CGT LAW
CUSTOMS AND GLOBAL TRADE

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The Director
Investigations 1
Australian Trade Remedies Commission
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Canberra Act 2601

By email: investigations1@atrc.gov.au

Dear Director

Investigation No. 691 – Aluminium windows and doors exported from the People's Republic of China

We act for multiple unrelated companies[1] that import and supply façade system, windows and doors to Australia's commercial construction market. This submission is a further response to the Statement of Essential Facts (**SEF**) published in respect of Investigation No. 691 – Aluminium windows and doors exported from the People's Republic of China (**Investigation**).

This submission is primarily to set out our clients' position regarding comments made by interested parties in response to the SEF.

In this submission we set out our clients' views on:

a) The interpretation of the dimension specifications of the goods under consideration (**GUC**)
b) The capacity of the Australian industry in respect of large façade projects
c) The potential of a change in dumping margins for sampled exporters on:
    i. The Commission's previous causation analysis
    ii. The calculation of the residual exporter rate
d) The extent to which the residual exporter rate can be used as positive evidence of dumping
e) Calculation of the dumping margin for Altop
f) If dumping is to be imposed, the form of measures
g) The transparency of the investigation.

In this submission we make submissions as to certain matters that presume dumping duties will be imposed and will apply to window wall. Our clients strongly maintain that:

a) The legislative grounds for the imposition of dumping duties have not been established; and
b) The wording of the GUC does not cover window wall.

No submission in this document should be taken as a concession that our previous submissions were incorrect or are no longer maintained.

[1] [Name of importers [redacted]

1. **Scope of GUC**

    a. **Window wall systems**

We have previously submitted that the wording of the GUC does not capture window wall and other façades. This was primarily because such goods are properly identified as wall and not windows or doors.

If we are wrong and window wall is included within the GUC, this submission addresses how the dimension limitations in the GUC apply to window wall. The primary specification addressed is that the GUC only covers window assemblies and partial assemblies up to and including 4.0 metres wide.

For the purpose of this submission, we are referring to window wall façade systems comprised of unitised or semi-unitised window wall whereby individual modules are installed between two continuous perimeter members that run the full length of the building opening. These perimeter members comprise a head receptor (deflection head) fixed to the underside of the slab above and a starter sill or sill receptor fixed to the slab below. There will also be included end jambs or closures where the run meets a wall, column or return.

Together, these items form the one outer frame around the entire window wall façade section within the building opening or structure. The individual modules fit into this perimeter.

The individual modules join to each other with split mullions. The outer frame is required for the façade system to join to the building.

The window wall system considered below:

- Comprises the modules and frames required to fill an entire opening in a building;
- Arrives at the one time on a single vessel (multiple openings may arrive on the one vessel);
- Are designed specifically to work together and can only function when assembled together;
- Are tested and certified as a system rather than as individual modules.

The submissions do not apply to discrete units or panels that are not designed to work with other panels or are not imported at the same time as those other panels.

    b. **Goods under consideration**

The Applicants' wording of the GUC is:

"*Aluminium windows and doors, whether fully or partially assembled, including their frames, panels, and sashes, with or without glass, whether or not thermally broken, whether or not including hardware, up to the following dimensions:*

- for window assemblies or partial assemblies (including window frames, panels and sashes), up to and including 3.0 metres high and up to and including 4.0 metres wide; and

- for door assemblies or partial assemblies (including door frames, panels and sashes), up to and including 3.0 metres high and up to and including 7.0 metres wide.

"Fully assembled" refers to a complete window or door unit in which all frames and the applicable panels and/or sash are joined together to form a complete and functional window or door assembly, whether or not glazed, whether or not thermally broken, whether or not including hardware.

"Partially assembled" refers to a fabricated aluminium frame, panel, or sash assembly that is supplied individually or connected to other frame, panel, or sash assemblies, where the combination does not yet

form a complete window or door unit, whether or not glazed, whether or not thermally broken, whether or not including hardware.

Excluded are curtain wall products"

c. Dimension requirements

The applicants have set dimensional limits regarding which aluminium windows and doors (**AWD**) assemblies and partial assemblies are the subject of the investigation and which are not. In respect of window assemblies (or partial assemblies), the maximum width is 4 metres. For door assemblies (or partial assemblies) the maximum width is 7 metres.

In our submission dated 28 December 2025 we set out arguments as to how the width is to be measured. The Commission did not address this issue in the SEF. This issue has been raised by a number of interested parties (see submission numbered 569, 572, 574, 577, 579 and 787).

The key issue is whether the width of window wall is determined by the total width of the window wall assembly or the individual modules that make up that window wall assembly.

In the Applicants' response to the SEF (submission 787), it states on page 12 that:

"*A related matter is the level at which the goods were recorded. AWDs for larger projects are commonly scheduled and quoted by reference to the overall architectural opening by location or elevation, rather than the individual windows and doors from which that item is made. A single scheduled item can describe an elevation many metres wide, made up of numerous individually framed windows and doors, each of which falls within the goods description …*

Where exporters' sales or cost data were recorded at the level of the scheduled item, goods within the goods description may appear to exceed dimensional parameters, and may have been excluded, or grouped with larger window wall or façade assemblies."

On page 14 the Applicants request in respect of the height specification that *"… this exclusion was made by reference to the dimensions of the individual windows and doors exported, rather than the overall scheduled item."*

The Applicants recognised that goods are scheduled and architecturally designed by openings and identify such goods as a "single" scheduled item. The Applicants proceed on the assumption that such items on import should be identified as individual windows and doors without providing any reasoning for or arguments in support of its view. Rather, it directs the Commission to confirm that the Commission has carried out the assessment of the width of goods in accordance with its view.

We submit that the Applicants' interpretation is incorrect. Our view is that the width of the fully functional window or door assembly, or schedule item, is the width of the complete unassembled imported system. In the case of window wall, this is the combined width of one or more modules included in a single importation that are designed to, and can only function if, they are joined together and encased by an outer perimeter frame. These modules and outer perimeter frame will be installed together and are designed to fill a single opening.

There are a variety of reasons that support this interpretation. These are:

- The GUC wording used by the Applicants;
- The application of the width requirement to partial assemblies;
- The width specification for doors;
- The Commission's description and identification of window wall; and
- The approach of Courts to the identification of unassembled goods for customs duty purposes.

Each of these are discussed below.

d. Wording used by the Applicants

The wording selected by the Applicants in respect of windows is consistent with the width of a window being based on the combined width of multiple modules designed to work together to fill a single opening. We note the following:

- The wording selected is window "assemblies" which is wider language than simply referring to an individual window or door unit;
- The definition refers to the "*frames, panels, and sashes*" of a window assembly. The reference to the pluralistic reference is consistent with an assembly consisting of the multiple modules designed to work together as the one assembly. For instance, a single window does not have multiple "frames";
- The definition of "fully assembled" distinguishes between the individual unit and the assembly. The wording is "*Fully assembled" refers to a complete window or door unit in which all frames and the applicable panels and/or sash are joined together to form a complete and functional window or door assembly* – It is clear from the definition that multiple units designed to work together will form a single assembly. This wording clearly captures the one window wall system comprised of multiple modules and the one outer perimeter frame to form the complete and functional assembly; and
- The definition of "fully assembled" only includes "complete" and "functional" window assembles. Individual components of window wall are neither a complete nor functional assembly

It is also important to adopt an interpretation of the GUC that gives meaning to the wording selected by the Applicants. The Applicants intended to exclude functional complete window assemblies with a width greater than 4 metres. If this limit is applied on a per module/unit basis, almost nothing is excluded. The limit has no practical purpose.

It is submitted that the limitation should be interpreted so as to give it a purpose. This purpose was to confine the goods the subject of the Investigation to discrete window and door units of the kind Ventora produces. Where the GUC was intended to cover multiple units working together, the maximum width was expressly widened (see the comments in 1(f) below on the width of doors).

e. Width of partial assemblies

The height and width specifications apply to both fully assembled items and partially assembled items. Partial assemblies are defined as including components supplied individually or connected to other assemblies where the combination does not yet form a complete window or door unit.

A partial assembly could consist of a variety of unassembled components. The only logical interpretation of a 3m x 4m dimension requirement applying to a partial assembly is that the dimension requirement applies to the partial assembly as assembled.

It is impossible to understand how a maximum height and width requirement could apply to unassembled components unless they are assessed in their intended assembled form.

The same logic must be applied to all aspects of the GUC definition as no distinction is made to the dimension wording as it applies to assembled and partially assembled goods.

If a complete window wall assembly is identified on importation as an unassembled window wall system, the width must be assessed as the width of the assembled system. Similarly, if a window wall system is viewed as a collection of complete window assemblies and frames, the width must still be the width of the complete assembled set.

f. Width of doors

The width specification nominated for doors makes clear that the width is to be determined by the combined width of modules/units designed to work together.

The width specification for door assemblies is 7 metres, compared to 4 metres for window assemblies. The nomination of a 7 metre width could not be referring to a single 7 metre wide door. Rather, the Applicants were referring to an opening of up to 7 metres that is filled by multiple door panels. The types of multi panel doors that may fill a 7 metre space would include:

a) Stacker doors which include 3 – 6 sliding panels on parallel tracks that stack behind one another;
b) Multiple-panel sliding doors; and
c) Bi-fold or folding doors comprising of 6-8 leaves.

A single 3.0 m x 7.0 m door panel is not a realistic product. It would be the size of a shop front or window wall/curtain wall. It would be absurd to believe that the Applicants intended such a product to be covered if it was a door, but would not be covered if it was a window (maximum width 4.0 metres).

The only logical interpretation is that the Applicants intended the width of an aluminium door to be calculated by the combined width of the various panels that comprised the door. That is, the width is determined by the width of the entire door system and not the individual panels that make up that door.

This reading also matches the product ranges of the Ventora companies. Those doors are the like goods the Commissioner relied on. Any wide doors offered by Ventora are multi-panel systems. For instance:

- Stegbar's Residential aluminium sliding and stacking doors are offered in multiple panel configurations with individual panels available up to 1500mm wide. There is no single door panel that is 7 metres wide.
- Stegbar's Alumiere range reaches up to 1800mm in width.
- A&L's ComfortSmart sliding and stacking door has a max sash width of 1500mm.
- Trend's Crestlite Windsor system allows for door panels up to 1800 mm wide.

On these published limits, a Ventora door assembly at, or near, 7.0 metres wide would need at least four, and more typically five or six panels. A door width of 7 metres only exists if what is measured is the combined width of panels intended to work together.

Given that windows and doors are part of the one GUC definition, it must be that if the width of doors is determined by the combined width of multiple panels designed to work together, then the width of windows is identically measured.

g. Commission's identification of window wall

Our suggested approach to interpretation matches the Commission's own description of the window wall. The Commission describes:

- Described window wall as "a series of window or panel assemblies";
- Described a window wall system as "a façade system comprising interconnected window, framing and spandrel components".
- Assessed window wall "having regard to the characteristics of window wall as a whole".

In footnote 316 of the SEF, the Commission accepts that window wall is within the goods only "[w]here window wall meets all other dimensions (i.e. height and width) described by the goods description".

Measuring each module individually would contradict the Commission's own characterisation of window wall as a series of interconnected assemblies. It would also mean the dimension limits never operate: any façade can be divided into modules narrower than 4.0 metres.

h. Approach to the identification of imported goods required by law

Case Law

If made, the terms of the GUC will, by reference, form part of the dumping notice. Goods will need to be identified at the time of importation and then an assessment made as to whether the imported goods, as identified, fall within the terms of the dumping notice (including the GUC).

Dumping duties are duties of customs. There is considerable case law that applies to both identification of goods for customs purposes generally, and identification for the purpose of determining the application of dumping duties.

These cases all support the proposition that:

(a) where imported goods are related, the test is whether the identity of the related units is subordinate to the identity of the combination; and
(b) that unassembled goods, designed to work together, are to be identified in their assembled state.

This case law was succinctly summarised in *Re Tridon Pty Ltd and Collector of Customs* [1982] AATA 119; (1982) 4 ALD 615 where it was stated at 620 that:

"(viii) Composite goods, notwithstanding that they have components which are separately identifiable, may nevertheless be identifiable in combination as a new entity if the identity of the separate units is subordinated to the identity of the combination."

In *Gissing and Collector of Customs* (1977) 1 ALD 144 the Tribunal (which included Justice Brenna, latter a High Court Justice) stated at 145:

"*When goods are separate units, each identical with the others, and possessing no distinctive feature by reason of their association, each unit may be identified self-evidently as the relevant entry for classification.*

On the other hand, there is sometimes a relationship between or among various units of such a kind as to identify them as a combination rather than as separate units. The test to be applied is whether the identity of the units is subordinated to the identity of the combination."

In *Solar Juice Pty Ltd and Comptroller-General of Customs* [2022] AATA 550 (**Solar Juice**) the Administrative Appeals Tribunal applied this principle in considering whether an unassembled solar panel mounting kit fell within the scope of the dumping notice applying to certain aluminium extrusions. The Tribunal identified that the unassembled products were not mere individual components, but were a composite good being an unassembled mounting system or kit for solar panels. In making this decision, the Tribunal took into account that all of the components were precisely designed to work together and were manufactured to specifications that make them only useable for this one purpose.[2] This was so even though the assembled kit could not form a single structure until combined with solar panels that were not included in the importation.

In *Solar Juice,* it was expressly noted that the rails would have been covered by the dumping notice if imported on their own, but were not included when identified as part of an imported system.[3]

[2] Solar Juice at paragraphs 47 - 49
[3] *Solar Juice* at [72] and [78]

Solar Juice is consistent with cases that have considered the identification of unassembled goods at the time of import.

In *Re Cemac Associated Ltd and Collector of Customs (NSW)* [1985] AATA 77; (1985) 7 ALD 411, an import consisted of goods that would be used to produce a complete access floor system. The issue was whether the imported goods were identified by the individual components to produce the access floor or as a single structure, being the access floor system. The importation consisted of four containers of pedestals, stringers, gaskets and floor panels. These components were "*the precise number of components ordered … to fulfil a contract to instal an access floor in a building*" ([9]). The Tribunal identified and classified the whole importation as one unassembled structure ([49]). The panels were part of that structure, even though they would be classified differently if imported alone and were not even fixed to the understructure. The decisive factor was that they were "*designed and manufactured for the express purpose of being fitted to*" the rest of the system ([47], [49]).

The Tribunal in Cemac adopted the principle stated by Isaacs J in *Whitton v Falkiner* (1915) 20 CLR 118 at 125–126 ([30]). Where a complete article "*is imported by the same person, at the same time, though its parts are disconnected for convenience of transport or otherwise, and need only unpacking and assembling to constitute the complete [article*]", the importation is to be regarded "in its integrity" as the one article. The Tribunal also observed that it is "*difficult to imagine any major structure … being imported otherwise than in an unassembled or disassembled state*" ([36]). It accepted that "structures" include sub-assemblies used in building work, such as "door and window frames" ([41]–[42]).

In *Re T-Systems Australia Pty Ltd and Chief Executive Officer of Customs* [1999] AATA 182, components imported in several shipments were identified as a single blown film line, not as an "extruder". The Tribunal found that "each component of the line is inter-related and inter-connected to the other in order to produce the end product", and that the extruder "alone cannot do this" ([53], [55]). The goods were "components of the line not the extruder" ([73]). In the same way, window wall modules are components of the window wall system. The goods are not windows that happen to be shipped together.

Where one shipment contains modules for more than one complete window wall assembly, each assembly is identified separately. In *Progress Metal Works* [1984] AATA 22 (as described in *Solar Juice* at [52]), components for 3,472 bicycles were identified as 3,472 unassembled bicycles. Each window wall assembly can be identified objectively from:

- the unit marks on each module;
- the shop drawings;
- the elevation schedule.

<u>Application of case law to window wall</u>

We submit that in respect of a window wall system, the identity of each individual module is subordinate to the façade which it will form with the other elements of window wall system including the perimeter frame.

The factual reasons for this view that such a consignment is identified as the one continuous item are:

a) Designed as one system: Window wall systems are the result of project-specific façade engineering, structural calculations for wind load and deflection across the whole elevation.
b) Modules depend on each other: Each module has interlocking mullions, continuous seals and may have integrated spandrels. Modules cannot be swapped with each other, cannot function on their own and each is marked with its location in the building.

c) Tested and certified as a system: Window wall façades prototype testing is of the system to AS/NZS 4284. Compliance with the NCC is demonstrated for the façade, not for individual units under AS 2047.
d) Ordered and invoiced as a whole. A single façade subcontract or purchase order is priced per project or per m² and often invoiced per floor of schedule system. Individual units are not purchased.
e) Installed together: Modules are installed in sequence by the façade contractor, and no module is installed or used on its own.
f) Shipped as a project (often by floor). Packing lists will be by project, floor or elevation and most often each consignment will contain at least a complete floor.

The fundamental point is, no window wall module is complete, or can be used in any way, without being joined to the adjacent module and being framed by the perimeter frame. Case law requires such goods to be identified as the one assembled item.

The GUC is to be applied to the goods as identified at the time of import in accordance with the law. The correct interpretation of the GUC, taking into account the relevant case law and facts, is that width of window wall is the width of the complete window wall systems that will fill a single opening.

The Commission should not adopt the Applicants' proposed interpretation of the GUC. The Applicants' approach is contrary to existing case law, is inconsistent with the wording selected and would result in different approaches to measuring the width of doors compared to window wall.

2. Australian industry capacity

Our clients continue to submit that the Australian industry has limited capacity to provide façade systems for larger or complex projects.

On page 3 of the Applicants' submission in response to the SEF it is claimed that Australian industry has available production capacity and that imports are not needed to supply larger or complex projects. The applicants cite submissions by "*Ventora and AGWA, G.James, Central Glass, Reynaers, Thermeco, Vitrocsa, Concept Aluminium Systems and Capral*". It is crucial that the Commission bases its findings as to capacity only on proven claims by manufacturers of façade systems for large or complex projects. Claims by extruders or manufacturers in the residential housing market are not evidence of capacity of Australian façade manufacturers.

The Commission has the ability to obtain evidence as to the volumes of façade systems produced by the Australian industry. Given the established dominance of the Australian AWD industry (79% market share), a claimed manufacturing capability should be reflected in substantial production volumes.

If the Commission finds that the Australian industry has a lesser share of the façades market than the general 79% market share, the Commission should investigate whether this reflects a lesser capacity of the Australian industry in this market segment.

We strongly suspect that it will be found that the Australian industry has a lesser presence in the façades market than in the household AWD market. If this is proven, the Commission must investigate whether there has been a general shift in the high rise construction market towards window wall and curtain wall. A shift in demand from standalone windows towards façade systems would represent a demand shift from a market in which the Australian industry dominated (household AWD) to one in which it had a reduced proven capacity and capability (façades).

Injury caused by a shift in customer preference to façade system should not be attributed to any alleged dumping.

Before attributing any façade specific reduction in market share to dumping, the Commission should hold evidence that dumping is more prevalent in the façade market than the household residential market. If dumping is greater in the household residential market than the façades market, but the Australian industry market share is lower in the façades market, it suggests causes other than dumping.

3. Potential change in dumping margins

The findings in the SEF were based on the evidence held by the Commission as to the level of alleged dumping. Relevantly, of the 6 exporters reviewed, 1 was found not to have dumped goods, 4 were found to have engaged in dumping and one exporter had unreliable data.

Subsequent to the publication of the SEF, each of Guangdong Kete and Foshan AMJ have made submissions the outcome of which, they claim, will be the reduction in their dumping margin below 2%. If those submissions are accepted, this would be a substantial change to the facts upon which the SEF was based.

The below submissions are made on the assumption that ultimately, one or both of Guangdong Kete and/or Foshan AMJ will be found to have a dumping margin of less than 2%. Such a finding would significantly impact the Commission's causation analysis and should result in a lower residual exporter rate.

a. Causation

The causation arguments in the SEF were based on the premise that 4 of the 6 sampled exporters were found to have engaged in dumping (with one exporter having unreliable data). The causations findings of the Commission need to be completely re-examined if it is in fact found that 3 of the 6 sampled exporters were not engaged in dumping.

<u>Tender analysis and undercutting</u>

As a starting point, the Commission's tender analysis would need to be reperformed excluding any tender lost to Guangdong Kete or Foshan AMJ or any tender not lost to Guangdong Kete or Foshan AMJ but where Guangdong Kete or Foshan AMJ would have been the successful party in the absence of any dumping by a Chinese exporter.

On page 192 of the SEF the Commission refers to sales tracing to 13 importers, 3 of which won repeatedly. If these importers (particularly the 3 that repeatedly won) were supplied by either Guangdong Kete or Foshan AMJ, the Commission will need to now attribute that injury to non-dumped imports.

The Commission has claimed that the alleged undercutting occurred across all building classes, with undercutting for non-residential projects averaging 40%. Given that Guangdong Kete predominately supply façades, the Commission needs to assess to what extent the undercutting in the non-residential market is attributable to non-dumped prices.

<u>Market share and volume</u>

Clearly any market share lost to Guangdong Kete and Foshan AMJ cannot be attributed to dumping. While the Commission must of course exclude these exports from the causation analysis, it should also ask why the Australian industry lost market share to Guangdong Kete and Foshan AMJ. If this was not due to dumping, what was the cause and could this same cause have impacted market share lost to other exporters.

<u>Profit effects</u>

The Commission's causation analysis regarding profit is virtually non-existent. The Commission at 9.8 of the SEF repeats the injury findings of a reduction in profit without discussing how this was caused by

dumping. The only causation analysis is in the final line of section 9.8 where it states "*Both factors were caused by imports of dumped and/or subsidised goods from China that materially undercut the prices of Australian industry.*"

The Commission states causation as a fact, rather than putting forward reasons supporting its claim. Leaving this aside, if the Commission continues to assert that loss of profits was due to undercutting by dumped imports, it needs to exclude the effect of imports by Guangdong Kete and Foshan AMJ and any goods that had a higher price than the Guangdong Kete or Foshan AMJ goods.

Such losses are due to the existence of goods with a lower price point than the Australian industry and that lower price point being due to factors other than dumping.

Imports that were not dumped

The Commission originally found that the split between dumped and non-dumped imports was 87% vs 13%. This analysis needs to be reviewed if Guangdong Kete and/or Foshan AMJ are found not to have engaged in dumping.

It is also worth noting that the Commission does not hold any evidence that a single good, other than those exported by the 6 sampled exporters, was dumped.

Cost advantages enjoyed by Chinese exporters

The Commission accepts that Chinese exporters enjoy cost advantages over Australian companies that are not linked to dumping. At a minimum, cost advantages arise from differences in labour costs and the scale of Chinese operations. The Commission previously attributed pricing by Guangdong Kete and Foshan AMJ to those exporters engaging in dumping. If, in fact, it is found that Guangdong Kete and/or Foshan AMJ have not engaged in dumping, the Commission must concede:

a) Guangdong Kete and Foshan AMJ enjoy price advantages over the Australian industry caused by factors other than dumping; and
b) The Commission has demonstrated that its tools of analysis are inadequate to distinguish price advantages caused by dumping from price advantages due to causes other than dumping.

b. Residual exporter rate

A reduction in the dumping margin for 2 examined exporters should logically, and in fairness, result in a lower residual exporter dumping margin.

The calculation of the residual exporter rate is set out in section 6.11 of the SEF and Confidential Attachment 31. If the level of dumping of the 6 sampled exporters is less in the Final Report than in the SEF, the residual exporter rate should also be reduced.

We assume that the residual exporter rate in the SEF was calculated using the weighted average export price and weighted average normal value of the sampled exporters, other than Altop (not found to be dumping) and Broad (unreliable information). If this assumption is correct, the residual exporter rate will have been based on information provided by Guangdong Kete (12.1%), Yhuhai Yipeng (51.6%), Foshan AMJ (5.3%) and Yuanjiang (34.8%).

Assuming that Guangdong Kete and Foshan AMJ are found not to be dumping, it would be open to the Commission under section 269TACAB(2) of the Customs Act to calculate the residual dumping margin by reference only to data available for Yhuhai Yipeng and Yuanjiang. Based on the current margins, this would produce a higher residual exporter rate than the current rate.

The absurd result would be that a decrease in the evidence of dumping would result in an increase in the dumping duty margin impacting residual exporters. The Commission does have a discretion to avoid this

absurd outcome and ensure that the measures imposed have some connection to the level of dumping actually found.

The calculation of the residual exporter rate is set out in section 269TACAB(2) of the Customs Act. That section set out:

a. the export price for residual exporters must not be less than the weighted average of export prices for like goods of cooperative exporters from the same country of export; and
b. the normal value of goods for a residual exporter must not exceed the weighted average of normal value for like goods of cooperative exporters from the same country.

These two requirements are designed to protect a residual exporter and provide a formula for the highest possible residual dumping margin to apply to future imports. However, this is all the section does. It does not preclude the Commission from considering all relevant information, and that information includes the evidence of the dumping margins of all the sampled exporters.

It is important to appreciate that section 269TACAB(2) of the Customs Act does not operate in isolation. Sections 269TAB(3) and 269TAC(6) of the Customs Act still operate to provide the legislative basis for the determination of the export price and normal value of goods for residual exporters. Section 269TACAB(2) of the Customs Act only sets a minimum and maximum level for the export price and normal value determined using all available information.

It is appreciated that section 269TACAB(3) of the Customs Act does exclude reference to certain data of exporters that were not found to be dumping when calculating the section 269TACAB(2) of the Customs Act minimum and maximum values. However, this does not mean that the exporter's verified data is irrelevant to setting a dumping margin below the maximum figure permitted by 269TACAB(2) of the Customs Act.

Setting a residual rate at the maximum permitted by section 269TACAB(2) of the Customs Act is a choice that the Commission can make. However, the Commission must act reasonably in exercising its power. It is submitted that weaker evidence of dumping should justify a lower residual exporter rate. It is reasonable for the Commission to recommend a residual exporter rate lower than 24.4% where there is less evidence of dumping than was the case when the Commission recommended the 24.4% residual exporter rate.

Such an approach is consistent with the purpose of the residual exporter rate. The rate is to approximate a dumping duty rate for exporters that had wished to be examined, but could not be due to the volume of exporters. The representative rate should be based on the outcome found for the sample that was examined. If an increasing portion of the sample is found not to be dumping, the residual rate should fall. The inverse occurring is not logically supported by the evidence held by the Commission.

It is submitted that the residual rate should be based on the weighted average of all five exporters for which the Commission holds reliable information. In the alternative, and at the very least, the residual margin in the SEF should not be increased following a finding that a lesser portion of the sample exporters have engaged in dumping.

In considering this approach, we ask the Commission to consider that each residual exporter is a party that wished to obtain an individual rate. Residual exporters are not uncooperative and are to be assessed by the outcome of the sampled exporters. Those exporters should not be punished as a result of a smaller portion of the sample being found to have engaged in dumping.

4. Evidence of dumping – residual and all other exporters

To the extent that the Commission's causation analysis relies on assumptions about dumping by residual exporters, it is speculative at best. We submit that the Commission should only rely on positive evidence of dumping and not make assumptions that contradict the held evidence.

It is stated that residual exporters and uncooperative exporters comprise approximately 71% of the value of Chinese AWDs imported into Australia. It is submitted that the residual exporter rate and the "all other exporter" rates are not positive evidence of goods that have been found to have been dumped. These rates are statutory constructs for the purpose of administering any future dumping notice. The statutory purpose in creating these rates is not to create positive evidence of dumping.

Our view is consistent with the purpose of the residual exporter rate and how the maximum residual exporter rate is calculated under the Customs Act.

Calculation of the residual exporter rate

As set out above, the Customs Act sets out a method for calculating a maximum residual exporter rate to be applied if a dumping notice is made. That maximum rate excludes consideration of data relating to sampled exporters that were found not to be dumping.

If the residual exporter rate was intended to be used as evidence of dumping during the investigation period, it stands to reason that the level of constructed, or assumed dumping, would be based on the weighted average of all sampled exporters and would not exclude findings in relation to exporters that were not engaged in dumping.

Purpose of the residual exporter rate

The residual exporter rate is not created for assessing levels of historic dumping. Rather, it is a rate to be applied to exporters if dumping duties are to be imposed. A residual exporter rate acts as maximum duty rate, not a proven dumping margin.

The rules for determining the residual exporter rate are derived from Article 9.4 of the WTO Agreement which sits within Article 9 – "Imposition and Collection of Anti-Dumping Duties". The residual exporter rate is not connected to Article 2 (determining dumping) or Article 3 (injury).

Within the Customs Act the section relating to residual exporters is headed "Dumping duty notice – export prices and normal values for different categories of exporters". That is, the reference is to the application of a dumping duty notice after a positive finding of dumping. By contrast, section 269TACAB is entitled "Working out whether dumping has occurred and levels of dumping" and refers to export prices being determined in accordance with section 269TAB and normal values in accordance with section 269TAC.

The Commission's approach is to use a mechanism designed to protect residual exporters (s269TACAB) as a tool to artificially find that such exporters have engaged in dumping.

WTO authority

The approach of the Commission is also at odds with WTO Appellate Body authority.

In EC – Bed Linen (Article 21.5 – India), the Appellate Body considered a determination by the European Communities that treated all imports from producers it had not individually examined as "dumped" for the purposes of its injury analysis. That was so even though imports from a large share of the examined

producers had been found not to be dumped.[4] The Appellate Body held that the approach was not objective as the result is predetermined by the methodology itself. The same can be said about the Commission's approach. If residual exporters must receive a rate based only on exporters that are found to have dumped goods, residual exporters will always be found to have engaged in dumping.

In treating every such import as dumped, the European Communities had failed to determine the volume of "dumped imports" on the basis of "positive evidence" and an "objective examination". It therefore acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

The Appellate Body did not accept that the "all others" rate provided for in Article 9.4 justified that approach. Article 9.4 is a rule about the imposition and collection of anti-dumping duties. It caps the duty that may be applied to exporters who were not examined, irrespective of whether they would have been found to have been dumping. It does not establish that those exporters' goods were in fact dumped, and it provides no basis for treating their exports as dumped imports when determining injury under Article 3.[5]

Section 269TACAB(2)(c) and (d) of the Customs Act reflects Article 9.4. It provides that the residual export price must not be less than, and the residual normal value must not exceed, the weighted averages of the selected exporters. That provision sets a limit on the duty payable by exporters who were not examined. It is not a finding about the prices at which those exporters actually sold goods.

The speculative nature of the Commission assuming dumping by residual exporters becomes even more evident if either, or both, Guangdong Kete and Foshan AMJ are found not to have engaged in dumping. In such a case, half of the exporters examined will be found not to have dumped goods, yet all residual exporters will be considered to have engaged in dumping.

The uncooperative or all other exporter rate is an artificial rate designed to ensure non-cooperation is not rewarded. The Commission is aware that the rate is based on a mismatched comparison of the lowest verified export price of any exporter and a weighted average normal value of sampled exporters (section 6.12 of the SEF). This may be appropriate for the application of future interim penalty dumping margins. However, it does not serve as a basis for a positive finding that dumping has occurred.

The Commission must base its findings of dumping on any positive evidence it holds. It should not use a methodology where a finding of dumping of residual exporters is predetermined.

5. Claims regarding the Altop rate by the Applicants

The Applicants in their submission in response to the SEF have made claims regarding amounts that should be excluded from the Altop export price.

On page 14 of the Applicants' submission it is noted by the Applicants that Altop is a façade supplier and that it supplies window wall systems with integrated punch windows. The Applicants then seem to raise issue with the potential that Altop's export prices might have included elements that go well beyond the price of the AWDs themselves. The Applicants' specifically raise *"design, engineering, testing, installation, sit supervision, servicing and warranty*".

It is entirely appropriate for a supplier of a façade system to include in the FOB export price of the good those expenses incurred in bringing the good into existence. A key difference between the goods supplied by Ventora and façade systems is that façade systems are bespoke products for which there

[4] 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, adopted 24 April 2003, paras 103, 128.
[5] Ibid paras 122-127

are direct design, engineering and testing costs. The exported goods simply would not exist without the incurring of these costs.

The Commission acknowledges in the Dumping and Subsidy Manual at section 9.3 that design costs for the specific customer are to be included in the costs to make and sell of the goods. The same must naturally apply to engineering and testing costs.

The Applicants' claims that a façade supplier's normal value would not include design, engineering or testing costs highlights the difference between the business of Ventora and façade suppliers. Such costs are a necessary part of a façade suppliers' cost to make and sell goods to a particular customer. The costs directly relate to the good supplied to a particular customer and do not fall into some general product development expense spread over the entire product range.

It would be appropriate for both the normal value and export price of goods supplied by a façade manufacturer to include the cost of designing, engineering and testing that good to the specified standard. If this is not the case for the Ventora product range, it simply shows that the Ventora products and façade systems are not comparable products.

However, we of course assume that the Ventora companies do test their products to ensure compliance with standards that apply to their products. This cost is no doubt amortized over the sale of 1000s of units of each product. It is not excluded from the price or the cost of production. By contrast, Altop and other façade suppliers have project specific testing that must be charged and recovered in respect of that project.

6. Form of dumping duties

In section 12 of the SEF the Commission recommended the *ad valorem* method of dumping duty. The nomination of the *ad valorem* method makes sense given the extremely wide variety of goods that the Commission considers are covered by the GUC.

The Applicants and Capral have advocated for the combination method. The combination method requires the identification of a single ascertained export price (**AEP**) per exporter. The AEP would presumably be based on a price per KG or a price per square metre.

In terms of a price per KG method, there is the obvious issue that the GUC covers both AWD including glass panels and those that do not. For an AWD that contains glass, the glass component will account for 80% to 90% of the total weight. However, this needs to be contrasted to the Commission's findings in the SEF that glass accounts for 19% of the costs of an AWD and aluminium 37% of the costs of an AWD.

A price per KG AEP would mean that an AEP for an AWD imported without a glass panel would be 10%-20% of the AEP of a glazed AWD. However, the unglazed AWD may contain at least 37% of the material cost of a glazed AWD.

This issue is not resolved by adopting a per square metre approach. How could such an approach produce the one AEP that applies to both glazed and unglazed AWDs? Would the per square metre rate be inclusive or exclusive of glazing?

Other significant differences in the variety of products covered by the proposed measures (adopting the Commissions' view as to the scope of the GUC) include:

a) Design and engineering costs vary significantly between bespoke façade systems and standardised AWD for residential homes;
b) Performance ratings and certifications will impact costs/price but not weight or area;
c) Bespoke AWDs may have project specific structural, acoustic, thermal or weather performance requirements;

d) An AWD may be single, double or triple glazed. Similarly, laminated glass AWDs will be heavier, and more expensive per square metre, than lightly glazed AWDs;
e) Whether the AWD includes hardware and if it does, the type of hardware (generic vs European);
f) The size of the AWD, including thickness of the frame (a small window will cost much more per metre squared than a larger similar window);
g) Whether the product is a window or a door;
h) Fixed (no hardware) compared to AWDs with openings;
i) The opening type (compare sliding doors to stacker doors to French doors);
j) Thermally broken frames will add a lot to cost/price but will not change the square meterage and will have little impact on weight.

As noted in the Commission's Guidelines on Application of Forms of Dumping Duty (**Guidelines**) at page 8:

"In Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth [2013] FCA 870 the Federal Court held that variable factors determined in a Notice published under section 269TG of the Customs Act 1901 imposing the dumping duties should reflect the dumping determination for the goods, and the Minister may not vary the notices by putting into effect different variable factors by model or finish type. This is relevant when deciding on the form of duty to be selected.

For some commodities there can be a large number of models with significantly different prices. In some cases the difference between the lowest and highest prices in the product range has been well over 100%. Where the 'ascertained' export price component of the combined duty must be determined as an average for all the models the 'broad brush' nature of this calculation can make the combined duty unsuitable."

It is submitted that the GUC are uniquely unsuitable for the application of the combination duty method.

The Commission has raised that the *ad valorem* method has the disadvantage that exporters may lower export prices to avoid the effects of the duty. Similarly, it is noted by the Commission and Ventora that the combination method is better suited to scenarios where there are complex company structures with related parties and where circumvention of measures is likely.

Claims as to potential circumvention and the existence of related party arrangements can be made in respect of any commodity. There is nothing about this Investigation that means that such considerations should outweigh the reality that no reliable or fair AEP can be set.

It is worth noting that while the Commission did find a level of related party sales, each of the 6 sampled exporters also made arm's length third party sales. The existence of both related party and third party sales will mean that the Commission is well placed to investigate any future circumvention claims.

It is submitted that speculation as to future circumvention should not be used as a justification to impose the combination method in circumstances where it is clear that the GUC are completely unsuitable for a single fixed AEP.

Ventora has advocated for the combination method on the basis of how the *ad valorem* method would apply in the context of any accelerated review. The Guidelines do not set out any support for Ventora's argument. The reason for this is that the Investigation is designed to identify dumping that causes material injury and the best form of measures to address that claimed injurious dumping. The form of dumping measures are not a tool for managing future accelerated reviews. The level of likely accelerated reviews and the likely outcomes of such accelerated reviews are not findings that have been made in the Investigation.

The Commission should not be making a recommendation as crucial as the form of measures, based on Ventora's speculation as to future reviews or the outcome of those reviews. It would lead to a situation

where 100% of exports are subject to an inappropriate measure as a form to address an outcome that Ventora considers unfair in respect of an application for accelerated review that has not yet been made. If the Commission accepted Ventora's claims as relevant, it would be acting against the Guidelines and be taking into account an irrelevant consideration.

While the outcomes of future accelerated reviews are irrelevant, Ventora has not put forward an explanation of why the outcome of an accelerated review under the *ad valorem* method is not in accordance with the Customs Act, the intention of parliament or the WTO Anti-Dumping Agreement.

While we do not believe that the legislative grounds for the recommendation of dumping duties are met, if the Commission maintains the view that they are, the appropriate measure is the *ad valorem* method.

7. Claims of confidentiality and acceptance of submissions

Given the impact of this Investigation on a large number of importers, developers, commercial property owners and home owners, it is crucial that the Commission conduct the Investigation in a transparent manner and in accordance with its own guidelines.

We have concerns that a large number of submissions have been accepted in circumstances that are inconsistent with the Commission's published guidelines.

General

A large number of submissions in response to the SEF include claims for confidentiality. Many contained the wording:

"Confidential Commercial Information Provided to the Commission."

There is no further description of the claimed confidential information and it is impossible to understand the nature of the information provided to the Commission.

Considering only the responses to the SEF, confidentiality claims with either an identical description, or very similar description, to the above confidentiality claim is included in the following submissions 605, 625, 627, 632, 634, 636, 637, 638, 639, 640, 643, 644, 651, 654, 656, 657, 659, 663, 665, 669, 670, 672, 673, 675, 677, 678, 680, 682, 684, 685, 686, 693, 694, 695, 701, 702, 712, 715, 716, 719, 727, 728, 730, 731, 737, 742, 747, 748, 751, 757, 760, 762, 764, 772, 775, 776, 780, 782, 784 and 788.

The dates of the submissions, compared to the date of publication, suggest that the Commission has not even requested that the party submitting the document:

- Provide a version of the document that includes a summary of the information containing enough detail to allow a sufficient understanding of the information without breaching confidentiality; or
- Satisfy the Commission that there is no way that the party could provide a summary that would provide sufficient understanding of the information.

In most cases in respect of the above mentioned submissions, the redacted information is described as "commercial information". It is clear that the party could have submitted a description of the category of commercial information and what the information is said to support. Where the information was to demonstrate a change in financial performance over a period of time, a base year of "100" could have been used with subsequent periods reported in comparison to the "100" base year.

We refer to the Commission's guide "How to lodge a submission in response to an anti-dumping or countervailing case" at https://www.industry.gov.au/australian-trade-remedies-commission/how-lodge-submission-response-anti-dumping-or-countervailing-case

The Commission states "*All of our cases are conducted in a transparent manner to allow all interested parties to present their views. We won't consider a submission where you haven't provided a non-confidential summary or a statement of reasons why a non-confidential summary cannot be provided*."

Where a party has lodged a submission without a non-confidential summary or a statement of reasons why a non-confidential summary cannot be provided, the Commission should not consider that submission. If the Commission elects to publish and consider such submissions it will have denied other interested parties procedural fairness and failed to comply with the Commission's own guidelines.

We invite the Commission to expressly state in the final report for each of the above listed submissions:

a) Whether a statement of reasons of why a non-confidential summary could not be provided was received by the Commission; and
b) If not, confirmation that the Commission did not consider the submission in making its final report.

It is crucial that the Commission expressly address this issue. If the matter is not clarified, it is open for interested parties to form the view that the Commission has acted against its own published guidelines and considered 60 submissions that did not comply with the Commission's guidelines. These 60 submissions presumably relate to the claims that the Australian industry has suffered material injury and/or the cause of that injury. These are crucial issues in the Investigation.

Given that the contents of the 60 submissions are not known, or even broadly described, it would be open for an interested party to believe that the failure of the Commission to follow its own Guidelines was an error of law that impacted the legality of any final decision by the Minister.

Ventora and AGWA

The Applicants' response to the SEF includes claims of confidentiality that are difficult to reconcile with the redacted information being confidential to the Applicants. Below we set out the Applicants' claims of confidentiality and request that the Commission either require an explanation of the confidentiality claim or not take into account the submission.

On page 14 the Applicants redact information relating to their own understanding of Altop's exports. On page 14 it is stated: *The applicants understand that [confidential text deleted: applicant understanding of export sales]*

The Applicants' understanding of Altop's export sales is redacted on two occasions.

The applicants' understanding of Altop's export sales may be confidential to Altop, but it is not the applicants' commercially confidential information. It is for Altop to object to the publication of the information.

On page 16 the Applicants set out requests of the Commission regarding further assessment of Foshan AMJ's arm's length sales. On page 16 it is stated: *The applicants therefore request that the Commission:*
- explain the basis for [confidential text deleted: confidential arms length assessment];
- identify whether [confidential text deleted: confidential arms length assessment]; and
- confirm whether [confidential text deleted: confidential arms length assessment].

In addition, the next two paragraphs under "Selling Costs" are heavily redacted on the basis of "confidential arms length assessment".

Requests by the Applicants for the Commission to perform particular tasks that do not relate to the business of Ventora cannot be considered confidential. The Applicants are asking the Commission to

undertake tasks in respect of a sampled exporter and using claims of confidentiality to hide the nature of that request from interested parties.

In permitting this approach the Commission prevents the Investigation from being a transparent process. Rather, it has the opposite effect. It creates the impression that the Applicants are privy to confidential information regarding Foshan AMJ and that the Applicants believe that they can make private requests to the Commission as to how the Commission should investigate Foshan AMJ.

The purpose of permitting redacted public versions of submissions is to protect genuine commercially confidential information. It is not to give parties a tactical advantage by concealing arguments and requests made to the Commission about investigations of third parties.

Please feel free to contact us with any questions.

Yours faithfully
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