure of material injury is a figure of $422.6 million. The Commission "evaluated a total value of approximately $455 million during the investigation period". From that material it found that "the total loss to the Australian industry by value was $422.6 million during the investigation period", made up of $350 million lost to price undercutting and $72.6 million in forgone sales. It then expresses that figure as "approximately 15% of the total Australian AWD market value in the investigation period".

On the SEF's own numbers, the claimed loss is equal to about 93% of the value of all the tenders and quotations the Commission says it reviewed. Either the Australian industry lost almost every project it reported, or the $422.6 million is made up of amounts that are not of the same kind as the $455 million. The SEF does not say which. The final report should state the composition of both figures.

The $72.6 million is described three different ways

The $72.6 million component is not described consistently in the SEF report. At page 190, it is the value of projects the industry did not bid for. The SEF records that "some industry members also provided the commission with information related to tenders available in the market that they elected not to bid for, having assessed that their success rate was low despite their historical competitiveness with these customers and/or projects". At page 193 it is an annual figure for former customers. There, "the annual value of work foregone is quantified at 72.6 million, after failing to win business on the basis of price". At page 203 it has become a loss of existing business "industry quantified a further annual loss of $72.6 million in business from former customers who had switched to Chinese imports of the goods".

A project not bid for, an annual estimate of work from former customers, and business lost to customers who switched are different things. Each would need different evidence. None of them is a tender lost in the investigation period, which is what the $350 million is said to be. The SEF adds an annual estimate to a figure for a single period without explaining why the two can be added.

The words "industry quantified" also matter. It is the industry's own estimate, and the SEF does not say how it was tested, and nothing in it suggests that projects the industry chose not to bid for were checked against any record of who won them, or at what price.

The SEF accepts its sample is not representative, then extrapolates from it

The SEF is open about the limits of the tender material. It states "given the significant scale and breadth of the AWD market it is not possible to achieve a representative sample of the market, despite the considerable volume of information provided by interested parties."

It nonetheless concludes, in the materiality section, that "the commission considers the magnitude of lost sales would have exceeded this figure had the commission had a broader pool of tender information to assess".

That conclusion is not open on the SEF's own premise. A sample that is accepted as unrepresentative cannot support an inference about what a larger sample would have shown, in either direction. The tender listings came from supporting industry members and importers who chose to respond. Members who lost business are the ones most likely to report it. That is a reason to treat the $422.6 million with caution, and no reason at all to assume the true figure is larger.

Whether the winning offers were dumped is largely assumed

The SEF states that "the commission has only considered lost tenders to dumped and/or subsidised Chinese imports." The basis for classifying a winning offer as dumped is narrower than that statement suggests.

For "certain projects", the evidence "allowed the commission to validate that the sales were lost to the named Chinese exporters". The sales tracing exercise found "13 unique Chinese importer tender winners in ABF import data". For the rest, the SEF does not say how it established that the successful offer was a Chinese import at all, let alone a dumped one. One examined exporter, Altop, was found not to be dumping, at a margin of negative 47.4%. Imports from other countries made up about 5% of import value.

Why each tender was lost is a separate question, and the SEF does not answer it. It is addressed above, in the section on the Australian market and the conditions of competition.

What Supplyhaus asks

Supplyhaus asks the Commission to publish, in non-confidential form, the composition of the $455 million and the $422.6 million. For each component of the $72.6 million, the final report should state what it represents, which period it covers and how it was tested. The inference that lost sales "would have exceeded" the figure found should be removed from the materiality assessment, and any undercutting finding should rest on the validated projects only.

Class 2 and above: division, market segmentation and causation

The SEF's own findings about the segments

The SEF finds three market segments, being residential, multi and high rise residential, and non-residential. It accepts that "the Australian market is not homogeneous". It also accepts that "some Australian industry members may have greater exposure to Class 1 buildings or generally the residential segment" and that "some imported AWD may be more prevalent in the Class 2 to Class 9 buildings and in particular commercial construction projects within the non-residential segment".

Those are significant concessions as the segments in which the SEF accepts imports are more prevalent are the segments in which the Australian industry is said to have the least exposure. If imports are concentrated in Class 2 to 9 work and the industry's sales are concentrated in Class 1 work, the degree of competition between the two is the central causation question.

Division of the goods was open to the Commissioner, and was not considered

Interested parties asked the Commission to divide the investigation between goods for Class 1 buildings and goods for Class 2 and above buildings.[24] The SEF's answered "Nor does the Act prescribe a separate statutory test requiring an investigation to be divided according to market segment." Its conclusion is that the Commission "does not consider that the matters raised provide a basis to divide or otherwise confine the investigation in the manner proposed".

That answers a submission and point nobody made. The point put to the Commission was never that the Act requires division. It was that division is open to the Commissioner, and that the facts of this investigation give grounds for it. The SEF engages with neither proposition.

On the first, nothing in Part XVB forbids the Commissioner from dealing with goods that fall into two distinct classes in two separate inquiries, provided the two together cover all of the goods described in the initiation notice. The Commissioner's duties are continuing ones. Section 33(1) of the *Acts Interpretation Act 1901* (Cth) provides that "Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires."[25] Whether those duties may be performed through separate inquiries for separate classes of goods has not been decided. An open question of that kind calls for the Commissioner to address it and give reasons. It does not justify treating the question as closed.

The SEF's reference to differential duties concerns something else. It states that the Act does not authorise "differential interim dumping duties across various exporters on the basis of different models of goods". Division concerns how many inquiries the goods require. It does not ask for different rates on different models within one notice.

On the second, the grounds are in the SEF itself. The Commission accepts that the market is not homogeneous and that imports are more prevalent in Class 2 to 9 buildings, where the industry has less exposure. Its own Manual lists "products with more than one end-use"[26] among the circumstances in which analysis by sector may be warranted. Even the applicants accept that "differences in scale, complexity, project type, customer base or procurement arrangements are matters relevant to competition, market segmentation and injury analysis".[27]

The SEF gives no reason for rejecting division beyond the statement that the Act does not require it. An objective examination, in the Appellate Body's words, "relates to the conduct of the investigation generally"[28] and must "conform to the dictates of the basic principles of good faith and

[24] SEF 691, s.2.4.11, p.51.
[25] *Acts Interpretation Act 1901* (Cth), Compilation No. 39 (28 March 2026), s 33(1).
[26] Anti-Dumping Commission, Dumping and Subsidy Manual, December 2021, s.4.3 (Practice), p.18.
[27] SEF 691, s.3.8, p.80.
[28] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 193.

fundamental fairness".[29] A request put on substantive grounds, answered by rejecting a proposition that was never advanced, has not been examined. It is a further example of an investigation that has accepted the applicants' framing of the market without testing it.

Supplyhaus asks the Commissioner to consider, and give reasons on, whether the goods should be dealt with as two classes. If the Commissioner concludes that division is not available, the final report should explain why, and should then carry out the segment analysis described below in its place.

The segments were accepted on paper and then not investigated

Having accepted three segments, the SEF did nothing to measure injury or causation within any of them.

Every injury indicator is either an industry total or Ventora alone. On sales volume, the SEF states that "the commission notes this analysis has been undertaken at an aggregate level incorporating all sales by these entities." Market share is a single industry figure.[30] Price suppression and profit are assessed on Ventora's results.[31] Ventora's own exposure to each segment is never stated. It is therefore impossible to tell from the SEF whether the producer whose results carry the price and profit findings competes in Class 2 and above to any material extent.

The SEF's whole answer to the segment argument is one paragraph. It found that the industry "has actively participated in projects across Class 1 buildings as well as Classes 2 through to 9 buildings", and that "this demonstrates that the Australian industry does compete across each segment within the Australian AWD market." From the fact that the industry "has been both successful and unsuccessful across the range of building classes", it concludes that the industry "has experienced injury in the form of lost sales across the entire Australian market".

Participation is not injury. A producer that bids for some Class 2 projects and wins a few competes in that segment in a formal sense. It does not follow that imports into that segment took material volume from it, depressed its prices or reduced its profits. The SEF moves from presence to injury without any measurement in between.

The capability finding rests on the same footing. The SEF finds that the industry "supplies and competes to supply AWD across Class 1 buildings through to Class 9 buildings". The evidence for that finding is in Confidential Attachment 1. No interested party can see what share of the industry's sales, by value, went to Class 2 to 9 projects, how many members supplied them, or at what scale. A finding that some members supplied some projects in every class is consistent with the industry's participation in Class 2 and above being marginal.

The SEF also describes the industry's capacity in two different ways. At page 101, Ventora "reported operating at approximately 80% capacity utilisation during the investigation period". At page 202, "Ventora operated at 80% capacity relative to FY2022". The first is a utilisation rate. The

[29] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 193.
[30] SEF 691, s.8.4.2, Figure 16, pp 173–174.
[31] SEF 691, s.8.5.2, pp 175–176, and s 8.6.1, pp 176–177.

second is an index against an earlier year and says nothing about how much capacity was idle. The capability and capacity findings rely on both.

The information needed for a segment analysis was already before the Commission. Tender respondents identified building classes, and the Commission classified each project by segment for its own analysis.[32] Yet no figure in the SEF reports sales, imports, lost tenders or undercutting by segment.

Why the market-level assessment falls short

The Commission's own practice sets the standard. The Manual states that "there is nothing to preclude the Commission from performing a sectoral analysis of an industry and/or market if it yields a better understanding of the effects of imports and a more thorough analysis and conclusion. Any conclusions drawn from a sectoral analysis must explicitly be related back to the industry as a whole."[33]

The Appellate Body has explained what an objective examination requires once segments are in play "where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry."[34] Its reason was that "different parts of an industry may exhibit quite different economic performance during any given period."[35]

A WTO panel has also explained why a finding of likeness does not dispose of the point. In *China – Autos (US)* the panel said:

"The finding of like product does not alone suffice to fulfil the obligation to make a reasoned determination of causation. We can readily envisage a scenario where domestic and imported goods are found to be 'like' within the meaning of Article 2.6 of the Anti-Dumping Agreement and/or footnote 46 to the SCM Agreement, but differentiation of goods within those two categories affects the competition between them in ways that have an impact on the assessment of causation."[36]

Measured against those standards, the SEF's assessment of the market falls short at each step.

It identifies segments and then measures nothing within them. The finding that window wall and other Class 2 and above products are like goods settles the scope of the investigation. It does not settle whether imports into those segments caused the injury the SEF finds, which was measured through industry totals and Ventora's results.

Its only segment-level material is the tender analysis, and of that material the SEF itself says that "it is not possible to achieve a representative sample of the market". Undercutting is described by

[32] SEF 691, s.9.6.1, p.190, footnote 558.
[33] Anti-Dumping Commission, Dumping and Subsidy Manual, December 2021, s 4.3 (Practice), p 18.
[34] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 204.
[35] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 204.
[36] Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R, 23 May 2014, para 7.343.

segment only in ranges, with no indication of the volume of sales, or the share of the industry's business, behind each range.

It never treats a shift in demand between segments as a cause of injury. The Act names "contractions in demand or changes in patterns of consumption" as a factor other than dumping. The SEF finds that demand contracted from FY2023 and during the investigation period. If that contraction fell mainly on Class 1 housing, where the industry's sales are concentrated, while imports were concentrated in Class 2 and above, part of the industry's decline was caused by the pattern of demand and not by imports. The SEF does not ask the question. It cannot, then, have excluded that injury as s.269TAE(2A) requires.

And it never relates any segment back to the industry as a whole, because it never examines a segment in the first place.

None of this asks the Commission to carve a segment out of the industry. The Australian industry is national. In *Swan Portland Cement* Lockhart J held that the expression "refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria".[37] His Honour went on to add that "The latter is not a question of construction; it is a question of identification by the relevant fact finding body".[38] That is the point. Whether imports into Class 2 and above caused material injury to the national industry is a question of fact, and the Commission has not yet found the facts.

What Supplyhaus asks

Supplyhaus asks the Commission to take the following steps.

- consider, and give reasons on, whether the goods should be dealt with as two classes.
- report, for each of the three segments it has found, the Australian industry's sales, the imports from China, the tender losses attributed to imports and the undercutting found, with the number of projects behind each figure. Where the underlying figures are confidential, these can be presented as indexed charts, shares of the total or ranges, so that interested parties have a reasonable understanding of the analysis without disclosure of any party's data.
- state Ventora's sales by segment, so that the reliance on its price and profit results can be tested.
- publish a non-confidential summary of Confidential Attachment 1.
- assess whether the contraction in demand fell unevenly across segments, and exclude any injury caused by it.
- relate each segment's results back to the industry as a whole, as its Manual requires.

[37] *Re Swan Portland Cement Limited and Cockburn Cement Limited v the Minister of Small Business and Customs and the Anti-Dumping Authority* [1991] FCA 49; 28 FCR 135, Federal Court of Australia, Lockhart J, 26 February 1991, [39].
[38] *Re Swan Portland Cement Limited and Cockburn Cement Limited v the Minister of Small Business and Customs and the Anti-Dumping Authority* [1991] FCA 49; 28 FCR 135, Federal Court of Australia, Lockhart J, 26 February 1991, [39].

- recognise the legitimate interests of Australia's established Class 1 window manufacturing industry, while distinguishing the substantially different requirements and domestic supply conditions of complex Class 2 to 9 facade projects.
- carry out separate assessments for Class 1 housing and Class 2 to 9 applications, with further consideration of large-scale, technically complex facade projects.
- assess actual domestic manufacturing and delivery capability, including available capacity, specialist resources, engineering expertise, project experience and demonstrated tender competitiveness, distinguishing between quotations submitted, tenders competitively assessed, contracts awarded and comparable projects completed.
- reconsider whether these differences warrant separate treatment or tailored exclusions, so that the injury and causation findings reflect genuine competition within each segment.

Factors other than dumping have been identified but not separated

The statutory test

Section 269TAE(2A) requires the Minister to "consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods", and provides that "any such injury or hindrance must not be attributed to the exportation of those goods". Among the listed factors are "contractions in demand or changes in patterns of consumption" and "the export performance and productivity of the Australian industry".

The Appellate Body has said what non-attribution requires, "logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports."[39] Without that step, an authority "would have no rational basis to conclude that the dumped imports are indeed causing the injury".[40] The method is for the authority to choose, but the obligation must be met.[41]

"Primary cause" is not the test

The SEF's conclusion on non-dumped imports is that the volume of dumped goods "is indicative of dumped and/or subsidised goods being the primary cause of injury to Australian industry despite the presence of other imports".

Section 269TAE(2A) does not ask whether dumping is the primary cause. It requires that injury caused by other factors not be attributed to dumping. That cannot be done without identifying how much injury the other factors caused, and the SEF does not attempt it for any factor.

[39] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 223.
[40] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 223.
[41] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 224.

Each factor the SEF identifies is set aside without being measured

On demand, the SEF accepts that there "has been a contraction in demand since FY2023, as well as during the investigation period", and that "this may explain in part the reduction in sales value achieved by Australian industry". The SEF's own figures allow the part to be estimated. In the investigation period, Australian industry sales value fell by about 6% while the market fell by about 2%. Had the industry held its share, its sales would still have fallen by about 2%, roughly a third of the decline the SEF records. The SEF does not make that calculation or any other.

On competition between Australian producers, the SEF accepts that "the observed trend in Ventora's market share may have been impacted by such events", meaning acquisitions, consolidation, exits and new entrants. It answers that the industry as a whole lost share. That does not separate anything. If customers moved away from a consolidated incumbent to other suppliers, local or imported, the effect on Ventora is real and is not caused by dumping.

On costs, the SEF finds that Ventora's cost to make and sell per unit rose by around 25% over the injury analysis period, mostly in FY2022, partly because falling production spread fixed costs over fewer units. The SEF itself states that costs "have increased (unrelated to Chinese imports)".

The largest single input is aluminium. The SEF observed that aluminium accounted for between 55% and 80% of the selected exporters' total raw material costs. Comparing Ventora's raw material costs with the London Metal Exchange price, it found that "Ventora's increase in raw material costs over the injury analysis period was approximately 7% higher than the change in LME". In other words, Ventora's aluminium inputs became dearer relative to the world price over the very period in which the SEF finds injury.

The SEF does not ask why. One explanation sits in the Commission's own record. Aluminium extrusions exported from China have been subject to anti-dumping measures in Australia for many years, and the SEF refers to "REP 657 and previous commission cases into aluminium extrusions exported to Australia from China". Those measures raise the landed cost of imported Chinese extrusions. They also allow Australian extruders to price their own extrusions up to the duty-paid import price.

The SEF does not say whether Ventora imports aluminium extrusions, buys them from Australian extruders, or extrudes its own. Each answer leads to the same place. If Ventora imports extrusions from China, part of its cost increase is the duty itself. If it buys locally, part of its cost increase may reflect local suppliers pricing to the duty-paid level of imports. In either case, a part of Ventora's higher costs is the product of existing trade measures on its main input, and not of dumping of the goods.

The SEF then accepts that Chinese producers may have legitimate cost advantages, including lower raw material, labour and energy costs, higher productivity, automation and scale. It says that "these relative efficiencies may have been a contributing factor in importers sourcing the goods from China, and in turn the observed deterioration in the economic performance of the Australian industry across the injury analysis period."

Part of that cost gap is one that Australian policy has itself created. Chinese window and door makers buy extrusions in China without the duty. Ventora's inputs carry the duty, or prices shaped by it. The gap between the two is not dumping. It is the cost effect of a separate trade measure on an upstream product. It is precisely the kind of injury that s.269TAE(2A) says "must not be attributed to the exportation of those goods".

The SEF's answer is that "margins of the magnitude assessed in relation to Chinese exports unfairly leverage the legitimate efficiencies that Chinese manufacturers may enjoy". That sentence does not separate the two effects, but instead assumes them together. The final report should establish where Ventora sources its aluminium extrusions and estimate how much of its cost increase is due to measures on extrusions. It should then exclude that injury, together with the injury from legitimate cost advantages and the productivity of the Australian industry, before attributing what remains to dumped imports.

What Supplyhaus asks

Supplyhaus asks the Commission to identify, for each factor in section 9.9 of the SEF, the injury that factor caused in the investigation period, and to explain how the injury attributed to dumping was found after that injury was excluded. Where an effect cannot be quantified, the final report should say why, and explain the reasoning by which it was separated.

The volume of dumped imports is a presumption

Most Chinese exports carry a margin worked out from other exporters' data

The SEF finds that "in total approximately 87% of imports into Australia during the investigation period were dumped and/or subsidised." That figure is the foundation of the volume, price and causation findings.

Only the selected exporters had their own dumping margins calculated. They represent approximately 29% of the value of goods exported from China. Residual exporters accounted for approximately 49% of Chinese exports and uncooperative exporters for approximately 22%. For more than 70% of Chinese export value, therefore, the conclusion that the goods were dumped rests on margins worked out from the selected exporters' data. One of the six selected exporters was found not to be dumping at all.

The SEF's analysis of exporter numbers shows how much weight the presumption carries. Of the smaller exporters, whose number grew most quickly, it notes "that all exporters in this category were found to have dumped during the investigation period". Those exporters were not examined. They were assigned a rate and should not be considered dumped for the purposes of assessing injury.

The Appellate Body has rejected this approach

In *EC – Bed Linen (Article 21.5 – India)* the Appellate Body held that, whatever methodology is chosen for determining the volume of dumped imports, if it "fails to ensure that a determination of injury is made on the basis of 'positive evidence' and involves an 'objective examination' of dumped

imports",[42] and not of imports found not to be dumped, then "it is not consistent with paragraphs 1 and 2 of Article 3".[43]

It found the European Communities' approach of treating all imports from non-examined producers as dumped was not objective, "because its result is predetermined by the methodology itself".[44] It explained that under such an approach "imports attributable to non-examined producers are simply presumed, in all circumstances, to be dumped".[45]

The SEF's 87% figure is reached in the same way. Supplyhaus asks the Commission to state the volume of imports found to be dumped on the basis of examined exporters' own data, to explain the basis for treating residual and uncooperative exports as dumped in the volume and price analysis, and to assess whether the injury findings hold on the volume established by examination.

The non-injurious price and the lesser duty

The SEF contradicts itself on Ventora's profitability

The SEF rejects a selling price basis for the unsuppressed selling price on the ground that Ventora has been selling "like goods at a loss for all of the injury period". Two pages later it states that "Ventora remained profitable throughout the injury period."

Both statements cannot be correct. The choice between the Manual's preferred method and a constructed price depends on which is. The Manual states that "in calculating the USP, the Australian industry's selling prices at a time unaffected by dumping or subsidisation will normally be used."[46] If Ventora was profitable before the investigation period, the reason given for departing from that method falls away.

The constructed price compensates for causes other than dumping

The Manual also states that "the USP does not redress the effects of other causes of injury including fair import competition or competition from other domestic producers."[47]

The SEF's constructed price departs from that in two respects. It declines to use the weighted average cost to make and sell for the investigation period, because that "may result in a USP, and consequently a NIP, that does not adequately address the injury suffered by the Australian industry". It does not say which cost it used instead. The SEF has found that Ventora's costs rose for reasons "unrelated to Chinese imports". A price built on a cost chosen to be higher than the

[42] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, para 113, as reproduced in WTO Analytical Index, Anti-Dumping Agreement, Article 3 (DS reports), p 25.
[43] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, para 113, as reproduced in WTO Analytical Index, Anti-Dumping Agreement, Article 3 (DS reports), p 25.
[44] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, paras 132–133, as reproduced in WTO Analytical Index, Anti-Dumping Agreement, Article 3 (DS reports), p 25.
[45] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, paras 132–133, as reproduced in WTO Analytical Index, Anti-Dumping Agreement, Article 3 (DS reports), p 25.
[46] Anti-Dumping Commission, Dumping and Subsidy Manual, December 2021, s 24.2 (Policy), p 106.
[47] Anti-Dumping Commission, Dumping and Subsidy Manual, December 2021, s 24.2 (Policy), p 106.

investigation period average carries those cost increases into the measure of injury caused by dumping.

The profit component is taken from an undisclosed period, and the SEF supports it by reference to "the high levels of profit observed by selected exporters in their domestic sales of OCOT during the investigation period". The SEF has found that the Chinese domestic market is affected by a particular market situation that makes those domestic sales unsuitable for normal value. Profits earned in that market are no guide to the profit an Australian producer would earn in Australia without dumping.

The lesser duty reasoning is internally inconsistent

Section 8(5B) of the *Customs Tariff (Anti-Dumping) Act 1975* requires the Minister to have regard to a lesser duty where "the non-injurious price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice is less than the normal value of goods of that kind". Section 8(5BAA) provides that the Minister is not required to do so where "the normal value of the goods was not ascertained under subsection 269TAC(1) of that Act because of the operation of subparagraph 269TAC(2)(a)(ii) of that Act".

The SEF states that, because the non-injurious price was not less than any normal value, "none of the above exceptions to the lesser duty rule are relevant". On the next page it relies on exactly that exception, finding that the Minister is not required to consider a lesser duty "because the commission did not ascertain the normal values of all exporters under section 269TAC(1) due to the operation of section 269TAC(2)(a)(ii)".

The comparison that matters is the first. Whether a lesser duty can apply depends on whether the non-injurious price is below normal value. On the SEF's approach it is above every normal value only because the price is built on a cost chosen to be high and a profit justified by a distorted market, and is compared with normal values raised by benchmark uplifts. Corrected on the points above, the non-injurious price may well fall below normal value for some or all exporters. Supplyhaus asks the Commission to recalculate it, to publish in non-confidential form whether it is below normal value for each category of exporter, and to recommend a lesser duty where it is.

The balance of the trade remedy system, the national interest and the Minister's discretion

The system weighs the applicant's injury but not the wider cost

Each of the matters above concerns a step in the Commission's process. Taken together they show a process that, at every point of choice, has resolved the question in the way that raises the duty, including profit worked out on a filtered set of sales and measured against costs the SEF had rejected, a loss figure extrapolated from a sample the SEF accepts is not representative, segments acknowledged and then not measured, and a non-injurious price built on a cost and a profit chosen to be high. Supplyhaus does not suggest that any one of these choices was made for that purpose. The pattern matters because nothing in the process tests the result against its cost to anyone other than the applicant.

That is a known feature of the Australian trade remedy system. The Productivity Commission examined it in 2009. Its first finding was that "the Australian anti-dumping system, which is based on agreed WTO rules and procedures, benefits a small number of import competing firms, but imposes greater costs on the rest of the economy."[48] Among the deficiencies it identified was that "there is no consideration of the wider economic impacts of anti-dumping measures".[49]

The Productivity Commission's answer was a bounded public interest test. It said such a test "would be a practical means to take account of wider impacts and prevent the imposition of measures that would be disproportionately costly".[50] The test would identify circumstances in which measures would not be in the public interest, "for example, where they would be ineffectual in removing injury; or would impose large costs on downstream users relative to the benefits for the applicant industry".[51] One of the circumstances in its formal recommendation was that "the price of the imported goods concerned after the imposition of measures would still be significantly below competing local suppliers' costs to make and sell".[52]

The Act does not contain that test. The SEF says so, stating that "beyond this the Act does not provide for the Commissioner to undertake a public interest test or an assessment of the overall economic impact". Supplyhaus does not ask the Commissioner to apply a test the Act does not contain. It submits that the absence of the test makes the information the Commissioner gives the Minister more important. The Minister's decision is the only point in the system at which the wider costs of measures can be weighed.

The Minister's discretion depends on what the final report contains

The Act leaves the final decision to the Minister. Section 269TL(1) requires public notice where the Minister decides, "after having regard to that recommendation", not to impose duty. The SEF accepts that "Section 269TL recognises that the Minister may ultimately decide not to impose measures after considering the Commissioner's recommendation."

The same is true of the amount of duty. Where the lesser duty rule is not mandatory, the SEF accepts that the Minister "may still wish to exercise a discretion to do so". It also accepts that "the Minister retains the discretion to apply a lesser amount of duty".

A discretion can only be exercised on the information put before the person who holds it. The SEF states that "the broader public interest considerations have not been considered by the Commissioner in making their preliminary findings and recommendations set out in this SEF". If the final report takes the same course, the Minister will be asked to decide whether to impose duty of up to 73.3% on goods used throughout Australian construction with no assessment of what that duty will cost anyone other than the applicant.

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[48] Productivity Commission, *Australia's Anti-dumping and Countervailing System*, Inquiry Report No. 48, 18 December 2009, Overview, Key points, p X.
[49] Productivity Commission, *Australia's Anti-dumping and Countervailing System*, Inquiry Report No. 48, 18 December 2009, Overview, Key points, p X.
[50] Productivity Commission, *Australia's Anti-dumping and Countervailing System*, Inquiry Report No. 48, 18 December 2009, Overview, Key points, p X.
[51] Productivity Commission, *Australia's Anti-dumping and Countervailing System*, Inquiry Report No. 48, 18 December 2009, Overview, Key points, p X.
[52] Productivity Commission, *Australia's Anti-dumping and Countervailing System*, Inquiry Report No. 48, 18 December 2009, Recommendation 5.1, p XXVIII.

What the SEF already shows about downstream effects

The measures would fall on a large and central part of the market. On the SEF's figures, imports from China supplied 19% of an Australian market valued at about $2.8 billion in the investigation period. Residual and uncooperative exporters alone represent approximately 9% and 4% of the whole market.

The goods are a construction input. Interested parties put before the Commission material on the scale of the construction sector, housing supply and project costs. Master Builders Australia, for example, submitted that construction activity of approximately $324.6 billion represents around 11.7% of GDP, and referred to the National Housing Accord target of 1.2 million homes by June 2029.[53] Parties with projects already contracted or under construction submitted that measures could make those projects loss-making.[54]

The SEF's only quantified answer is that "AWD costs account for approximately 5% to 7% of total construction costs for a typical 3 to 4 bedroom dwelling". That is a Class 1 figure. The SEF itself notes that "the proportion of AWD costs in the total construction cost varies according to building type", and that "these estimates are not a basis on which to assess the overall cost impact of the proposed measures within this SEF". It contains no figure for apartment, commercial or institutional buildings. Those are the segments in which the SEF accepts imports are more prevalent, and the segments in which window wall and facade packages make up much more of the building envelope.

The SEF also records evidence that local supply for those segments is limited. One end user told the Commission that "Australia does not currently have sufficient local capability and capacity to reliably meet domestic demand for the relevant products at the scale, timeframe and specification required".[55] The SEF's answer, as explained above, rests on a confidential attachment that no interested party can test.

What the final report should give the Minister

Supplyhaus asks that the final report contain a full assessment of the downstream effects of the proposed measures, so that the Minister can decide whether to impose them and, if so, at what level. At a minimum, it should set out the following:

- the expected increase in the cost of AWD to builders, by building class, and the share of AWD in total project cost for Class 2 and above buildings as well as Class 1 dwellings.
- the effect of that increase on the cost and timing of housing and apartment delivery, and on projects already contracted or under construction.
- the Australian industry's capacity to supply Class 2 and above projects at the scale and timing required, in non-confidential form.
- the effect of measures on competition and choice for builders in each segment.

[53] SEF 691, s 2.4.12, p 56 (summary of EPR 691 document no. 396).
[54] SEF 691, s 2.4.12, p 58 (summary of EPR 691 document nos. 403 and 405).
[55] SEF 691, s 9.9.5, p 201, quoting EPR 691 document no. 408.

- whether, after duty, imports would still be priced well below the Australian industry's costs, so that measures would raise costs downstream without restoring the industry's sales.

The recommendation Supplyhaus seeks

On the information summarised in this submission, Supplyhaus submits that the final report should recommend that the Minister consider exercising the discretion in s.269TL not to impose measures, or not to impose them on goods for Class 2 and above buildings, whose local supply the SEF has not shown to be adequate.

If measures are to be imposed, the final report should recommend that the Minister exercise the discretion to apply a lesser amount of duty, worked out from a non-injurious price corrected in the ways set out above. The non-injurious price is, by definition, "the minimum price necessary" to prevent the injury caused by the dumped goods. Duty that takes the price above that level imposes a cost on importers, builders and their customers that the injury does not require. The SEF's own concession that the Minister retains that discretion means the question must be put to the Minister with the information needed to answer it.

The SEF records that it has received 6 exemption inquiry requests and that it may consider them in this investigation. If the segment analysis sought above shows that imports into a segment are not causing injury, Supplyhaus asks that the final report say so and that the exemption requests be decided before measures are imposed.

Request and recommendation

For the reasons set out above, Supplyhaus submits that the SEF does not yet establish that dumped imports caused material injury to the Australian industry, or that the proposed rates are the rates the evidence supports. Nor does it give the Minister what the Minister needs to decide whether measures at those rates are in the interests of the Australian economy as a whole. It asks the Commission, in the final report, to take the following steps.

- recalculate the amount for profit in Yuanjiang's normal value under s.45(3)(b) of the Regulation as the weighted average of all of the actual amounts realised by the other exporters on domestic sales of like goods, without an ordinary course of trade filter, consistent with section 9.3 of the Manual and with the 2016 reinvestigation.
- recalculate the residual normal value on that basis, and publish the corrected residual rates.
- obtain tender evaluation information from the purchasers of Class 2 and above projects, state for each tender counted as lost whether the local bidder was pre-qualified and why the tender was awarded elsewhere, and remove tenders lost for reasons other than price.
- carry out a market-wide and segment-by-segment analysis of injury and causation, and assess in non-confidential form the local capacity to supply Class 2 and above projects.
- assess actual domestic delivery capability for complex Class 2 to 9 facade projects, distinguishing quotations submitted from tenders competitively assessed, contracts

awarded and comparable projects completed, and consider separate treatment or tailored exclusions for those projects.

- publish the composition of the $455 million and the $422.6 million, state what each component of the $72.6 million represents and how it was tested, and remove the inference that lost sales "would have exceeded" the figure found.
- rely only on validated undercutting results, and state the number of projects behind each range.
- consider, and give reasons on, whether the goods should be dealt with as two classes for Class 1 and for Class 2 and above buildings.
- report sales, imports, tender losses and undercutting separately for each of the three market segments the SEF has found, and explain how imports into segments with little Australian supply caused injury to the industry as a whole.
- identify and, where possible, quantify the injury caused by contraction in demand, competition among Australian producers, Ventora's cost increases and the relative efficiency of Chinese producers, and attribute to dumping only the injury that remains.
- state the volume of imports found to be dumped on examined exporters' own data, and test the injury findings against that volume.
- resolve the conflict between pages 209–210 and 211 on Ventora's profitability, recalculate the non-injurious price without the cost increases the SEF found unrelated to imports, and recommend a lesser duty where the non-injurious price is below normal value.
- give the Minister a full assessment of the downstream effects of the proposed measures, including the cost to builders by building class, the effect on housing and apartment delivery and on contracted projects, the industry's capacity to supply Class 2 and above projects, and the effect on competition.
- recommend that the Minister consider exercising the discretion in s.269TL not to impose measures, or not to impose them on goods for Class 2 and above buildings.
- if measures are imposed, recommend that the Minister exercise the discretion to apply a lesser amount of duty based on a corrected non-injurious price.
- decide the exemption requests before measures are imposed.

Supplyhaus does not seek to diminish the protection legitimately available to Australian manufacturers. It seeks to ensure that measures intended to protect one established segment of the industry do not unnecessarily disadvantage another, materially different segment that Australian manufacturing capacity is substantially unable to serve.

Yours faithfully,



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