Australian Government
Trade Measures Review Officer

DECISION OF THE TRADE MEASURES REVIEW OFFICER

WWW.TMRO.GOV.AU

TRADE MEASURES REVIEW OFFICER
C/O AUSTRALIAN GOVERNMENT SOLICITOR
GPO BOX 2727, SYDNEY NSW 2000
P 02 9581 7640 | F 02 9581 7732
REVIEWOFFICER@TMRO.GOV.AU

ALUMINIUM ROAD WHEELS

REVIEW OF DECISIONS TO PUBLISH A DUMPING DUTY NOTICE AND A COUNTERVAILING DUTY NOTICE

PART 1 - INTRODUCTION & DECISION

Background

1. Arrowcrest Group Pty Ltd (**Arrowcrest**), trading as ROH Automotive and ROH Wheels Australia, manufactures aluminium road wheels (**ARW**s) and sells them domestically, on both an original equipment manufacture (**OEM**) and after-market (**AM**) basis.

2. On 19 October 2011, Arrowcrest applied for the publication of a dumping duty notice and a countervailing duty notice under s 269TB of the *Customs Act 1901* (**the Customs Act**) in respect of ARWs exported to Australia from the People's Republic of China (**China**). The application argued that low-priced, dumped and subsidised ARWs from China had caused significant material injury to the Australian industry which had been producing ARWs since 2003 and threatened to continue to cause further injury.

3. The Australian Customs and Border Protection Service (**Customs**) initiated an investigation in November 2011 and on 12 June 2012 published an International Trade Remedies Report No.181 (**the Report**). In the Report, Customs recommended the publication of a dumping duty notice in respect of the goods exported to Australia from China by exporters other than Zhejiang Shuguang Industrial Co. Ltd also known as PDW International (**PDW**) and the publication of a countervailing duty notice in respect of goods exported to Australia from China by exporters other than PDW and CITIC Dicastal Wheel Manufacturing Co., Ltd (**CITIC Dicastal**).

4. On 27 June 2012, the Minister accepted Customs' recommendation in relation to the alleged dumping and subsidisation of the goods from China contained in the Report. On 5 July 2012, the Minister published a dumping notice and a countervailing duty notice in the Australian Government Gazette and *The Australian* newspaper.

5. Under Part XVB of the Customs Act, I accepted 9 applications for review of the decision of the Minister to publish a dumping duty notice and a countervailing duty notice from the following parties:

    5.1. Speedy Corporation Pty Limited (**Speedy**), an importer of ARWs;

    5.2. Taleb Tyres & Wheels (**Taleb Tyres**), an importer of ARWs;

    5.3. GM Holden Limited (**Holden**), a manufacturer of vehicles and purchaser of ARWs;

    5.4. Samad Tyres Pty Ltd t/as Motorsport Wheels & Tyres (**Samad Tyres**), an importer of ARWs;

5.5. Ford Motor Company of Australia Limited (**Ford**), a manufacturer of vehicles and purchaser of ARWs;

5.6. YHI Manufacturing (Shanghai) Co Ltd and YHI (Australia) Pty Ltd (**YHI**), an exporter of goods subject to the dumping duty notice and countervailing duty notice by way of being a "selected non-cooperating exporter" as that term was used by Customs, and its related Australian entity;

5.7. StarCorp Holdings Pty Ltd (**StarCorp**), an Australian producer and importer of ARWs;

5.8. CITIC Dicastal, a Chinese exporter of ARWs named in the dumping notice; and

5.9. Jiangsu Shenzhou Wheel Manufacturing Co Ltd (**Jiangsu**), an exporter of goods subject to the dumping duty notice and countervailing duty notice, by way of being a "selected non-cooperating exporter" as that term was used by Customs.

6. I refer below to these applicants collectively as the **review applicants**.

7. Following public notification of my intention to review the above decisions, I received submissions from interested parties in accordance with s 269ZZJ of the Customs Act:

7.1. Arrowcrest (in relation to each of the applications for review by CITIC, Ford, YHI, Taleb Tyres, Speedy, Jiangsu, StarCorp, Samad Tyres and Holden);

7.2. Show Wheels Pty Ltd;

7.3. Boss Wheels Pty Ltd; and

7.4. Ningbo Motor Industrial Co. Ltd.

8. Arrowcrest also lodged submissions in response to the submissions by Show Wheels Pty Ltd, Ningbo Motor Industrial Pty Ltd and Boss Wheels Pty Ltd. Arrowcrest lodged these submissions on 26 October 2012 and 29 October 2012.

9. Dragway Performance Engineering **(Dragway**) lodged a submission on 29 October 2012.

10. CITIC lodged a submission on 30 October 2012.

11. The Customs Act allows interested parties to lodge submissions with the TMRO within 30 days after public notification of the review by the TMRO (s 269ZZJ of the Customs Act). Public notification of my review was made on 17 September 2012.

Accordingly, *all* submissions were required to be lodged with the TMRO by 19 October 2012.

12. The submissions lodged by Arrowcrest on 26 and 29 October 2012, Dragway on 29 October 2012 and CITIC on 30 October 2012 are therefore out of time and, in accordance with s 269ZZK(4)(b) of the Customs Act, I am not permitted to have regard to them.

Material taken into account

13. In accordance with s 269ZZK(4) of the Customs Act, I have had regard only to information that was before the CEO of Customs and to which Customs had regard or was required to have regard under s 269TEA(3)(a) of the Customs Act, and any conclusions based on the information contained in the applications for review and submissions received from the interested parties.

14. I also met with relevant Customs officers in the course of my consideration and considered the submissions received by interested parties pursuant to s 269ZZJ of the Customs Act.

Extension of time

15. On 6 November 2012, the Minister for Home Affairs approved an extension of time of approximately 5 weeks for me to make a decision on the applications for review of the Minister's decisions to publish a dumping duty notice and a countervailing duty notice in respect of ARWs exported to Australia from China, pursuant to s 269ZZK(3)(b) of the Customs Act.[1]

16. I am therefore required to make a decision on the applications by 21 December 2012.

Decision and recommendations

17. Under s 269ZZK(1)() of the Customs Act, I recommend that the Minister direct the CEO to reinvestigate the calculation of the dumping margins for all residual exporters. I further recommend that, when he reports the results of any such reinvestigation, the CEO of Customs should also raise the possibility of a direction under s 269TAC(2)(d), and request that the Minister consider whether or not to issue a direction under s 269TAC(2)(d). In this way, any eventual reliance upon section 269TAC(2)(c) can be placed on a more legally sound basis.

18. Under s 269ZZK(1)(b) of the Customs Act, I recommend that the Minister direct the CEO to reinvestigate the following findings in respect of the decision to publish a countervailing duty notice:

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[1] The TMRO is required to make a decision within 60 days after public notification of the review, unless a longer period in allowed by the Minister in writing because of special circumstances: s 269ZZK(3).

18.1. the finding that YHI received a benefit under all countervailable subsidies identified by Customs; and

18.2. the finding that there is a countervailable subsidy of the type described as 'Program 1'.

19. In all other respects, I recommend that the Minister affirm the reviewable decisions.

Reasons

20. The review applicants advanced a large number of grounds for review which, although variously expressed, overlapped to a considerable extent.

21. In preparing this decision, I have addressed each ground of review under the broader finding to which it relates, whether that be like goods, normal value, export value, material injury, dumping margin or countervailable subsidy. My reasons are set out below.

22. Many of the matters I have considered in this decision were also considered in the context of my review of the Minister's decisions to publish a dumping duty notice and a countervailing duty notice for certain hollow structural sections (**HSS**) exported to Australia from the People's Republic of China, the Republic of Korea and Malaysia (Report 177 refers).

PART 2 - REVIEW OF THE DECISION TO PUBLISH A DUMPING DUTY NOTICE

23. In relation to the review of the Minister's decision to publish the dumping duty notice, the review applicants raised a large number of grounds of review that I address below under the following headings:

    23.1. consideration of 'like goods' (paragraphs 24 to 42);

    23.2. assessment of normal value (paragraph 43 to 133);

    23.3. assessment of export prices (paragraphs 134 to 152);

    23.4. material injury (paragraphs 153 to 222); and

    23.5. non-cooperating exporters (paragraphs 223 to 238).

CONSIDERATION OF 'LIKE GOODS'

24. The review applicants submit that Customs erred in its analysis of like goods by:

    24.1. treating ARWs produced for two distribution channels, the Original Equipment Manufacturer (**OEM**) and Aftermarket (**AM**) segments, as 'like goods'; and

    24.2. treating particular ARWs that are not produced by the Australian industry as 'like goods'; and

    24.3. not taking into account consumer preference in its assessment of like goods.

25. Each of the above grounds is considered separately below.

ARWs produced for the OEM and AM market should not be treated as like goods

26. Holden and Ford both submit that ARWs produced for the OEM market segment and the AM market segment should be treated as two distinct goods for the following reasons:

    26.1. AM ARWs and OEM ARWs are produced for different markets (in each of which different standard requirements must be met);

    26.2. there is a physical difference between the OEM ARWs and AM ARWs; and

    26.3. AM ARWs and OEM ARWs are sold via different distribution methods.

27. These companies further submit that Customs should have applied different investigations and different measures for both the OEM and AEM sectors which they

claimed were separate markets, rather than applying measures for what it considered to be only one market.

28. The term 'like goods' is defined in s 269T of the Customs Act as:

> ***like goods***, in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

29. This definition does not use terminology such as "substitutable", but rather focuses on characteristics. Goods may have characteristics closely resembling those of the goods under consideration even if some further alteration is required in order to put the goods to the same end use and even if they are incapable of being altered to perform an identical use. Whether or not that alteration or a difference in characteristics precludes a good from being a like good will necessarily be a question of fact and degree.

30. The goods that are subject to the investigation are those described by Customs as:

> … aluminium road wheels for passenger motor vehicles, including wheels used in caravans and trailers, in diameters ranging from 13 inches to 22 inches. For clarification the goods include finished or semi-finished ARWs whether unpainted, painted, chrome plated, forged or with tyres and exclude aluminium wheels for go-carts and All-Terrain Vehicles.[2]

31. The review applicants object to the treatment of wheels that are sold in both the AM and OEM market segments as like goods. In my view, the only essential difference between the segments is the time of fitting the wheel, which is not a difference related to the product itself, but rather to the application of the product.

32. ARWs may be technically different one from the other because the car manufacturer requires or chooses to specify particular requirements in relation to quality, design or fit. But in my view such differences are insufficient for the goods to be considered not like goods. I consider this to be the case even if the manufacturer's requirements arise from a particular regulatory standard that it has to meet as a consequence of applying the ARW to a new vehicle.

33. It is not necessary that goods be identical to be 'like', but simply that they have characteristics closely resembling those of the goods under consideration. Accordingly, the fact that a wheel will fit only a particular brand or model of car does not render it unlike in this sense. Nor does the fact that a car manufacturer may choose or be required to fit to a new vehicle a wheel of a higher quality than those sold for fitting to used cars. And while a manufacturer may choose not to fit to its new cars wheels of a more “radical” design favoured by some individual owners of used cars, that choice is driven by its perception of what will sell in the mass market. Notably, it is not that long ago that most manufacturers offered as original

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[2] The Report, page 20.

equipment only steel wheels with decorative hubcaps, and not the spoked alloy wheels then sold in the after-market segment which they commonly fit as standard equipment today.

34. In my view, there is but one market for ARWs falling within the definition of goods under consideration, albeit with two segments that are relatively easily discernible at any point in time (although particular designs may move from the AM segment to the OEM segment over time as new car manufacturers perceive consumer demand to change).

35. In reaching my conclusion I have had regard to Ford's submission that Customs erred by not concluding that Arrowcrest's claim that it fitted AM ARWs to Tickford vehicles in 2002 was irrelevant. I do not consider that Customs erred in failing to disregard this information. However, nor do I find this a compelling point. My assessment of ARWs produced for the AM and OEM segments of the market is based primarily on an assessment that the characteristics or ARWs sold in each closely resemble each other and is less reliant on the specific use to which each ARW is put or the time at which it is fitted.

36. For completeness, I note that Holden submitted that Customs erred in its assessment of the Australian market for ARWs erred by treating Premoso as part of Holden. This ground would only be relevant if I found that there are two separate markets for ARWs in Australia. As indicated above, I do not consider there to be two markets. Therefore, I do not need to form a view as to whether Premoso should or should not have been treated as part of Holden.

Goods not produced by the Australian Industry

37. A few of the review applicants made submissions that particular imports should be exempt on the basis that they are not products that are offered by the Australian market, specifically:

    37.1. wheel products for the current Extreme 4WD sector, Classic Vehicle Sector and common American and other international vehicles (Taleb's submission);

    37.2. ARWs having a European Prestige Car Fitment (Pitch Circle Diameter, Offset and Centre Bore size) (Samad Tyres' submission); and

    37.3. ARW imported by Motor Sport Wheels & Tyres (the trading name of Samad Tyres) for use on European PMVs (StarCorp's submission).

38. The review applicants submit that the above goods should be excluded on the basis that ARWs for these "niche" segments of the automobile market are not supplied by the Australian industry.

39. Whether or not goods are produced in Australia is irrelevant to the question of whether or not they are like goods (although it may be relevant to the question of material injury). The relevant test is concerned only with the characteristics of the

goods in question. In my view, the goods sought to be excluded by the review applicants are either the goods under consideration as defined in the Report, or are like goods having 'characteristics closely resembling those of the goods under consideration'.

Consideration of consumer preference in determining 'like goods'

40. Taleb Tyres submits that consumer preference for the modern and innovative designs not offered by local manufacturers should be taken into consideration in determining like goods.

41. Consistent with what I have said above, I do not consider that consumer preference for modern and innovative designs is a relevant consideration in determining 'like goods'. Consumer preference may change over time and is very subjective; preference for a particular design at any one time is not determinative of whether a product is a like good.

42. Whilst variation in design, or physical likeness, is a factor to consider in determining whether the goods under consideration have characteristics closely resembling those goods the subject of the application, it will only be one of a number of matters taken into consideration. In these circumstances I consider Customs gave appropriate consideration to the physical likeness aspect of the ARWs and reached an appropriate conclusion on this point.

ASSESSMENT OF NORMAL VALUE

Market situation finding

43. The normal value for the goods under consideration exported from China was assessed by reference to an external benchmark because Customs found that the situation in the market in China was such that domestic sales were not suitable to determine the normal value under s 269TAC(1) of the Custom Act, that is, by reference to arms length sales in the ordinary course of trade ('**the market situation finding**').

44. Speedy Corporation, CITIC, Holden and Samad Tyres submit that the market situation finding should be re-investigated and dumping margins re-calculated using actual domestic selling prices of ARWs in China. These submissions were made on the following grounds:

    44.1. the Report does not establish the existence of a 'particular market situation';

    44.2. Customs failed to analyse how the measures it identified, which it relied on for its finding that a market situation existed, actually lowered aluminium and aluminium alloy prices;

    44.3. Customs erred in its finding about the existence of a countervailable subsidies of the type described as "Program 1".

45. In this section I deal with the first two grounds, I deal with the third ground separately in Part 4 of this decision.

Legislation

46. As a general rule, the normal value of goods is determined under s 269TAC(1) of the Customs Act, which provides that:

> Subject to this section … the normal value of goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

47. The market situation finding in the Report relies on s 269TAC(2)(a)(ii) of the Customs Act. Section 269TAC(2) relevantly provides that:

> Subject to this section, where the Minister:
>
> (a) is satisfied that:
>
> (i) because of the absence, or low volume, of sales of like goods in the market of the country of export that would be relevant for the purpose of determining a price under subsection (1); or
>
> (ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);
>
> the normal value of goods exported to Australia cannot be ascertained under subsection (1); or
>
> (b) […]
>
> the normal value of the goods for the purposes of this Part is:
>
> c) except where paragraph (d) applies, the sum of:
>
> (i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and
>
> (ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export—such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and, subject to subsection (13), the profit on that sale;
>
> […]

48. The phrase 'situation in the market' is not defined in s 269T or elsewhere in the Customs Act. Nor does the Customs Act indicate any criteria by reference to which sales may be rendered "not suitable" for use in determining a normal value because of a situation in the market.

49. The Report states that:

> Australia treats China as a market economy anti-dumping purposes and Customs and Border Protection conducts its investigation in the same manner for China as it does for other market economy members of the World Trade Organisation (WTO).
>
> Irrespective of the country subject of the investigation, the Australian anti-dumping framework allows for rejection of domestic selling prices in market economies as the basis for normal value where there is a 'market situation' making the sales unsuitable…

50. Whether the legislation does this is a matter for statutory interpretation. The Customs Act does not contain any express statement to the effect of this assertion by Customs. Equally, the Customs Act does not contain any direct or express statement to the contrary. Nevertheless, the undefined concepts of market situation and unsuitability may conceivably infer some limitation on the circumstances in which prices in a market economy can permissibly be rejected.

51. In the interpretation of a Commonwealth Act, it is permissible to have regard to extraneous materials to assist in determining the meaning of a statutory provision. Section 15AB of the Acts Interpretation Act 1901 provides as follows:

> (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.
>
> …
>
> (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
>
> (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into accounts its context in the Act and the purpose or object underlying the Act; and
>
> (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

52. Section 269TAC(2)(a)(ii) was originally inserted into the Customs Act in 1989[3], when it was transferred without change from the *Customs Tariff (Anti-dumping) Act 1975* (Cth) (**the Anti-Dumping Act**). Prior to the 1989 amendments, the relevant

[3] *Customs Legislation (Anti-Dumping) Act 1989 (Cth).*

provision was s 5(2)(b) in the Anti-Dumping Act, which was inserted by the Customs Tariff (Anti-Dumping) Amendment Act 1981 (Cth) (**the 1981 Amendment Act)**.

53. Section 4 of the 1981 Amendment Act inserted into s 5 of the Anti-Dumping Act new or revised provisions dealing with the ascertainment of normal value:

    a. where there was an absence of sales;

    b. where a situation in the market rendered prices not suitable;

    c. where the government of the country of export had a monopoly or substantial monopoly of the trade of the country; and

    d. where the government of the country of export determined or substantially influenced domestic prices.

54. The introductory text of the Explanatory Memorandum to the 1981 Amendment Act provided that the purpose of the amendments was to 'bring the Anti-Dumping Act into line with the provisions of the revised GATT Anti-Dumping Code and the GATT Subsidies and Countervailing Measures Code concluded in the Tokyo Round of Multilateral Trade Negotiations in 1979'. In particular, the text of s 5(2) of the Anti-Dumping Act is based on Article 2.4 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade* concluded at the Tokyo Round in 1979 (**the Anti-Dumping Cod**e). Article 2.4 of the Anti-Dumping relevantly provides that:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

55. In discussing in more detail the individual particular provisions of the 1981 Amendment Act, the Explanatory Memorandum then stated that the amendments to s 5 of the Anti-Dumping Act:

> insert additional criteria for the assessment of normal value for goods exported from Centrally Planned Economy countries. This criteria conforms to the Subsidies and Countervailing Measures Code and has equally application for both anti-dumping and countervailing measures.
>
> (emphasis added)

56. The Explanatory Memorandum did not expressly distinguish between each of the four different circumstances dealt with by the amendment as listed above. On the face of it, the first sentence of this passage of the Explanatory Memorandum appears to suggest that the new provision allowing rejection of domestic prices in a market situation was to be used only in respect of Centrally Planned Economy

countries. If this is correct, then s 269TAC(2)(a)(ii) arguably would have no application to China, because Australia recognises China as a market economy for anti-dumping purposes and the market situation finding made in this case would be without statutory authority.[4]

57. However, the second sentence contains a reference to the Subsidies and Countervailing Measures Code. As noted above, the market situation provision is not based on the Subsidies and Countervailing Measures Code, but is founded instead on Article 2.4 of the Anti-Dumping Code. Accordingly, if the second sentence of this passage of the Explanatory Memorandum is read as qualifying and limiting the first sentence, then it would seem that the Explanatory Memorandum simply failed to provide any guidance as to the intended meaning and operation of the market situation provision.

58. In all these circumstances, I do not consider it is possible, or that it would be appropriate, for me to conclude that s 269TAC(2)(a)(ii) is legally incapable of application to a market economy such as China. While a court might subsequently reach that conclusion if the matter came before it, I consider that it is preferable for me to proceed to consider whether the conclusion by Customs that such a market situation existed in this case was reasonably reached on the assumption (even though it may perhaps be erroneous) that s 269TAC(2)(a)(ii) could apply to China.

59. On this basis, it is then appropriate to consider what meaning should be attributed to the terms 'situation in the market' and 'not suitable'.

60. Section 269TAC(2) was amended by the *Customs Legislation (World Trade Organization Amendments) Act 1994* (Cth). The associated Explanatory Memorandum notes that changes were being made to the manner of assessment of a normal value 'where the overseas domestic market is found to be unsuitable for assessing the normal value of goods for comparison purposes'. Specific to the amendments to s 269TAC(2)(a)(ii), the Explanatory Memorandum provided that:

> drafting changes are made for ease of reading and understanding of the subparagraphs and to introduce a new criterion of “low volume of sales. The amendments are expressed to reflect Article 2.2 of the Dumping Agreement.

61. Article 2.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* was amended as part the Uruguay Round of negotiations in 1994 (the Anti-Dumping Agreement). The article relevantly provides that:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of

[4] See r 182 and Schedule 1B of the *Customs Regulations 1926* (Cth).

> production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

62. There is no international jurisprudence concerning the interpretation of the term 'particular market situation' in Article 2.2 of the Anti-Dumping Agreement. There is, however, some domestic jurisprudence in relation to the related provision of the Customs Act.

63. Section 269TAC(2)(a)(ii) was considered in *Enichem Anic SrI v Anti Dumping Authority*[5], although prior to the amendments made in 1994, where Hill J said that:

> Another case where subs (1) is not to be applied is where there is something about the situation in the relevant market which brings about the conclusion that arms length sales in that market are nevertheless "not suitable for use" in determining the price. An obvious example is where there is some factor which so distorts the market that arms length transactions made in the ordinary course of trade are rendered unsuitable to give the true normal value in the country of export.

64. Another case that considered paragraph 269TAC(2)(a)(ii) is *Hyster Australia Pty Ltd v Anti-Dumping Authority (No 2),*[6] although this case again precedes the amendments made in 1994. Hill J referred to his decision in *Enichem*, said that the circumstances in which paragraph 269TAC(2)(a)(ii) would apply could not be exhaustively defined, but that:

> the question of the suitability of sales for the purpose of s 269TAC(2)(a) and (c) could arise where there was some factor which so distorted the market that arms length transactions made in the ordinary course of trade were rendered unsuitable to give the true normal value in the country of export. Incidentally, it may be said that "suitability" in s 269TAC(2)(a)(ii) must mean something different from lack of arms length sales, that being a matter within s 269TAC(2)(a)(i).

65. *In La Doria Di Diodata Ferraioli Spa v Beddal, Minister for Small Business, Construction and Customs*,[7] Lee J said that:

> Whether the domestic market in Italy is a market in the sense of a free trading market is not the question required to be addressed under subpara 269TAC(2)(a)(ii). Depressing or inflating factors affecting the price of goods sold in that market will not in themselves establish that there is a situation in the market that makes prices obtained in the market unsuitable for use for the purpose of subs 269TAC(1).

66. The above analysis indicates that there must be a degree of distortion in the market that renders arms length transactions in the ordinary course of trade unsuitable to give a true normal value, but that this unsuitability will not necessarily be brought about by any factor that simply depresses or inflates domestic prices. At the same time, however, the cases do not provide any assistance on what more is required.

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5 (1992) 39 FCR 458.

6 (1993) 40 FCR 364.

7 unreported, 11 June 1993, NG541 of 1992.

67. I do not believe that it is possible to suggest any definitive test of what more would be required. Nevertheless, some hypothetical examples may be useful.

68. So, for example, where an extreme weather event greatly reduced the supply of a primary product with a consequential significant increase in both domestic and export prices, this would not, in my view, give rise to a market situation that rendered the abnormally high domestic prices unsuitable for comparison with the equally affected export price. However, if the export sales were covered by forward contracts at a set price reflective of normal production levels, the increase in domestic prices resulting from that weather event may well be sufficient to bring about a market situation that rendered the domestic prices unsuitable for use in assessing whether or not sales at usual export prices involved dumping.

69. Government regulation of business provides another example of a factor which may affect pricing. The imposition, for example, of strict environmental controls on products for sale on the domestic market over and above those imposed in the importing country may clearly inflate domestic prices to a point where it would be inappropriate to conclude that export sales at a lesser price that reasonably reflected the less onerous controls involved dumping.

70. Conversely, a government subsidy in the country of export for goods sold on the domestic market but not applicable to goods for export, may render a domestic price unsuitable for comparison with the export price for the purpose of ascertaining whether there is dumping. For example, there may be factors other than the payment of the subsidy that mean that the export price is less than that which the domestic price would be, but for the payment of the subsidy.

71. Essentially, however, it will be a matter for case by case analysis of distorting factors to assess whether or not a finding of a market situation for the purposes of s 269TAC(2)(a)(ii) of the Customs Act can reasonably be made.

Customs' findings

72. Customs found that domestic prices of aluminium (a major cost component in aluminium road wheels) are not substantially the same as they would have been without influence from the Government of China, and are likely to be artificially low. Customs considered that the influence of the Government of China has created a market situation in the Chinese ARW market, such that any sales of ARWs in the Chinese domestic market are not suitable for determining a normal value under s 269TAC(1).[8]

73. When considering the question of distortion in the aluminium market, Customs had regard to broad, overarching Government of China macroeconomic policies and plans that outline aims and objectives for the Chinese aluminium industry, including:

[8] The Report, page 52.

73.1. Guidelines for Accelerating the Restructuring of the Aluminium Industry issued by the National Development and Reform Commission[9] (**Guidelines**). The Guidelines note the importance of aluminium as a fundamental raw material for the development of the national economy and the structural and systematic problems that need to be addressed. The Guidelines identify a number of objectives for the industry, such as "support good enterprises and eliminate inferior ones through the market"[10]; and

73.2. The Eleventh Five Year (2006-2010) Plan of the People's Republic of China for the National Economic and Social Development[11] (**11th National FYP**). The 11th National FYP outlined the Government of China's macroeconomic policy for the Chinese aluminium industry for the period 2005-2011.

74. Customs considered that the objectives and plans set out in the above policy documents (and other policy documents identified by Customs) went beyond being 'aspirational' in nature and were actively implemented and monitored by the Government of China. In supporting this proposition, Customs referred to confirmation from China's National Development and Reform Commission that implementation of China's Five Year Plans occurred at the agency level.[12] Customs also relied on the existence of a number of sub-policies, directives and notices that imposed measures following the promulgation of the Guidelines and the 11th National FYP that appeared directed toward achieving the objectives set out in these documents, including:

74.1. *Nonferrous Metal Industry Adjustment and Revitalisation Plan* issued by the State Council in 2009 that, amongst other objectives, aimed to achieve production by the top ten aluminium procedures representing 70 percent of national output;[13]

74.2. *Directory Catalogue on Readjustment of Industrial Structure,* which divides industries into Encouraged Investment Industries, Restricted Investment Industries and Eliminated Investment Industries. The policy provides that the first category will receive preferential treatment, the second is to be transformed in line with the policies, and the third category concerns outdated and inefficient industries which do not comply with macro-economic policy objectives.[14] The *Interim Provisions on Promotion Industrial Structure Adjustment* (**Interim Provisions**) empower local and regional governments to give effect to the Directory Catalogue by imposing requirements on

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9 The Report, Appendix A, page 12.

10 The Report, Appendix A, page 13.

11 The Report, Appendix A, page 15.

12 The Report, Appendix A, page 19.

13 The Report, Appendix A, pages 21 to 22.

14 The Report, Appendix A, pages 22 to 23.

enterprises with a view to eliminating outdated production processes and equipment, while encouraging others[15];

74.3. *Notice of the State Council on Further Strengthening the Elimination of Backward Production Capacities* (**Backward Capacities Notice**), which outlines a number of measures available to implement the policies, including control of market access, intensifying punishment and enforcement in cases of non-compliance, improving fiscal support, resettling employees and supporting transformation of outdated enterprises, supporting competitive enterprises though merger, acquisition or restructuring to eliminate backward production capacities, improving regulation and control of land use, and raising the costs of energy, resources for backward methods and increased environmental permits;[16]

74.4. *Requirements on Entry into the Aluminium Industry* (**Redundancy Circular**), which identifies requirements for departments to comply with when approving investment proposals and other business proposals. The Report states that the aims of this policy are to speed up structural reform and regulate investment behaviour, in addition to achieving environmental goals;[17] and

74.5. *Circular of the State Council on Accelerating the Restructuring of the Sectors with Production Capacity Redundancy* issued by the State Council, which outlines key measures and principles underlining the need to restructure sectors with production capacity redundancy, including the aluminium industry. The Redundancy Circular states the Government of China should intensify the implementation of industrial policies related to this sector.[18]

75. Customs also identified taxes and tariffs that it considered exerted downward pressure on the domestic price of primary aluminium in China. Customs considered these taxes and tariffs implemented the Government of China's macroeconomic policy of discouraging export of the inputs into ARWs (bauxite, aluminium and aluminium alloy) and instead focussing on the export of processed aluminium products and increased domestic demand for aluminium. The measures relied on by Customs included:

75.1. the levels of import tariffs for ARWs remained the same throughout 2006 to 2011 at 10 percent. Lower rates applied to bauxite (the raw material from which alumina is recovered) and aluminium and pre-alloyed aluminium. Customs considered these tariffs encouraged the import of raw materials used in the production of ARWs in preference to the import of finished aluminium products;

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15 The Report, Appendix A, pages 23 to 26.

16 The Report, Appendix A, pages 26 to 27.

17 The Report, page 30.

18 The Report, Appendix A, pages 32 to 33.

75.2. there was no export tax on ARWs throughout July 2006 to June 2011. The export tax on aluminium alloy was reduced from 30 to 15 percent in 2007 and remained steady. The export tax on primary aluminium was reduced from 30 percent to 9 percent in 2007, but was reintroduced in 2009 at a rate of 15 percent, and remained at that rate until June 2011. Export tax on bauxite was imposed at a rate of 10 percent in 2007, increased to 15 percent during 2008 and 2009 and then reduced to 0 percent;

75.3. bauxite and primary aluminium attracted no export rebates from July 2006 to June 2011. Over the same period ARWs attracted VAT export rebates of 17 percent; and

75.4. the export of bauxite was subject to obtaining a licence (but the Report does not indicate whether licences are capped or exceed demand).

76. For the purpose of finding a situation in the market pursuant to s 269TAC(2)(a)(ii), Customs also had regard to the subsidies from which it found ARW producers benefited. Customs identified 34 programs that it considered to be countervailable subsidy[19], including Program 1 which it considered concerned the provision of aluminium raw materials (pure aluminium and aluminium alloy) to ARW producers by state-invested enterprises at a price less than adequate remuneration. Customs also referred to subsidies identified in Government of China macroeconomic policies to upstream enterprises to ARW manufacturers, such as the reference in the Backwards Capacities notice that the Government of China will 'strengthen fiscal support of backwards capacity elimination' and support the transformation of enterprises (science and technology) upgrading.

77. Another matter referred to by Customs in relation to the assessment of whether a market situation existed was the *Price Law of the People's Republic of China*, which requires departments to create a price monitoring system in respect of aluminium and alumina. This monitoring is carried out by a local monitoring authority and provided to a provincial price monitoring authority, which produces a province-wide briefing paper.

78. Customs also referred to evidence from State Invested Enterprises (**SIEs**) to the effect that broader policies in relation to reform of the aluminium industry were being implemented. For instance Chalco, in its Form 20-F filing with the SEC for 2010, acknowledged that the Government of China exercised a substantial degree of control and influence over the aluminium industry through the imposition of industry policies.

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[19] The Report (at page 50) states that 34 subsidy programs were identified as countervailable; 34 programs are also listed as countervailable at pages 14 & 15 of the Report. However the accompanying table at pages 50-52 identifies only 32 programs as countervailable. Further the particulars of the notice under section 269TJ(1) and (2) identify 31 programs as countervailable. It appears that Programs 10 and 30 have been incorrectly included as countervailable programs in the list at pages 14 and 15 (despite Customs being satisfied that these programs ceased to operate prior to the investigation period) and the notice has failed to list program 22.

79. Customs considered that the above matters amounted to sufficient evidence that the Government of China played a significant role in the aluminium industry in China. Customs then undertook an analysis of the price of aluminium in China, as compared to a competitive market benchmark, the London Metal Exchange (**LME**), and concluded that the lower prices that prevailed in China were likely due to the Government of China's interference in the aluminium industry.

Submission from the Government of China

80. The Government of China did not lodge a submission as part of my review. However, I have had regard to its submissions, made during Customs' investigation, that the importance of broad macroeconomic policy is limited.

81. The Government of China submitted that the macroeconomic policies and plans that Customs identified as impacting on the aluminium industry were 'aspirational' in nature. For instance, in relation to the Guidelines, the Government of China submitted:

> These Guidelines are a broad review of the performance of the aluminium sector in respect of the commitments made by the GOC concerning the reduction of waste and pollution from industrial operations, and aspirational statements about the goals of the aluminium industry. The objectives of the Guidelines for accelerating the restructuring of the aluminium industry are to promote structural adjustment; to promote recycling and to minimise the industry's environmental impact; and generally to guide the healthy and scientific development of the aluminium industry.
>
> …
>
> These Guidelines go on to set out the aspirational goals of achieving greater organisation, structure and sustainability in the aluminium industry. Rather than directing how the aluminium industry will operate, the Guidelines state how the industry should ideally operate. The *Guidelines for Accelerating the Restructuring of the Aluminium Industry* is a statement of ambition and proposal…[20]

Consideration

82. In my view, a market situation that renders domestic sales unsuitable for determining normal values would not arise if, by reason only of their own commercial decisions, market participants acted in a way that achieved those things that are stated to be the objectives of the Government of China's objectives for its aluminium industry policies – for example, mergers to create higher concentration and increases economies of scale, introduction of more efficient technology, disuse of inefficient technology and relocation of plant to locations closer to export facilities. That activity would simply reflect normal profit maximisation operations of an open market.

83. Nor do I consider that a market situation that renders domestic sales unsuitable for determining normal values would arise if a government simply encouraged and

[20] Government of China Response to Government Questionnaire, response to question 2.9.

exhorted market participants to engage in such activity. Indeed, many might think that a government that failed to do so was remiss in the performance of its role to foster the wellbeing of its citizens.

84. And I do not consider that a market situation that renders domestic sales unsuitable for determining normal values would necessarily arise where a government simply exercises other ordinary functions of government, including by imposing regulatory controls on market participants that affect their costs and therefore increase or decrease the prices at which they sell their productive output. The imposition of at least some regulatory controls such as those designed to ensure occupational health and safety, community health and environmental protection must be viewed as part of an ordinary market economy. As Lee J. said in *La Doria* as quoted above:

> Depressing or inflating factors affecting the price of goods sold in that market will not in themselves establish that there is a situation in the market that makes prices obtained in the market unsuitable for use for the purpose of subs 269TAC(1).

85. Equally, however, it is clear that government intervention in a market beyond this usual level can conceivably distort the workings of an ordinary market economy to such a degree as to create a market situation that renders domestic sales unsuitable for determining normal values. Perhaps the classic example would be Government provision of free or subsidised raw materials, meaning that the industry was able to operate at less than what would otherwise be fully commercially determined prices.

86. The question here is whether or not there is sufficient evidence of sufficiently distorting intervention by the Government of China.

87. CITIC Dicastal submit that the policy measures identified by Customs appeared mainly intended to assist and encourage the restructuring of the aluminium industry to make it more efficient and more technically and environmentally enhanced. I agree with this observation. However, where policies and regulations sufficiently distort an otherwise open market, the legitimacy or prudence of the underlying policies does not, in my view, prevent a market situation finding. A market situation finding does not express disapproval of a policy, but simply reflects a determination that mere regard to otherwise arm's length transactions in the ordinary course of trade in the domestic market will not enable proper comparison of the normal value and export price.

88. The policies of the Government of China are expressed in both mandatory and exhortatory terms. Examples of mandatory language include the following:

88.1. Chapter 13 of the 11th National FYP refers to the Government of China's aim to control the total quantity of electrolytic aluminium[21];

88.2. the Interim Provisions provide that the people's governments shall take, restrict and eliminate outdated production capacities and prevent blind

[21] The Report, Appendix A, page 16.

investments and that 'if any entity violates the provisions, its persons [shall be] directly held liable and the relevant leaders shall be subject to liabilities in accordance with the law'[22];

88.3. the Interim Provisions also provide, at Article 19, that:

> if any enterprise of the eliminated category refuses to eliminate the production technique, equipment or products, the local people's government at each level and the relevant administrative department shall, in accordance with the relevant laws and regulation of the state, order it to stop production or close it […][23]

89. Examples of aspirational language are likewise common in the policy documents. Examples include the following:

89.1. The Guidelines set out objectives which include "encourage the coordination and monitoring of the import of alumina" and "strengthen the coordination and monitoring of the import of alumina"[24];

89.2. Chapter 13 of the 11th National FYP provides that the aims of the Government of China include "encourage[ing] the development of deep aluminium processing and new type alloy material and enhance[ing] the comprehensive utilisation level of aluminium industrial resources".

89.3. the Backwards Capacities Notice identifies the elimination of backwards production capacities being achieved through such measures as 'strengthening GOC organisation and leadership of the elimination of backward production capacities and supporting competitive enterprises in elimination of backward production capacities through merger, acquisition or restructuring of enterprises with a backward production capacity'[25].

90. In these circumstances, I consider that Customs had reasonable cause to suspect that the Government of China was intervening in the aluminium market to introduce a sufficient degree of distortion so as to create a market situation that renders domestic sales unsuitable for determining normal values.

91. Notwithstanding that a suspicion of active government intervention extending beyond ordinary acceptable government regulation may be reasonably formed, suspicion alone is in my view not an adequate basis for a market situation finding. I consider that this requires some more concrete evidence of the implementation of governmental policies and their effect in the market, such as the generation of a artificial domestic price. Only then, in my view, would it be possible to form a defensible view that it was more likely than not that a market situation of the requisite type had arisen.

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22 The Report, Appendix A, pages 24 to 26.

23 The Report, Appendix A, page 25 to 26.

24 The Report, Appendix A, page 14.

25 The Report, Appendix A, page 27 to 28.

92. CITIC Dicastal criticised Customs' reliance on macroeconomic polices and their implementation through analogy with Australian macroeconomic policies. CITIC Dicastal's submission is that the Australian government has an extensive range of policies that affect prices of inputs to goods, and producers of those goods would be surprised to learn that the price at which those prices are sold in Australia are not market competitive prices because they have been influenced by a government policy. This analogy is useful as it demonstrates the problem with assuming that any level of government intervention that might have a flow on effect to price will be sufficient to establish a market situation finding. Almost all markets will be affected to some degree by government policy.

93. There is a need to differentiate between the type of intervention, and the consequences of such intervention, that might be considered the ordinary business of government and intervention that results in a distortion of a greater magnitude such that domestic prices cannot be relied upon for the purpose of establishing a normal value. In essence, the inquiry as to whether government intervention has resulted in a 'situation in the market', such that sales are 'unsuitable' for determining a normal value, becomes one of degree.

94. In the particular circumstances of this case, I am satisfied that Customs found not just mere statements of policy but sufficient examples of governmental intervention in the aluminium market that might reasonably be relied upon to conclude that the prices in the Chinese ARW market were distorted to a sufficient degree such that they were unsuitable to give a true normal value. In reaching this conclusion, I rely primarily on the intervention that occurred in the form of tax and tariff policy and, to a lesser extent, intervention in the form of provision of subsidies.

95. In my view, the taxes and tariffs described above would have exerted downward pressure on the domestic price of primary aluminium in China. These taxes and tariffs do not appear to be aimed at achieving any policy within the ordinarily accepted business of government, such as occupational health and safety, public safety, or avoidance of environmental damage. Rather, it appears that they are directed solely toward enhancing the international competiveness of Chinese industries producing processed aluminium products. The combination of low or no export taxes on processed aluminium products and high export taxes on primary aluminium and bauxite discourages the export of these inputs and encourages the manufacture of such products in China. The achievement of this objective is also assisted through the provision of VAT export rebates to processed aluminium products whilst primary aluminium and bauxite attracted no export rebates.

96. On balance, I am satisfied that this policy implementation resulted in a significant increase to the supply of aluminium in China which in turn exerted marked downward pressure on the domestic price of primary aluminium in China which, given the significance of aluminium input costs in ARW production, would have materially lowered domestic ARW prices in China. While the underlying policy of the Government of China may be the best interests of China, it is accepted that other

countries whose industries are thereby adversely affected are entitled in such circumstances to take action to redress those effects.

97. I am conscious that, in its earlier report on aluminium extrusions (REP 148), Customs concluded to the contrary - that there was no market situation in the supply of aluminium for the manufacture of aluminium extrusions. Instead, it found that the aluminium purchase prices recorded in the accounts of aluminium extrusion manufacturers did not reasonably reflect competitive market costs - and then similarly applied an uplift to those prices to reflect the levels on the LME. Moreover, on review, I did not disagree with the position taken by Customs - although my focus was necessarily on the application of Regulation 180(2)(b)(ii) rather than section 269TAC(2)(a)(ii). Those earlier decisions are, of course, not binding precedents. It is possible that a market situation finding could have been equally justified at that time had it then been made. In any event, the sole question in considering these applications for review is whether a market situation finding can now be properly justified.

98. In relying on the tariff policies of the Government of China to support of a finding that a market situation persisted, I am also conscious that there is no direct evidence of the precise extent to which these tariffs (and associated rebates) impacted on the domestic price of aluminium. Customs' analysis was limited to a comparison between the domestic price of aluminium against a competitive market benchmark, the LME. Whilst this analysis demonstrated that the Chinese domestic price of aluminium was materially lower than the LME, the analysis did not attempt to isolate the extent to which the tariffs contributed to these lower prices. I can understand Customs not attempting such an analysis as it would be an extremely difficult exercise to attempt to isolate the contribution of individual policy implementations.

99. However, I am satisfied that it is reasonable to infer that these tariffs and taxes were a significant contributing factor, especially given the high proportion of aluminium in overall ARW costs. The only alternative explanation suggested for lower prices of aluminium prevailing in China, as opposed to the LME, was the competitiveness of the Chinese aluminium industry. Whilst this may have been a factor, I am not satisfied that there is evidence that it materially contributed to the lower price such that government intervention cannot be assessed as a material contributing factor. Firstly, if competition alone was responsible for the lower prices it would be expected that the prices of the competitive market benchmark, the LME, would be comparable. Secondly, if the lower prices of aluminium were materially lower as a result of competition alone, it would suggest that greater amounts of aluminium would be exported. However, Customs' analysis indicated that export volumes of aluminium were not high and the export tariffs are a reasonable explanation for this result. Accordingly, even in the absence of an analysis of the extent to which export tariffs contributed to the lower domestic price in China, I am satisfied that it is reasonable to infer that it had a material impact on the price of aluminium. Further, I am satisfied that it had a material impact on the domestic price of ARWs.

100. Finally, I am conscious that in the recent HSS matter I concluded both that there was no market situation despite the existence of not dissimilar Government of China policies and that the absence of evidence of the impact of tariffs on coke and coking coal on HSS prices was a material deficiency in any finding of unsuitability of domestic prices. Lest it be thought that the position I took in HSS is incompatible with the position I am now taking in ARWs, I note the following:

100.1. First, the evidence of implementation of overarching government policies here is, in my view, far stronger than was present in HSS, where relevant tariffs applied to a input to an input or to an input to an input to an input. Here, Government of China tariff and tax action impacts far more directly on the goods under consideration;

100.2. Second, there was in HSS a plausible explanation and rationale for the relevant tariff action as the ordinary business of government in environmental protection, which is lacking in the present case; and

100.3. Third, because of the significance of aluminium as a direct ARW input, it is far easier to conclude that the effect of tariff and tax policies would be material than it was in HSS where they impacted at a lesser level far higher in the production chain.

101. In coming to the above conclusions, I had regard to specific submissions of relevance made by a number of interested parties as noted in the following paragraphs.

102. CITIC Dicastal and Speedy criticised Customs' analysis on the basis that the Report provides no explanation of how the measures it identified as distorting the market actually lowered aluminium prices. I do not accept this proposition. Customs identified, albeit in the broad sense, that the impact of the measures resulted in lower prices of inputs and changes in the determinants of supply in both the ARWs and upstream industries. In relation to the lower prices of inputs, the approach taken by Customs was to firstly establish whether prices were lower than a competitive market benchmark and then, having established that was the case, in the absence of identifying another possible explanation for these lower prices, concluded that it was a result of the market interference. In the context of identifying another explanation, Customs considered a submission from the Government of China that the lower prices were a result of active competition in the Chinese domestic market. Customs preferred the explanation that the lower prices were a result of the Government of China's policies and implementation measures.

103. I am satisfied that the approach taken by Customs was reasonable. It was reasonable to conclude that the lower prices were materially affected by the Government of China policies and implementation measures that it had identified. Whilst it might also be the case that other factors, such as a high degree of competition, led to lower prices, this does not preclude a finding that there is a market situation, unless that other factor or factors could be said to be so significant

that they are primarily responsible for the lower prices of aluminium that prevailed in the domestic market. The alternative proposition suggested by the Government of China, that the lower prices were due to a high degree of competition cannot be the preferred explanation for the reasons set out at paragraph 99.

104. Speedy submitted that if the actions of the Government of China had resulted in a lowering of aluminium prices, it would not be reasonable to expect that Chinese aluminium prices followed overseas market trends (which they did), but rather that they would remain stable at an artificially low level. I disagree with this proposition. A finding that prices of aluminium were distorted by intervention by the Government of China, and an observation that Chinese domestic prices of aluminium still followed world trends, from which it can be inferred they were impacted by external pricing trends, are not mutually exclusive. The distortion resulting from intervention by the Government of China might be to suppress prices from those that would prevail in a competitive worldwide market, but not necessarily insulate those prices from all price impacts, such that the prices still follow the trends observed on the competitive market benchmark, the LME. Of course, as set out above, whether suppression of prices is sufficient to amount to a 'situation in the market' will depend on the degree of that suppression.

105. For completeness, I note Holden's submission that reliance by Customs on the decision of the European Commission (**EC**) goes "beyond what is appropriate given the difference in facts and jurisprudence". I am not satisfied that this is the case. Customs expressly recognised that the EC test applied in its 2010 investigation was distinctive to that applied by Customs and proceeded to conduct its own, independent, analysis of whether a market situation existed.[26]

106. In being satisfied that a market situation existed in China in relation to aluminium, as noted above, I also had regard to the subsidy programs identified by Customs that were designed to increase the competitiveness of the Chinese ARW industry. Whilst on their own I think these programs would not have been sufficient to give rise to a market situation finding, particularly given the conclusions I have reached in relation to Program 1 (see Part 4), in combination with the tax and tariff policies of the Government of China, I consider these subsidy programs to be evidence of intervention in the market that resulted in a significant distortion in price, sufficient that domestic transactions were unsuitable to give a reliable normal value for dumping assessment purposes.

107. I do not consider that the Customs Act poses any barrier to having regard to subsidies when considering the situation in a domestic market. The provision of financial benefits conferred by a government to an industry may significantly impact on a market. The impact of any countervailable subsidy is therefore in my view clearly relevant to a market situation finding. The result of a market situation finding is only that Customs is required to construct a normal value under s 269TAC(2)(c) or

[26] The Report, Appendix A, page 2.

(d) of the Customs Act. The amount of any subsidy is not taken into account in this process and the subsidy is therefore not countervailed twice.

108. On balance, therefore, I am satisfied that there was sufficient evidence to support Customs' finding that there was a 'situation in the market' such that domestic prices of ARWs in China were unsuitable for the purpose of determining a normal value.

Constructing a normal value based on the London Metal Exchange

109. In circumstances where Customs had concluded that the market situation in China resulted in artificially low prices for the key raw materials used in ARW production in China (aluminium and aluminium alloy), it proceeded to construct a normal price in accordance with s 269TAC(2)(c).

110. In constructing normal values, Customs replaced the costs of aluminium and aluminium alloy for each Chinese exporter with what it considered a reasonably competitive market cost for these inputs. Customs assessed the costs of aluminium from the LME, plus an adjustment for alloy manufacture where appropriate.

111. Holden submitted that the price payable by Holden for its ARWs is based on LME data already subject to adjustment. Holden queried why Customs came to a different normal value than that provided by Holden. Whilst this submission was expressed more in the sense of a query with respect to calculations, rather than identification of any error arising from method used by Customs in constructing a normal value, in order to properly address this submission it is necessary to first establish the correctness of Customs' approach in constructing costs pursuant to s 269TAC(2)(c) of the Customs Act.

112. There are two aspects raised by this submission – one implicitly and the other expressly.

113. First, Section 269TAC(2)(c) relevantly provides that the normal value is:

> (c) except where paragraph (d) applies, the sum of:
>
> (i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and
>
> (ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export--such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and, subject to subsection (13), the profit on that sale;
>
> (d) if the Minister directs that this paragraph applies--the price determined by the Minister to be the price paid or payable for like goods sold in the ordinary course of trade in arms length transactions for exportation from the country of export to a third country determined by the Minister to be an appropriate third country, other than any amount determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of any such transactions.

114. Section 269TAC(2)(c) may be relied upon if paragraph (d) is not applicable.

115. In my recent review of the decision to terminate an investigation into the alleged dumping of formulated glyphosate, I stated:

> In my opinion, it is satisfactory for Customs to ordinarily proceed with calculating a normal value under s 269TAC(2)(c) in accordance with its general preference to use that provision, unless there are circumstances which give rise to a reasonable suggestion that s 269TAC(2)(d) might provide a more appropriate method of assessing normal value. In such circumstances, it is necessary for Customs to give substantive consideration to whether s 269TAC(2)(d) is a more appropriate method, which would require some level of detailed consideration of third country export data.

116. Although it is a question of fact whether or not the Minister has issued a direction under s 269TAC(2)(d), in my view, s 269TAC(2)(c) requires the Minister to turn his mind to the question whether or not he should make a direction under paragraph (d), before paragraph (c) can be relied upon to construct the normal value.

117. There is no indication in the Report, or in the Minister's decision dated 27 June 2012, that the Minister considered whether or not he should give a direction under s 269TAC(2)(d). Accordingly, I consider that s 269TAC(2)(c) was strictly not available to Customs to construct the normal value for Chinese ARW producers. Elsewhere in this decision I have found that Customs erred in other respects and have recommended that the Minister should recommend that these be the reinvestigated. I recommend that, when he reports the results of any such reinvestigation, the CEO of Customs should also raise the possibility of a direction under s 269TAC(2)(d), and request that the Minister consider whether or not to issue a direction under s 269TAC(2)(d). In this way, any eventual reliance upon section 269TAC(2)(c) can be placed on a more legally sound basis.

118. As to the second aspect, the Minister's determinations under ss 269TAC(2)(c)(i) and (ii) must be made in accordance with the *Customs Regulations 1926* (Cth), pursuant to ss 269TAC(5A) and (5B). Regulation 180(2) of the Customs Regulations concerns the determination of the costs to manufacture or produce, and relevantly provides that:

> (2) If:
>
> (a) an exporter or producer of like goods keeps records relating to the like goods; and
>
> (b) the records:
>
> (i) are in accordance with generally accepted accounting principles in the country of export; and
>
> (ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;
>
> the Minister must work out the amount by using the information set out in the records.

119. In view of the market situation finding, Customs determined that the records kept by Chinese ARW producers could not reflect competitive costs. Customs therefore did

not determine the cost of production or manufacture in China by reference to the records kept by Chinese ARW producers.

120. Regulation 180 does not give any guidance as to the manner of assessment of the costs to manufacture or produce if the terms of r 180(2) are not met. This may be contrasted with r 181(3), which relevantly provides that:

> (3) If the Minister is unable to work out the amount by using the information mentioned in subregulation (2), the Minister must work out the amount:
>
> […]
>
> (c) by using any other reasonable method and having regard to all relevant information.

121. Section 269TAC(2)(c)(i) provides that the Minister may determine the amount of the costs of production or manufacture. Where this cannot be done under the regulations as required by s 269TAC(5A), I consider that it is open to the Minister to determine the costs of production or manufacture by having regard to all relevant information, either under s 269TAC(2)(c)(i) or s 269TAC(6). In these circumstances, Custom proceeded to replace the costs of aluminium and aluminium alloy for each Chinese exporter, with a reasonably competitive market cost for these inputs. Customs used costs based on the LME, plus an adjustment for alloy manufacture where appropriate.

122. Customs calculated the adjustment as detailed below. The only exchange from which Customs could obtain comparable data for both raw aluminium and alloy prices was the Yangtze River Exchange.

122.1. Firstly, Customs obtained the quarterly average LME price for aluminium;

122.2. Next it compared the quarterly average price of raw aluminium to the quarterly average price for aluminium alloy from the Yangtze River Exchange. Alloy is not traded on the LME. Accordingly, to undertake the comparison, the difference between the raw aluminium and alloy was calculated as a percentage on a quarterly basis. This percentage was applied as an uplift to the LME price for use with exporters that purchased alloy;

122.3. For each exporter Customs calculated the quarterly average unit price of actual aluminium purchases by the company. This was based on actual transactional purchase data;

122.4. For each exporter, the quarterly average actual unit price of aluminium purchased was compared to the quarterly average LME price for raw aluminium, or quarterly average LME-adjusted price for alloy, as relevant to the exporter's individual circumstances. This calculation resulted in a percentage uplift for each exporter, for each quarter, that represented the difference between the actual purchase price and the LME price.

123. I am satisfied that, insofar as Customs constructed a normal value for the “selected non-cooperating exporters” by reference to prices obtained from the LME with an uplift as calculated above, its approach was appropriate and consistent with s 269TAC(2)(c). Whilst Customs' calculations might have resulted in a different normal value than that calculated by Holden, this may be due to Holden's assessment of normal value being based on a different subset of sales or averaging over a different period. I am not satisfied that Customs' methodology was inappropriate.

The calculation of the profit component of normal value

124. CITIC Dicastal submitted that Customs constructed its normal value using its own unreasonable and implausibly high weighted average profit margin and that the profit used in its contract negotiations with customers should be used in place of the actual profit on domestic sales.

125. Section 269TAC(2)(c)(ii) permits the Minister to determine an amount for profit. Further s 269TAC(5B) provides that the amount determined to be the profit on the sale of goods must be worked out in such manner, and taking account of such factors, as the regulations provide. Relevantly regulation 181A of the *Customs Regulations 1926* provides:

> (1) For subsection 269TAC(5B) of the Act, this regulation sets out:
>
> (a) the manner in which the Minister must, for subparagraph 269TAC(2)(c)(ii) or (4)(e)(ii) of the Act, work out an amount (**the amount**) to be the profit on the sale of goods; and
>
> (b) factors that the Minister must take account of for that purpose.
>
> (2) For subregulation (1), the Minister must, if reasonably possible, 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.
>
> (3) If the Minister is unable to work out the amount by using the data mentioned in subregulation (2), the Minister must work out the amount:
>
> (a) by identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export; or
>
> (b) identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or
>
> (c) subject to subregulation (4), by using any other reasonable method and having regard to all relevant information.

126. Customs calculated the profit component of CITIC Dicastal's normal value using the verified cost to make and sell data and verified domestic selling prices from sales made in the ordinary course of trade in the investigation period. In doing so, Customs was relying upon regulation 181A(2).

127. CITIC Dicastal submit that the profit used in its contract negotiations with customers should be used in place of the actual profit on domestic sales - in other words, that Customs should have applied subregulation 3(c), being the use of "any other reasonable method". However, it is only open to Customs to employ a method pursuant to subregulation 181A(3)(c) if it is unable to work out the amount of profit on the sale of goods using data relating to the production and sale of like goods by CITIC Dicastal in the ordinary course of trade (subregulation 181A(2)).

128. In this instance, Customs considered it was able to calculate the profit based on domestic sales of like goods made in the ordinary course of trade. CITIC Dicastal submit that it was not "reasonably possible" to apply this method because the domestic sales it used to calculate the profit were the same sales considered unsuitable for the purpose of calculating a normal value in accordance with s 269TAC(1).

129. Subregulation 181A(2) only operates in circumstances where profit is being worked out for the purpose of calculating a normal value in accordance with s 269TAC(2)(c)(ii), a scenario which, by definition, only arises where the normal value is unable to be calculated in accordance with section 269TAC(1). If section 269TAC(1) has been rejected as the basis for calculating the normal value it means that domestic sales in the ordinary course of trade have been rejected as an appropriate basis for the calculation of normal value.

130. On its face, this may be thought to give rise to an inconsistency with r 181A(2) which refers to using data relating to sales of goods 'in the ordinary course of trade' that have been rejected for the purpose of a calculation pursuant to s 269TAC(1) of the Customs Act. However, it does not necessarily follow that, because s 269TAC(1) has not been used as the basis of calculating normal value, there are no 'sales of like goods by the exporter or producer of the goods in the ordinary course of trade'.

131. In these circumstances, s 269TAC(1) was not used as the basis for calculating normal value because of the finding of a 'market situation' in China. Despite this finding, I do not consider that there were no sales that could be said to be in the ordinary course of trade. Notwithstanding that Customs expressly made a finding that all sales were affected:

> It is considered that the GOC influences on the Chinese aluminium and alloy markets had a distorting effect on the domestic market overall, and hence have distorted prices throughout the entire market…[27],

132. The definition of “ordinary course of trade” in s 269TAAD is limited to sales below cost. Clearly, sales in a market affected by a market situation are not necessarily made below cost, and may even be highly profitable for the individual market participant.

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[27] The Report, page 32.

133. Accordingly, I am not satisfied that Customs erred in calculating profit pursuant to the method identified in r 181A(2).

ASSESSMENT OF EXPORT PRICES

134. The review applicants sought review of Customs' assessment of export prices on the following grounds:

134.1. Holden submitted that Customs had improperly assessed different export values depending on the ultimate consumer of the goods;

134.2. Holden also sought review of the export price in relation to Baoding Lizhong Wheels Manufacturing Co Limited (**Baoding**) on the basis that Customs should not have constructed an export price when sufficient verifiable information in relation to the actual export price was available;

134.3. YHI submitted that its export price should have been calculated on the basis of the information it provided to Customs; and

134.4. Taleb Tyres sought review on the basis that insufficient regard had been had to the impact of the geographical location of the particular exporters in assessing export value.

135. Each of these grounds of review is addressed separately below.

Difference in calculation of export prices depending on ultimate consumer

136. Holden submitted that the method of calculation of export prices for ARWs exported to Australia by CITIC Dicastal appeared to have been calculated differently depending on whether the ultimate customer was Holden or Ford.

137. Section 269TAB sets a different export price for goods depending on the particular circumstances of export. In summary:

137.1. section 269TAB(1)(a) provides the method of ascertaining an export price in circumstances where the goods have been exported to Australia otherwise than by the importer and were the subject of arms length transactions;

137.2. section 269TAB(1)(b) provides the method of ascertaining an export price in circumstances where the goods have been exported to Australia otherwise than by the exporter, were not the subject of arms length transactions and were subsequently sold by the importer to a person who was not an associate of the importer; and

137.3. section 269TAB(1)(c) provides a method of ascertaining an export price in any other circumstances.

138. Customs calculated the export price for sales from CITIC Dicastal to Holden in accordance with s 269TAB(1)(a). This was on the basis that the goods had been exported to Australia otherwise than by the importer (CITIC Dicastal) and had been purchased by the importer from the exporter in an arms length transaction.

139. In contrast, Customs calculated the export price for sales from CITIC Dicastal, where the ultimate consumer was Ford, in accordance with s 269TAB(1)(c). This was on the basis that the goods were exported to Australia by CITIC Dicastal and transferred to Dicastal Australia, two related entities considered by Customs to be the one exporter for reasons set out in CITIC Dicastal's confidential response to exporter questionnaire. I agree with Customs' conclusion on this point. The export price can only be calculated in accordance with s 269TAB(1)(a) or (b) where the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter.

140. Whilst different approaches may have been taken to assessing an export price depending on the ultimate customer, the final export price for CITIC was based on a weighted average that took into account the different pricing calculations. I consider it was appropriate, and indeed required by the Customs Act, that Customs calculated the export price for goods ultimately acquired by Holden and Ford to take into account the different manner in which those goods were exported.

Export price of Baoding

141. Holden submitted that Customs should not have constructed an export price under s 269TAB(3) in relation to Baoding because Holden provided verifiable information to Customs in its Importer Questionnaire in relation to the imports from Baoding.

142. Section 269TAB(3) provides:

> Where the Minister is satisfied that sufficient information has not been furnished, or is not available, to enable the export price of goods to be ascertained under the preceding subsections, the export price of those goods shall be such amount as is determined by the Minister having regard to all relevant information.

143. When Customs visits an importer, they may select a sample of shipments for verification. However, to accurately verify these shipments, Customs needs to verify information from both the importer and exporter. While Customs could verify Holden's imports in this case, Customs did not have information from Baoding and so could not verify the shipments from the exporter side.

144. I am satisfied that Customs did not have sufficient information to determine that the purchase of the goods by the importer was an arms length relationship and accordingly it was appropriate to calculate the export price in accordance with s 269TAB(3) of the Customs Act. However Baoding was not a “selected” exporter and therefore, for the reasons set out at paragraphs 229 to 232, I recommend that the Minister direct the CEO of Customs to reinvestigate the calculation of the dumping margin to which it is subject.

Use of YHI Global price list

145. YHI submitted that the Report does not identify a coherent reason why the YHI global price list could not be used to extract export prices for YHI's goods. YHI submitted that the information available to Customs indicated that the YHI global price list was a reliable source of information about YHI's export prices.

146. Customs conducted an importer visit to YHI's related importer, YHI Australia, on 28 March 2012. During the visit, YHI provided a price list issued by YHI head office that was said to outline the prices for all wheel sizes and finishes supplied to all YHI Group companies. YHI Australia suggested that these prices be used to calculate an export price for the group.

147. I am satisfied that Customs were correct in not relying on this price list for the purpose of calculating an export price. Even if Customs could verify that it was a global price list issued by YHI, I am not satisfied that it should have been used to ascertain the export price. A price list is not evidence of actual transactions; it is only a price list showing prices at a particular point in time, which may or may not reflect the actual prices paid over the whole or part of the investigation period.

Export pricing varies depending on the location of the manufacturer

148. Taleb Tyres submitted that export pricing of ARWs from China varies depending on the location of the manufacturer and the incentives of different provincial cities located in China and that this was not taken into account by Customs in assessing export prices. Taleb Tyres also extended this argument to Customs' calculation of normal pricing, submitting that normal pricing of ARWs from China varies depending on the location of the manufacturer and that this was not taken into account by Customs.

149. For those exporters that did cooperate with the investigation, Customs calculated export price and normal value taking into account (albeit by uplifting in the case of aluminium inputs) their actual costs and therefore reflected geographical differences. If an exporter did not cooperate, Customs could not do this and accordingly Customs had to derive a general rate.

150. I do not consider that a failure to have regard to specific factors that might affect the calculations of export or normal pricing for an exporter who does not co-operate with Customs' investigation to constitute a basis for re-investigation. However, given my finding in relation to the general approach taken by Customs to the entities it termed "selected non-cooperating exporters" at paragraphs 229 to 232, I have recommended the dumping margins for all residual exporters be re-investigated.

151. For completeness, I note that, to support its submission, Taleb Tyres attached information from a company called Nantong Trade Union Aluminium Alloy Co. Ltd (**Nantong**). This material was not before the CEO of Customs at the time the CEO made his recommendation to the Minister and, consistently with s 269ZZK(4) of the Customs Act, I have formed the view that I cannot have regard to such information.

152. If Nantong considers that it may be appropriate to review the anti-dumping and countervailing measures imposed by the Minister as they apply to it, it can lodge an application with the CEO of Customs initiating a review of anti-dumping measures pursuant to s 269ZA of the Customs Act. Nantong may also request an accelerated review of the dumping duty notice or countervailing duty notice with the CEO pursuant to section 269ZF of the Customs Act as appropriate. Similarly importers purchasing Nantong products may apply for an assessment if the duty paid by them on those products under section 269V of the Customs Act.

MATERIAL INJURY

153. The review applicants made a number of submissions in relation to the method undertaken by Customs in determining that material injury to the Australian industry had occurred.

154. Material injury is assessed in accordance with s 269TAE of the Customs Act. This sections sets out a non-exhaustive list of matters to which Customs may have regard in determining whether material injury has been or is being caused or threatened to the Australian industry. Whilst the analysis is concerned with material injury to the Australian industry as a whole, in these circumstances the analysis was, in practice, an analysis of the material injury caused to Arrowcrest which represented more than 95 percent of ARW production in Australia during the investigation period.

155. Customs concluded that material injury was caused, and would continue to be caused, to the Australian industry by dumped and subsidised exports from China. This conclusion was reached on the basis of:

155.1. Price undercutting: Customs found that price undercutting occurred and the evidence it relied on to support this conclusion was:

a. correspondence summarised at section 9.4.1 of the Report between Arrowcrest and its customers where customers compared Arrowcrest's prices to that of goods available from China. Whilst the correspondence made available to me stopped short of expressly stating that Arrowcrest lost or would have lost sales as a result of this price undercutting, I consider that to be a reasonable inference given the context in which the correspondence occurred; and

b. economic analysis that found that Arrowcrest's prices were undercut throughout the investigation period by up to 28 per cent.

155.2. Price suppression: Customs found that subsidised goods exported from China undercut prices and prevented Arrowcrest from increasing its prices to match cost increases. Customs relied on the following evidence to support its conclusions:

a. the fact that major AM customers multi-source ARWs through both Chinese and Australian manufacturers which afforded customers considerable leverage over the Australian industry; and

b. negotiations with Toyota which showed Chinese imports were used to reduce a price increase proposed by Arrowcrest.

155.3. Loss of sales volume: Customs found that Arrowcrest lost sales volume in the investigation period. The evidence on which this conclusion was based was:

a. Arrowcrest's loss of sales volume decreased to a greater extent than the Australian market for ARWs;

b. Price-undercutting, which was most prevalent in the AM sector; and

c. An unsuccessful tender to supply ARWs for a particular model vehicle to Holden that was successfully awarded to a Chinese manufacturer.

155.4. Reduced profit and profitability: Customs found that the Australian industry's reduced profit and profitability was a function of loss of volume and suppressed prices in the investigation period.

156. I consider that Customs erred by relying on some of the evidence above, being:

156.1. reliance on Arrowcrest losing a tender to supply ARWs to Holden; and

156.2. reliance on the fact that Arrowcrest was denied a price increase under its contract to supply ARWs to Toyota.

157. My reasons in relation to the above conclusions are set out below. However, despite the conclusion that Customs should not have relied on the above matters, I am not recommending that the Minister direct the CEO to reinvestigate the finding that the dumping and subsidisation of the goods exported from China caused material injury to the Australian Industry. This is because, despite the errors that I consider have been made, I am satisfied that there was sufficient other evidence on which Customs could make the assessment that material injury was experienced and that it was caused by dumping and subsidisation of the goods exported from China.

158. In particular, in reaching this conclusion, I have had regard to the material summarised by Customs at paragraph 9.4.1 of the Report, which included:

158.1. correspondence from an Arrowcrest customer comparing Arrowcrest's prices to those available from Chinese manufacturers in the context of a request for Arrowcrest to provide competitive pricing; and

158.2. internal Arrowcrest correspondence that states that Arrowcrest was informed by Suzuki that a price it had quoted for ARWs had been undercut by [stated amounts] by YHI Australia, who would manufacture the ARWs in Shanghai.

Whilst I was not provided with any correspondence or other documentation from Suzuki confirming that it had decided to purchase its ARWs from YHI Australia on the basis of the lower quote, I am satisfied that this was a reasonable inference for Customs to draw based on the information that was provided.

159. Based on the above information, combined with the growth in market share occupied by the Chinese exports, I am satisfied it was reasonable for Customs to conclude that dumped or subsidised goods exported from China undercut prices in the Australian industry during the investigation period, causing material injury as a result.

160. In reaching this conclusion, I am satisfied that it is neither legislatively required nor reasonably expected for Customs to accurately and quantitatively assess the injury caused to the Australian industry by each factor. A qualitative judgment is sufficient about the likely contribution which each factor might make to the overall injury to the Australian industry. In respect of some matters, the Customs Act specifies particular outcomes when certain quantitatively measured situations arise - for example, when the dumping margin is less than 2%. But this is not the case in respect of the injury analysis required by the legislation.

161. The question posed by the legislation is simply whether dumping-caused injury to the Australian industry is material. Customs was therefore only required to form a qualitative view about the significance of the injury attributable solely to dumping, and in particular whether the injury caused by dumping was “material”. Other factors need to be considered to ensure that their impact is not wrongly attributed to dumping, but I do not consider that the legislation imposes a requirement to calculate the quantitative impact of each separate factor individually.

Evidence of lost sales

162. The review applicants made various submissions alleging that Customs erred in respect of the evidence it relied on for the purpose of finding that the Australian industry suffered injury in the form of lost sales. Specifically:

162.1. Holden and Samad Tyres submitted that Customs should not have concluded that Arrowcrest lost sales to Holden for the supply of ARWs;

162.2. Holden submitted that Customs ignored, or had insufficient regard to, a number of matters in relation to Arrowcrest's supply of ARWs to Toyota;

162.3. Samad and CITIC Dicastal each submitted that their exports of ARWs did not result in any loss of sales to Arrowcrest.

162.4. Ford broadly submitted that there was no evidence that Arrowcrest lost sales from exports.

163. Each of these grounds are dealt with below.

Lost tender to Holden

164. In considering whether material injury occurred in relation the OEM market, Customs relied on evidence that Arrowcrest was unsuccessful in a tender to supply Holden ARWs for a particular model during the investigation period. The tender was ultimately awarded to a Chinese manufacturer. Holden and Samad Tyres submitted that the conclusion, that material injury was suffered by the Australian industry, should be reinvestigated because of Customs' reliance on this evidence.

165. Holden, claim that the problem with relying on this information is that it was not correct, because:

165.1. Arrowcrest was unsuccessful for reasons other than price and it was unreasonable for Arrowcrest to draw this conclusion; and

165.2. the tender was ultimately awarded to a Korean exporter, not a Chinese exporter.

166. The Report states that Arrowcrest provided evidence of a quote to supply Holden ARWs for a particular model and was unsuccessful in its tender. Customs requested further evidence of the tender process in order to establish the reasons why Arrowcrest's bid was not successful, but no further detail was provided. In the absence of this information, Customs considered it reasonable to conclude that price would be an important factor in any tender process.

167. I asked Customs whether it had any further information to support its conclusion that Arrowcrest was unsuccessful in its tender based on price. Customs provided me with correspondence between ROH Automotive (a trading division of Arrowcrest) and Customs which indicated that ROH Automotive's prices for ARWs were significantly higher than Holden expected based on international market prices. Customs indicated that this evidence supported its conclusion that price was a factor when Holden considered which entity would be awarded the tender.

168. Whilst I am satisfied that it was reasonable for Customs to infer that price could have been an important factor in the tender process, I am not satisfied that, in the absence of any additional information, it was reasonable to conclude that Arrowcrest lost the tender based on price alone. There are many additional and perhaps equally important matters that Holden might properly have considered when deciding to award a tender, such as warranty terms.

169. Furthermore, Holden stated that the tender was awarded to a Korean Exporter, not a Chinese exporter. Whilst I am advised that this information was not before the CEO when the CEO made his recommendation to the Minister, neither was there any direct evidence that the tender was awarded to a Chinese exporter. This highlights the danger in making assumptions about the outcome of the tender process in the absence of specific information. I am thus not satisfied that it was reasonable to assume that dumped and subsided exports from China caused Arrowcrest to lose the tender.

170. In a related but broader ground of review, Holden submitted that it could be concluded that the loss of sales and contracts to each of Holden and Ford was due to dumping or subsidisation of goods from China. I am satisfied that, for the reasons outlined above, no loss of sales to Holden can be attributed to dumping of goods from China. Further, I am satisfied that there is no evidence of any loss of sales to Ford attributable to dumping. However, I also do not consider that Customs relied on any loss of sales to Ford as a cause of material injury, although I appreciate that the Report may give rise to this impression insofar as it concludes that Arrowcrest experienced injury in the form of reduced capacity utilisation on the basis of cessation of production for Holden and Ford.[28]

171. Notwithstanding my conclusion that it was unreasonable for Customs to rely on the loss of a tender to Holden as evidence of material injury, I am satisfied that there was sufficient other evidence of material injury as set out at paragraph 158.

Reliance on negotiations between Toyota and Arrowcrest

172. Holden submitted that Customs erred in its assessment of material injury because Customs ignored, or had insufficient regard to, the following matters in relation to the supply of ARWs to Toyota:

172.1. the reduction in volume of Toyota production and in the PMV market generally; and

172.2. the fact that Toyota made no submissions in respect of the Investigation.

173. I am not satisfied that Customs did not adequately consider the reduction in volume of sales attributable to a decline in Toyota's production and in the PMV market generally. The Report specifically refers to Toyota's decline in production when assessing whether there was a loss of sales volume attributable to dumped and subsided imports from China.[29] Further the Report specifically refers to the reduction in production of PMVs.[30]

174. Moreover, I am not satisfied that Customs disregarded the fact that Toyota declined to participate in the investigation. Where an entity fails to participate in an investigation, and evidence is put to Customs about that entity's actions, Customs must consider the weight to be attributed to that evidence. It might be that the evidence from another source is accepted because there is no contrary evidence before Customs. In this instance, Arrowcrest provided information, such as the fact that it supplied Toyota with 100 percent of its requirements of ARWs during the investigation period, which was accepted by Customs because there was no information to the contrary.[31] I do not see anything unreasonable in Customs taking

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28 The Report, page 64.

29 The Report, page 61.

30 The Report, page 75.

31 The Report, page 61 (footnote 34).

this approach. Customs is only able to consider the evidence that is made available to it or that it is able to obtain as a result of its own inquiries.

175. In a related submission, Ford criticises Customs' reliance on the broader term negotiations with Toyota beginning in November 2009 and carried through to September 2011. Customs relied on these negotiations, and particularly the fact that Chinese prices were used to counter a price increase proposed by Arrowcrest, to find that price suppression was experienced by the Australian industry and was caused by the dumped and subsidised goods exported from China.[32] Ford's specific complaint is that Arrowcrest was granted the contract with Toyota in January 2010, five months prior to the commencement of the investigation period. I understand Ford's submission to be that:

175.1. Customs could not have had regard to any negotiations preceding the contract being granted (because this was outside the investigation period), and;

175.2. whilst it could have had regard to price increases that were denied to Arrowcrest during the investigation period, there was insufficient evidence to conclude that there was an entitlement to a price increase and, even if there was, there was no evidence that the price increase was denied as a consequence of dumped or subsidised imports.

176. For the reasons outlined below at paragraphs 208 and 209, I do not accept that Customs could not have regard to negotiations preceding the investigation period for the purpose of determining material injury. However, on the evidence made available to me during my review, I am not satisfied that there is sufficient evidence to conclude that Toyota denied Arrowcrest a price increase on the basis that its prices were higher than Chinese exports. To be satisfied that this was the case, it would be necessary for me to review the contractual provisions for price increases to determine if, firstly, there was an entitlement to a price increase and, secondly, the basis on which that price increase was to be permitted. The only contract I was provided with contained no terms allowing price variation.

Samad Tyres and CITIC Dicastal's involvement with Arrowcrest

177. Samad Tyres stated that it has never purchased ARWs from Arrowcrest, and accordingly the business of Samad Tyres had no bearing on the sales volume of Arrowcrest. Samad Tyres' submission appears to be that Customs cannot have concluded that Arrowcrest had a decrease in sales volume over the investigation period.

178. Similarly, CITIC Dicastal submitted that exports of ARWs by CITIC Dicastal did not cause injury to the Australian industry for reasons including the fact that it does not supply ARWs to the AM market and, in relation to the OEM market, it only supplies ARWs to Ford and Holden who do not source ARWs from Arrowcrest.

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[32] The Report, page 70.

179. The question to be investigated by Customs is not whether an individual importer caused material injury, rather, it is whether dumping and subsidisation of the goods exported from China as a whole has caused material injury to the Australian industry producing ARWs. For the reasons set out above, I am satisfied that there was sufficient evidence of material injury.

Evidence of lost market share

180. Ford submitted that, during the investigation period, Customs noted that imports of ARWs increased but at the expense of imports from other countries and that there was no evidence that Arrowcrest lost sales from these imports.

181. I disagree with this interpretation of the conclusions reached in the Report. Customs found that Arrowcrest's total market share declined by four percent during the injury analysis period, from 23 percent to 19 percent. During the same period China's market share increased from 24 percent to 48 percent and the market share of other imports declined from 53 percent to 33 percent.[33] This suggests that over a number of years both the Australian Industry and other imports were losing market share to imports from China. Further, this trend continued during the investigation period.

182. Ford also submitted that Arrowcrest's drop in market share in the AM segment of the market segment occurred prior to the investigation period and accordingly no finding of material injury caused by the import of Chinese ARW into the Australian market can be made. I disagree with this submission. Whilst no conclusion could be drawn that the Australian industry suffered lost market share during the investigation period (which was the conclusion reached by Customs[34]), the fact that a market share loss occurred prior to the investigation period is relevant to considering whether material injury occurred in another respects. In these circumstances, the fact that Arrowcrest was unable to regain market share that it had held prior to the commencement of the investigation period supports the conclusion that the Australian industry suffered material injury in the form of lost sales volume during the investigation period.

183. In respect of Ford's broader submission that no finding of material injury caused by the import of Chinese ARW can be made, I refer to paragraphs 158 and 159 which refer to evidence of loss of sales from Arrowcrest to China.

Whether injury incurred by Arrowcrest in the AM segment was material

184. Customs found that material injury was suffered in the ARW market as a whole and, as part of this analysis, it separately examined the AM and OEM segments of the market. In relation to the ARW segment of the market, Customs found that price undercutting occurred, which meant it was not possible for Arrowcrest to gain any AM share that was potentially available to it.

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33 The Report, page 62.

34 The Report, page 62.

185. Speedy submitted that Customs did not find that any injury incurred by Arrowcrest in the AM segment of the market was material to Arrowcrest's ARW business considered as a whole.

186. The relevant question for Customs was whether the injury suffered in the ARW market as a whole was material, not just a particular segment of that market. Accordingly, I do not consider that it was necessary for Customs to make a specific finding that injury incurred by Arrowcrest in the AM segment was material to its ARW business as a whole. And, for the reasons addressed above, I consider there was sufficient evidence to support the finding that material injury was suffered by the Australian Industry.

Other potential causes of injury

187. Some of the review applicants submitted that any alleged loss of sales to Arrowcrest was due to reasons other than price and was not associated with any alleged dumping or subsidisation. Other review applicants submitted that Customs failed to examine whether *any* of the injury that was caused to the Australian industry could in fact be attributed to dumping and/or subsidisation.

188. The Customs Act does not require that the only cause of injury must be circumstances in relation to the exportation of goods to Australia. A dumping duty notice may apply in circumstances where dumping or subsidisation is the sole cause of injury or where there are other contributing factors.

189. However, the Customs Act does require that any injury caused by other factors must not be attributed to the exportation of the goods. Relevantly s 269TAE(2A) provides:

> In making a determination in relation to the exportation of goods to Australia for the purposes referred to in subsection (1) or (2), the Minister must 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, such as:
>
> …
>
> and any such injury or hindrance must not be attributed to the exportation of those goods.

190. In assessing the injury caused to the Australian industry, Customs did consider other potential causes of injury to the Australian industry including:

190.1. changes in the Australian market for PMVs;

190.2. claims of poor service and product quality;

190.3. imports from other countries; and

190.4. unavailability of particular models from the Australian industry.[35]

191. After considering these other possible causes of injury, Customs ultimately concluded that they did not detract from its assessment that dumping and subsidisation, in isolation, had caused material injury to the Australian Industry.[36]

192. With respect to the matter at paragraph 190.2, Holden and Samad Tyres each submitted that they had never had any issues with timeliness from Chinese exporters I do not consider that these submissions in any way affect the conclusion reached by Customs on this point, namely that insufficient evidence was produced to support any claim that poor service or other non-price factors contributed to Arrowcrest losing business.

193. With respect to the matter at paragraph 190.4, I note Holden and Samad Tyres' submissions that Customs' conclusion that the number of styles offered by Arrowcrest was a less significant injury factor than dumped exports was a finding outside of Customs' area of expertise and accordingly the conclusion should not be taken into account when determining material injury. I do not agree that it was improper for Customs to have drawn this conclusion. To the contrary, s 269TAE(2A) of the Customs Act specifically requires the Minister to consider whether any injury to an industry is being caused or threatened by a factor other than the exportation of goods and dumped prices. The sufficiency of the style releases by the Australian industry was raised by an interested party as a contributing factor to Arrowcrest's market situation. Accordingly, it was necessary for Customs to investigate, and the Minister to determine, whether in fact any injury should be attributed to this factor.

194. I am not satisfied that there was sufficient evidence to establish the above factors caused injury to the Australian industry. In any event, even if there was evidence to the effect that the above factors caused some injury, I am not satisfied that Customs wrongly attributed any injury caused by these factors to dumping or subsidies in setting the dumping margin. The amount at which the non-injurious price is set effectively quantifies the amount of "injury" that is attributed to dumping; the non-injurious price of the goods exported to Australia is the minimum price necessary to remove the injury caused by the dumping and or subsidisation.

195. In these circumstances, Customs calculated the non-injurious price by subtracting from the unsuppressed selling price (USP) the costs incurred in getting the goods from the export free-on-board point to the relevant level of trade in Australia. The USP is the price at which Customs assessed the Australian industry might reasonably sell its product in a market unaffected by dumping, which Customs set by reference to Arrowcrest's cost to make and sell AM ARWs.[37]

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35 The Report, pages 74 to 77.

36 The Report, page 77. Also see page 79.

37 The Report, pages 82 to 84.

196. Even if there were sufficient evidence to establish that one of the "other factors" such as poor service contributed to the injury suffered by Arrowcrest, that would not necessarily be sufficient to require a reassessment of the non-injurious price.

197. Speedy submitted that Customs erred by failing to have regard to Arrowcrest's profit margins in the AM segment of the market. Specifically, Speedy submitted that, given that Arrowcrest obtained larger profits in the AM than in the OEM segment of the market, it would have been possible for Arrowcrest to reduce its profit market and compete with imports on price, but it elected not to do so. This choice, claimed Speedy, meant any injury incurred by Arrowcrest, was self-inflicted.

198. I am unable to be satisfied on the evidence available to me that Arrowcrest did obtain larger profits in the AM segment of the market. Customs did reach this conclusion[38] and I asked Customs for the evidence supporting this proposition. I was provided with the analysis that sat behind Diagram 1 at page 57 of the Report. This analysis was confined to the average unit prices of ARWs in the OEM and AM segments. It did not include an analysis of the average unit cost of producing ARWs for these two segments of the market.

199. Whilst I understand that Arrowcrest advised Customs, and it was accepted by Customs, that the cost to manufacture was the same for both segments of the market, this does not assist me in establishing the profitability for each market segment. Accordingly, I am unable to conclude that profitability is higher in the AM segment of the market. Moreover, I am unable to reach a conclusion as to whether Arrowcrest did in fact maintain its profitability in this segment of the market over the investigation period.

200. Even if I were satisfied that Arrowcrest obtained larger profits in the AM segment of the market, I am not satisfied that any failure to reduce its profits in that segment would be a matter that that would necessitate a reinvestigation of the finding that material injury was caused in the market as a whole. Given the extent of price undercutting in this segment of the market, I consider it was reasonable to infer that the Australian industry was unable to match or come close to prices offered on Chinese imports. This inference is supported by Customs' analysis that Arrowcrest's overall profitability declined during the investigation period.[39]

The 2007 fall in market share

201. Speedy submitted that Customs failed to investigate the reasons behind Arrowcrest's market share falling in 2007 and, in the absence of such an investigation, could not establish any material injury in relation to this segment of the market. Holden submitted that it was inappropriate for Customs to rely on the loss of market share.

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38 The Report, page 61.

39 The Report, pages 63 to 64.

202. Customs found that Arrowcrest's market share of the AM segment of the market fell in 2007 and then remained constant. Specifically, Arrowcrest had a 5 percent share in this segment in 2007, which fell to 1 percent in 2008 and remained at this level throughout the injury analysis period.[40] During the same period, imports from China grew from 26 percent to 54 percent of the market.[41] I am satisfied that Customs did investigate possible reasons for this fall in market share apart from price undercutting by Chinese imports. For instance, Customs investigated claims associated with poor service, product quality and style offerings. I am satisfied that Customs adequately investigated these other potential causes of loss of market share and that it was reasonable for Customs to draw a causal link between dumped and subsidised imports from China and Arrowcrest's loss of market share that occurred during the injury analysis period.

203. Holden submits that it was inappropriate for Customs to focus on Arrowcrest's market share decline in the AM segment of the market by 4 percent when, in practicality, that was a relatively small change compared to its previous percentage. I am not satisfied that Customs placed too much weight on Arrowcrest's loss of market share in the AM segment of the market in finding material injury was present. Whilst Arrowcrest may have only held a small percentage of the market share, its inability to capture more of the market in circumstances where the market share held by imports from China increased at 24 percent during the same period is of significance. I am satisfied that it was reasonable for Customs to have regard to this fall in market share as part of its overall assessment of whether exports from China caused material injury.

204. For completeness, I note the submission by Holden that Customs displayed a lack of precision in assessing the size of the AM segment of the ARW sector of the market. Specifically that Customs referred to the AM segment as accounting for 73 percent of the Australian market[42] and at other times "approximately 70 percent" and another time as "over 70 percent"[43]. I do not consider that this observation warrants reinvestigation of any of Customs' findings. In any event, I do not consider any of these descriptions to be contradictory.

Reliance on alleged material injury occurring prior to the commencement of the injury assessment period

205. Holden and Samad Tyres submitted that Customs had not excluded reference to any alleged material injury prior to the commencement of the injury assessment period.

206. Customs did refer to material injury occurring prior to the commencement of the injury analysis period (1 July 2006) in the Report. Specifically:

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40 The Report, page 62 (Table 5).

41 The Report, page 62 (Table 5).

42 The Report, page 71.

43 The Report, pages 60 to 61.

206.1. Customs indicated it was 'reluctant' to place much weight on trends observed prior to 2006 given the lack of relevant sales and cost information available in the earlier period. Customs stated that, for the purpose of its investigation, *most* weight was given to the period from 1 July 2006 for injury analysis purposes and only data from the injury analysis period had been used for injury analysis calculations.[44] The inference to be drawn is that *some* weight was given to the period pre 1 July 2006 for injury analysis calculations; and

206.2. Customs referred to Arrowcrest providing evidence of its larger AM market share volumes and market share in the years pre 1 July 2006[45] and indicated that, whilst data prior to 2006 was not subject to verification, it was considered reliable for the purpose of examining trends.

207. Unlike the term "investigation period" which is defined by the Customs Act, the term "injury analysis period" is not a term used in the Customs Act. Rather it is a period nominated by Customs in relation to which it will analyse the condition of the Australian industry for the purpose of determining whether material injury has occurred.

208. Section 269T(2AD) of the Customs Act relevantly provides:

> The fact that an investigation period is specified to start at a particular time does not imply that the Minister may not examine periods before that time for the purposes of determining whether material injury has been caused to an Australian industry or to an industry of a third country.

209. I am satisfied that Customs was legally able to consider occurrences outside the injury analysis period for the purpose of considering whether material injury to the Australian industry occurred. In any event, I do not consider that Customs did anything more than refer to a trend in the AM market pre-2006 for the purpose of putting its findings during the investigation period into context; Customs did not in my view rely on this information in any significant manner for the purpose of reaching its conclusions on material injury.

Finding that material injury would continue to occur into the future.

210. Holden, Samad Tyres and Ford submitted that any alleged loss of sales in the future, in relation to the OEM segment of the market, would be for reasons other than price and not associated with dumping or subsidisation. Specifically, these review applicants submitted that Customs ignored:

210.1. Ford stating it will not purchase ARWs from Arrowcrest for reasons other than price;

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44 The Report, pages 55 to 56.

45 The Report, page 63.

210.2. Holden stating that it will not purchase ARWs from Arrowcrest for reasons other than price;

210.3. Ford and Holden being locked into long term contracts for the supply to them of ARWs for the OEM; and

210.4. a drop in demand for ARWs from Premoso for reasons other than price.

211. It is not necessary for the purpose of imposing a dumping duty that applies after the date of publication of the notice pursuant to s 269TG(2) to establish that material injury will continue to occur into the future. Relevantly the Minister must be satisfied that:

> (2) Where the Minister is satisfied, as to goods of any kind, that:
>
> (a) the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, *and* the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods; and
>
> (b) because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered.
>
> …
>
> (emphasis added)

212. Section 269TG(2)(b) only contains a requirement for the Minister to be satisfied that material injury has been caused or is being caused or is threatened; not that it will be caused in the future.

213. I am satisfied that it was reasonable for the Minister to conclude that the Australian industry would be threatened in the future. In particular, any continuation of price undercutting may result in lost sales volume and continued price suppression, in both the AM and OEM segments of the market.

214. The submissions in this regard amount to a submission that lost volume will not occur in the future in the OEM segment of the market because there are no sales effectively "available" in this segment due to long term contracts and customers being unwilling to purchase from Arrowcrest. I am not satisfied that these submissions amount to a sufficient basis on which to be satisfied that material injury will not occur in the future, because:

214.1. a car manufacturer expressing its position that it will not purchase from an Australian manufacturer for reasons other than price is at best evidence of its present intentions, which might change in the future depending on a comparison of the options as they may then exist;

214.2. the fact that a manufacturer may be 'locked in' to a long term contract does not mean no material injury has not already been caused and that ongoing injury from past decisions is no longer threatened; and

214.3. in any event, at some point existing contracts will come up for renewal and there may in the interim be additional sourcing requirements for ARWs that emerge outside the scope of current contracts.

215. Accordingly, I am satisfied that it was reasonable for Customs to conclude and the Minister to accept that exports of ARWs from China at dumped or subsidised prices may cause further material injury to the Australia industry in the future.

Limited source of information

216. Holden and Samad Tyres submitted that the conclusion reached by Customs, that Arrowcrest would obtain a greater proportion of the AM sector but for the low cost Chinese imports, was not a conclusion that Customs should have drawn. Holden and Samad Tyres' submissions appear to be made on the basis that it was not a conclusion that Customs could have drawn as it only had information from a small sample of those entities involved in the import, distribution and sale of ARWs in the AM segment.

217. I am not satisfied that Customs based its conclusions on an inappropriately limited source of information. Customs contacted 181 importers (following a search of its database) and contacted 7 entities that it identified as key end users of ARWs in the AM market (being wholesalers or retailers). Whilst only a limited number of these entities decided to participate in the investigation, I am satisfied that Customs took appropriate steps to obtain the information it required for its investigation.

Approach taken to exporters that did not co-operate with Customs' investigation

218. Jiangsu submitted that its export price is the same as its normal value and so it is impossible for its exports to cause material injury to the Australian industry producing ARWs.

219. In a similar submission, Samad Tyres submitted that Customs should have approached particular exporters for information on export price. Samad Tyres submitted that, had these importers been contacted, they would have co-operated with Customs' investigation. I have not identified the particular exporters by names as Samad has requested that this information be kept confidential.

220. Customs sent a letter to each of Jiangsu and the exporters identified by Samad Tyres, inviting them to participate in the investigation. Customs did not receive any response to its letter. Accordingly, I am satisfied that these submissions give rise to no basis for recommending any part of the Minister's decision be set aside.

221. These exporters (and others) did not cooperate with Customs in its investigation. In circumstances where an exporter does not co-operate with Customs, information about its export price and normal price may not be able to be ascertained by reference to its particular circumstances. Accordingly, its dumping margin is properly established in accordance with the method applied to non-cooperating exporters.

222. However, for the reasons given below at paragraphs 229 to 232, I recommend the calculation of the dumping margin of all entities classified by Customs as 'selected non-cooperating exporters' be re-investigated.

NON-COOPERATING EXPORTERS

Dumping duty rates for non-cooperating exporters

223. In the Report, Customs described five exporters who had provided an adequate and timely response to the questionnaire issue in relation to the dumping and subsidy investigation as 'selected cooperating exporters'. All remaining exporters were termed 'selected non-operating exporters'.

224. These terms are, however, not found in the Customs Act, which provides for only three categories of exporters - namely new exporters, residual exporters and selected exporters. These terms are defined in section 269T as follows:

> ***new exporter***, in relation to goods the subject of an application for a dumping duty notice or a countervailing duty notice or like goods, means an exporter who did not export such goods to Australia at any time during the period:
>
> (a) starting at the start of the investigation period in relation to the application; and
>
> (b) ending immediately before the day the CEO places on the public record the statement of essential facts in relation to the investigation of the application.
>
> ***residual exporter***, in relation to a dumping duty notice or a countervailing duty notice in respect of goods, means an exporter of goods the subject of the application or like goods, other than:
>
> (a) a selected exporter; and
>
> (b) a new exporter of such goods.
>
> ***selected exporter***, in relation to a dumping duty notice or a countervailing duty notice in respect of goods, means an exporter of goods the subject of the application or like goods whose exportations were investigated for the purpose of deciding whether or not to publish that notice.

225. Customs did not apply s 269TG(3B) to any of those it termed “selected non-cooperating exporters”. This section requires that:

> In ascertaining a normal value and export price for goods of the residual exporter, the Minister must ensure that:
>
> (a) the normal value does not exceed the weighted average of normal values for like goods of selected exporters from the same country of export; and

(b) the export price is not less than the weighted average of export prices for like goods of selected exporters from the same country of export.

226. It therefore seems that Customs considered that those exporters it named 'selected non-cooperating exporters' are not 'residual exporters' but 'selected exporters' for the purposes Part XVB of the Customs Act. As is apparent from the above quoted definitions, whether or not this is correct turns upon whether or not the exportations of the so-called 'selected non-cooperating exporters' were "investigated".

227. I considered these terms and the application of s 269TG(3B) of the Customs Act in my review of the dumping duty notice in relation to clear float glass exported from the Peoples Republic of China, the Republic of Indonesia and the Kingdom of Thailand dated 13 February 2012 ('the Clear Float Glass decision').[46] In that decision I said in relation to the above terms that:

> 50. It is apparent that the factor that places an exporter in one category or another is whether or not their exports were “investigated”.
>
> 51. Clearly, the exports of CSG and Xinyi were inquired into to the point where the Minister and CEO respectively felt able to determine individual export prices and normal values. I consider that their exportations were accordingly “investigated” and they were “selected exporters”.
>
> 52. The exports of Landson Qingdao were inquired into, but only to a point short of being able to verify its export prices and normal values. Because of a failure to further cooperate, the statutory discretion was exercised to disregard its information on the basis that it was unreliable. Export prices and normal values, and thus dumping margins and duty rates, were not determined for it – it was treated in the same way as all other or residual exporters. I think this degree of inquiry falls short of being able to say that its export prices and normal values were “investigated”. If it were otherwise, section 269TG(3B) would have the effect of requiring that unreliable information had to be used in setting a cap on export prices and normal values used for the determination of dumping margins for other exporters. I think that would be a manifestly absurd or unreasonable outcome.
>
> 53. The export prices and normal values of other Chinese exporters were inquired into, but only to the point of requesting them to complete an exporter questionnaire, which they failed to do. If this degree of inquiry amounted to their export prices and normal values being “investigated”, they would be “selected exporters” and their export prices and normal values would have to be factored into the calculation required by section 269TG(3B) but this would not be possible because they were unknown. This too I would view as a manifestly absurd or unreasonable outcome.

228. Conceptually exporters can be classified in a number of ways:

a. those exporters who provided information which the CEO of Customs considered adequate to allow an exporter specific decision on whether or not there was dumping, and if so, as to the rate;

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[46] http://www.tmro.gov.au/Site/2011_6.asp

b. those exporters who were willing to or may in fact have provided adequate information to allow the CEO to reach such decisions, but in respect of whom such decisions were not made in reliance on s 269TACB(8).

c. those exporters who provided some information but not information that was reliable enough to allow the CEO of Customs to reach such decisions;

d. those exporters who were requested to provide information but simply failed to do so;

e. those exporters who existed but were unknown to the CEO of Customs and who may or may not have been aware of his request to make themselves known; and

f. those exporters who did not exist at the relevant time, but later become exporters during the period a dumping notice is operative.

229. Consistently with the views I expressed in the earlier matter, I consider that it is simply not correct to say that the exportations of exporters falling within categories (b), (d), (e) and (f) above have been “investigated”. They thus cannot be classified under the Customs Act as "selected". They must therefore be either "residual" or "new". If they are "residual" then the rate set for them must be set in accordance with s 269TG(3B).

230. So far as exporters within category (c) are concerned, I consider that the proper analysis is that the information they have provided is to be viewed as disregarded under the discretions in ss 269TAB(4) and 269TAC(7) and that, while their exportations may have been considered up to a point, that consideration does not amount to an investigation. As I noted in the earlier decision, a contrary view would require that information deemed unreliable should be used in determining the residual rate under s 269TG(3B).

231. I appreciate that this analysis has the potential to reward non-cooperating exporters who, had they cooperated, might have been the subject of exporter specific dumping rates in excess of those that would be applicable under s 269TG(3B). That, however, does not mean that this interpretation of the existing law is wrong. It simply means that it would be appropriate to amend the existing law. In this regard, I note that the Parliament has recently passed relevant amendments which have not yet come into effect and are thus inapplicable as at the date of my decision.

232. For the above reasons, I consider that Customs has failed to apply s 269TG(3B) in the calculation of the dumping margin for residual exporters. I therefore recommend that the Minister direct the CEO of Customs to re-investigate the calculation of the dumping margins for residual exporters and to recommend to the Minister a rate for new exporters.

Whether YHI should have been considered a non-cooperating exporter

233. YHI submits that it should not have been treated as a 'non-cooperating exporter' and, accordingly, the finding of a dumping margin of 29.3 percent should be

reinvestigated. To understand YHI's submission it is necessary to examine the interaction that occurred between YHI and Customs during the investigation:

233.1. YHI was sent an exporter questionnaire. The exporter questionnaire was returned to Customs, substantially completed. Customs did not visit YHI in China. It is Customs' practice to visit the biggest exporters, due to resource constraints, and do a desk verification for the other exporters.

233.2. As part of the desktop verification, Customs sent YHI the first stage ("stage A") of the verification plan for YHI. YHI responded that the workload for the desktop verification was too high and requested a face to face investigation (I am informed by Customs that the work required in responding to the desktop verification exercise is no greater than the requirements that would have been placed on YHI if Customs conducted a face to face investigation. Customs would have requested the same documents and explanations).

233.3. Customs advised YHI that it was unable to visit all companies in an investigation and that a desktop verification should continue. However, Customs also acknowledged the workload concerns raised by YHI and indicated it was developing a new strategy over the "coming days" to assist in the verification process. Customs also referred to the non-cooperation of YHI's related entity, YHI Australia.

233.4. YHI Australia contacted Customs querying why it had been assessed as non-cooperating and indicated to Customs that it was welcome to visit its offices.

233.5. Customs attended YHI Australia's offices for a site visit.

233.6. YHI asserts (and I have been provided with no evidence to the contrary) that Customs never contacted it about an alternative strategy to assist in the verification process.

234. I am sympathetic to YHI's submission, given the miscommunication that appears to have occurred between Customs and YHI in relation to verifying the information in the exporter questionnaire. Nevertheless, I do not consider that Customs had enough information available to it to calculate a dumping margin for YHI based on the data that had been provided, and that accordingly it could not be considered a 'selected exporter'.

235. On the basis of the analysis above, YHI falls with that category of exporter described at paragraph 228(c); whilst inquiries had been commenced, they fell short of the level of inquiry necessary to be able to verify YHI's export prices and normal values. Therefore, I do not consider that YHI could meet the definition of 'selected exporter', being an exporter whose 'exportations were investigated'.

236. The export prices and normal values for non-cooperating exporters were determined pursuant to sections 269TAB(3) and 269TAC(6) respectively. Relevantly, these sections are conditional on:

> … The Minister is satisfied that sufficient information has not been furnished, or is not available, to enable the export price of goods to be ascertained under the preceding subsections [section 269TAB(3)]
>
> … The Minister is satisfied that sufficient information has not been furnished or is not available to enable the normal value of goods to be ascertained under the preceding subsections (other than subsection (5D)… [section 269TAC(6)]

237. I am satisfied that, as a matter of fact, sufficient information had simply not been furnished by YHI. I am thus satisfied that it was reasonable for the Minister to consider sufficient information was not available to enable YHI-specific normal values and export prices to be ascertained.

238. In reaching this conclusion, I have taken into account Customs' failure to revert back to YHI after it indicated an "alternative strategy" to assist in its verification was being devised. Whilst it is possible that further dialogue with YHI may have resulted in further information being provided, I do not consider this possibility precluded the Minister being satisfied that sufficient information was not available, particularly given that Customs did make further attempts to ascertain an export price following YHI not completing the desktop verification by visiting its related company YHI Australia. These further inquiries led Customs to conclude that the information on export prices for selected shipments was unreliable. Accordingly, I consider that Customs was correct to calculate the export and normal prices pursuant to ss 269TAB(3) and 269TAC(6) of the Customs Act.

PART 3 - NON-INJURIOUS PRICE

239. In respect of a dumping duty notice, the non-injurious price is defined at s 269TACA:

> The non-injurious price of goods exported to Australia is the minimum price necessary:
>
> a) if the goods are the subject of, or of an application for, a dumping duty notice under subsection 269TG(1) or (2) - to prevent the injury, or a recurrence of the injury, or to remove the hindrance, referred to in paragraph 269TG(1)(b) or (2)(b).
>
> …
>
> (emphasis added)

240. Under the Anti-Dumping Act the Minister must have regard to the desirability of ensuring that the amount of dumping duty is not greater than is necessary to prevent injury or a recurrence of the injury.[47] If the export value in addition to the calculated dumping duty is more than the non-injurious price, then the dumping duty is higher than is needed to prevent the injury.

241. Customs assessed the non-injurious price in two steps:

241.1. Firstly, it established a price at which it considered the Australian industry might reasonably sell its product in a market unaffected by dumping. This price it referred to as the unsuppressed selling price (USP);

241.2. Secondly, it deducted from the USP the costs incurred in getting the goods from the export free-on-board point to the relevant level of trade in Australia. The deductions include overseas freight, insurance, into store costs and amounts for importer expenses and profits.

242. In relation to the first step, Customs calculated the USP using Arrowcrest's costs to make and sell ARWs for the AM segment of the market, plus an amount for profit. Previously, in its Statement of Essential Facts, Customs constructed a USP using a weighted average cost to make and sell of ARWs to both the OEM and AM segment of the market. Customs changed to using in the Report only Arrowcrest's costs to make and sell in the AM segment of the market because it considered the weighted average price would be below the minimum price necessary to remove injury caused by dumping and subsidisation in the AM market segment.

243. Holden submitted that Customs erred with respect to the first step. Specifically Holden submitted that Customs should not have calculated the USP using Arrowcrest's cost to make and sell ARW in the AM market. The submission is made on the basis that it was inappropriate for Customs to have regard to only one segment of the market and not both.

244. The assumption underpinning Customs' method at step 1 was that, in a competitive market, unaffected by dumping, the Australian industry could sell all its AM ARWs at

[47] See for example *Customs (Anti Dumping) Act 1975*, ss 8(5), 9(5A), 10(3C)

its cost to make and sell ARWs in the AM segment of the market, plus an amount for profit even though, in a similarly competitive market unaffected by dumping, it might only reasonably expect to sell its product in the OEM segment of the market at a lower price.

245. Ordinarily, I would not consider it reasonable to set the USP by reference to only the most expensive form of otherwise homogeneous goods under consideration, as doing so could result in a higher than necessary non-injurious price. However, while I consider them to comprise only one market for the reasons discussed earlier, the ARW market is at any point in time distinguished by two quite separately discernible market segments. If the USP is set only by reference to a weighted average of prices across both segments, injury will not be prevented in the higher cost/price segment and injury will be suffered in the market.

246. Accordingly, I consider that the position adopted by Customs on this occasion was both consistent with the Customs Act and reasonable.

PART 4 - REVIEW OF THE DECISION TO PUBLISH A COUNTERVAILING DUTY NOTICE

Countervailable subsidies and non selected exporters

Whether it was reasonable to assume all non selected exporters received all countervailable subsidies

247. In the Report, Customs found that, of the subsidies identified, 32[48] were countervailable. Further, in the absence of information being provided by the selected non-cooperating exporters, or the Government of China, about whether benefits were conferred on these exporters, Customs determined that selected non-cooperating exporters had benefits conferred upon them under all of these programs. This resulted in Customs determining a subsidy margin of 58.8 percent of the export price for the selected non-cooperating exporters, compared to a subsidy margin of less than 5.1 percent of export price for all the selected co-operating exporters.

248. Holden, Speedy, CITIC Discastal and Taleb Tyres submitted that Customs erred in the approach taken to assessing the existence and value of countervailable subsidies in relation to 'selected non-cooperating exporters'. In summary, their submissions were that[49]:

248.1. it is more likely that selected non-cooperating exporters received subsidies, if any, at levels comparable to those of the selected exporters and, unless the full 58.8 percent of subsidies actually flowed through into the export prices of the selected non-cooperating exporters, there was no justification for the imposition of countervailing measures at this level; and

248.2. Customs failed to comply with s 269TACC of the Customs Act in determining that so-called 'selected non-cooperating exporters' received the full value of all identified countervailable subsidies.

249. Section 269TACC sets out how the question of whether a benefit has been conferred and the amount of a subsidy is to be determined. I agree with Customs that, in the absence of exporters providing information about receipt of benefits and in the absence of Customs being able to obtain that information from elsewhere, it is not able to determine the question of the existence and amount of a benefit pursuant to sections 269TACC(2), (3), (4) and (5). Accordingly, it is open to the Minister, pursuant to s 269TACC(7), to determine an alternative basis for deciding whether a benefit has been conferred and for working out the amount of subsidy attributable to the benefit.

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48 See above, at 19.

49 Taleb Tyre's submission was limited to a request to re-examine the validity of countervailable duties payable to non-cooperative exporters, without further elaboration of the reasons why a further investigation was required.

250. The discretion contained in s 269TACC is not limited by any requirement that the amount of any subsidies be constrained by reference to what has been found to exist in relation to selected exporters. Relevantly, in relation to the calculation of countervailing duty, there is no direct equivalent to section 269TG(3B) of the Customs Act, which requires that the normal value and export price of goods of the residual exporter do not exceed the weighted average of the normal and export prices for like goods of selected exporters. I consider that to infer that such a constraint, in the absence of an express statutory provision to this effect, would be particularly inappropriate given the potential consequences. To somehow limit the Minister's discretion by reference to the amount of the subsidies that were found to have been received by selected exporters would provide an incentive for entities in receipt of large amounts of subsidies not to co-operate with Customs' investigation.

251. Nor do I consider that Customs' approach results in a non-injurious price that exceeds the minimum price necessary to prevent the injury from occurring. Section 269TACA relevantly defines the non-injurious process as:

> The non-injurious price of goods exporters to Australia is the minimum price necessary:
>
> …
>
> (c) if the goods are the subject of, or an application for, a countervailing duty notice under subsection 269TJ(1) or (2) - to prevent the injury, or a recurrence of the injury, or to remove the hindrance, referred to in paragraph 269TJ(1)(b) or (2)(b).

252. Relevantly, the non-injurious price is defined by reference to the injury that has been or is being caused or is threatened to the Australian industry because of receipt of a countervailable subsidy. Accordingly, the finding that a countervailable subsidy exists, and the amount of that subsidy, is a precondition to assessing the level of injury, and the non-injurious price. The relevant provision for assessing whether a benefit has been conferred and for working out the amount of subsidy attributed to the benefit is s 269TACC. Accordingly, once the existence and amount of a subsidy has been worked out in accordance with s 269TACC, it constitutes the magnitude of the injury for the purpose of the non-injurious price.

253. I am satisfied that it was not unreasonable for Customs to decide that exporters that did not co-operate were conferred a benefit under all countervailable subsidies that it identified [The exception is a benefit under Program 1 which is discussed below and which I believe did not constitute a countervailable subsidy].

254. In reaching this decision, I have had regard to the fact that some of the programs were limited in operation to specific regions in China. However, in the absence of information being provided by exporters or the Government of China to the effect that they did not receive benefits under particular programs because of geographical eligibility constraints, I consider it was reasonable for Customs to assume that they did receive a benefit under each these programs. Even if a particular entity had a head office in a particular region and this information was publicly available, this would not rule out an entity having a branch or interest in another region of China potentially making it eligible for that program.

255. For completeness, I note that Jiangsu submitted that it had not received any countervailable subsidies in respect of the ARWs it exported to Australia. Jiangsu were contacted by Customs to invite them to participate in the investigation, but no response was received. In circumstances where Jiangsu did not cooperate with Customs' investigation, I consider Customs were correct to assess the benefits received by Jiangsu in the method described above. Other avenues are now available to Jiangsu, or importers purchasing from it, to seek review or assessment of duties payable on its products provided that it cooperates with the necessary Customs investigation.

256. In a related ground of review, Holden submitted that Customs should have taken a separate approach to determining subsidy margins in respect of non-cooperating exports in the OEM, because the only cooperating exporter in the OEM segment of the market was CITIC Dicastal. This ground only arises if I consider that OEM ARWs and AM ARWs should not be considered like goods. For the reasons give in Part 2, I do not consider this to be the case.

The provision of information by YHI

257. As set out above, Customs determined whether a benefit had been conferred and the amount of subsidy attributable to non selected exporters by reference to s 269TACC(7).

258. Customs applied s 269TACC(7) on the basis that no information was provided by the Government of China or individual exporters regarding whether particular benefits were conferred on these exporters under these programs.[50]

259. YHI submit that, to the extent this reasoning applied to it, it is wrong because YHI provided a response to the Exporter Questionnaire which stated that it only received benefits under one of the programs identified by Customs as amounting to a countervailable subsidy, being Program 7. I have reviewed YHI's response to the Exporter Questionnaire and confirm that it did provide this information.

260. It may be that Customs considered this information incomplete or unreliable, but this is not apparent from the Report. There is no evidence that Customs gave any consideration to whether or not it should rely on this information for the purpose of determining the financial benefits received by YHI. I consider Customs should have given consideration to this information before deciding to assess the financial benefits received by YHI in accordance with s 269TACC on the basis that it received benefits under all identified programs.

261. I recommend that the Minister direct the CEO of Customs to re-investigate its findings with respect to the subsidies that were received by YHI.

[50] The Report, Appendix B, page 95 to 96

Program 1

262. Customs found that there was a countervailable subsidy of the type described as "Program 1". Customs described Program 1 in the following terms:

> ..a benefit to exported ARWs is conferred by aluminium and/or alloy being provided by the GOC (through SIEs) at an amount reflecting less than adequate remuneration, having regard to prevailing market conditions in China.

263. CITIC Dicastal submitted that Program 1 was not a subsidy because:

263.1. it did not exist; and

263.2. an aluminium price being "subsidised" should not be dependent on the identity of the supplier of the aluminium.

264. In considering CITIC Dicastal's submission, I have had regard to the Government of China's submission provided to Customs during its investigation that expressed concern with the findings in relation to Program 1. Specifically, the Government of China submitted that an SIE, in the context of a manufacturer of aluminium or aluminium alloy, was not a public body for the purpose of the Customs Act.

265. The other review applicants did not challenge Customs' determination with respect to its findings in respect of particular subsidies. Whilst Holden made the broad submission that there were errors in the decision of Customs regarding "the existence of countervailable subsidies, programs or grants in the PRC…", insufficient information was provided by it as to what those errors were or which of the particular countervailable subsidies were challenged. Accordingly, in reviewing Customs' findings, I am confined to examining its finding in relation to Program 1.

Are State Invested Enterprises public bodies?

266. Customs' analysis in Part II.9 of Appendix B to the Report focussed on the question whether the benefits provided under Program 1 are provided by a public body of the Government of China, or a private body entrusted or directed by the Chinese government to carry out a governmental function. Customs concluded that Chinese State Invested Enterprises (SIEs) that manufacture aluminium and or aluminium alloy are public bodies for the purposes of s 269T of the Act.[51]

267. The definition of 'subsidy' is found in s 269T(1). For present purposes, it relevantly provides:

> ***subsidy***, in respect of goods that are exported to Australia, means:
>
> (a) a financial contribution:
>
> (i) by a government of the country of export or country of origin of those goods; or

[51] The Report, Appendix B, page 25.

(ii) by a public body of that country or of which that government is a member; or

(iii) by a private body entrusted or directed by that government or public body to carry out a governmental function;

268. The terms 'public body', 'private body' and 'governmental function' used in the definition of subsidy in s 269T(1) are not further defined in the Act. The definition of subsidy was inserted by the *Customs Legislation (World Trade Organization Amendments) Act 1994* (Cth). The associated Explanatory Memorandum provides that the definition is based on Article 1.1 of the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement). Article 1.1 relevantly provides that:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

269. Customs referred to the guidance provided by the World Trade Organisation's Appellate Body in decision DS379, dated 11 March 2011, in relation to the above terms. In relation to the term 'public body' as used in Art 1.1(a)(1) of the SCM Agreement, the Appellate Body said that:

> [317] We see the concept of "public body" as sharing certain attributes with the concept of "government". A public body […] must be an entity that possesses, exercises or is vested with governmental authority.
>
> […]
>
> [318] The same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body. We do not, for example, consider that the absence of an express statutory delegation of authority necessarily precludes a determination that a particular entity is a public body. What matters is whether an entity is vested with authority to exercise governmental functions, rather than how that is achieved. […] Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. […] We stress, however, that, apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of

> governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.

270. Customs deduced from these paragraphs 3 tests to determine whether an entity is a public body:

270.1. a statute or other legal instrument expressly vests government authority in the entity (the first test)

270.2. the entity is in fact exercising governmental functions that serve as evidence that the entity possesses or has been vested with governmental authority (the second test); or

270.3. the government exercises meaningful control over the entity, and the entity's conduct serves as evidence that it possesses governmental authority and exercises that authority in the performance of governmental functions (the third test).[52]

271. In relation to the exercise of governmental functions, the Appellate Body in decision DS379 said that:

> …for a public body to be able to exercise its authority over a private body (direction), a public body must itself possess such authority, or ability to compel or command. Similarly, in order to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility. If a public body did not itself dispose of the relevant authority or responsibility, it could not effectively control or govern the actions of a private body or delegate such responsibility to a private body. This, in turn, suggests that the requisite attributes to be able to entrust or direct a private body, namely, authority in the case of direction and responsibility in the case of entrustment, are common characteristics of both government in the narrow sense and a public body.[53]

Customs' findings

272. SIEs are private enterprises that are part or wholly owned by the Government of China. The Government of China invests in private enterprises through the State-Owned Assets Supervision and Administration Commission (SASAC) at national level. Provincial or regional government bodies may also invest through similar institutions. The Government of China advised that these institution 'are shareholders in the normal sense'. However, the SASAC is also responsible for 'the

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52 The Report, pages 10 and 15.

53 DS379, at [294].

implementation of the system for the administration and supervision of the state-owned assets in accordance with the *Law on State Owned Assets*.[54]

273. *The Company Law* allows a Board of Supervisors to be established within an SIE by the SASAC.[55] However, s 6 of the *Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People* prescribes the role of a government-owned investor, providing that the role of the investor must be carried out:

> … based on the principles of separation of government bodies and enterprises, separation of the administrative functions of public affairs and the functions of the state-owned assets contributor, and non-intervention in the legitimate and independent business operations of enterprises. [56]

274. Section 15 of the *Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People* adds that:

> Bodies performing the contributor's function shall protect the rights legally enjoyed by the enterprises as the market participants, and shall not intervene in the business activities of enterprises except to legally perform the contributor's functions.[57]

275. In relation to the first test Customs did not identify any statute or other legal instrument which expressly vested government authority in any SIE producing aluminium and/or alloy.

276. For the second test, Customs relied in large part on Article 36 of the *Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People* Company Law, which provides that:

> A state-invested enterprise making investment shall comply with the national industrial policies, and conduct feasibility studies according to the state provisions; and shall conduct a transaction on a fair and paid basis, and obtain a reasonable consideration. [58]

277. Customs considered that this article amounted to a direction that SIEs carry out a governmental function. With reference to the policies and implementing measures analysed in the market situation finding, Customs found that the implementation of those policies and measures constituted a government mandate and function.[59]

278. Further evidence, Customs said, was found in the provisions of the *Guiding Opinions of the SASAC of the State Council about Promoting the Adjustment of State-owned Capital and the reorganization of State-owned Enterprises* (SASAC

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54 The Report, Appendix B, page 12.

55 The Report, Appendix B, page 12.

56 The Report, Appendix B, page 16. No definition is given for the terms used.

57 The Report, Appendix B, page 16.

58 The Report, Appendix B, page 18.

59 The Report, Appendix B, page 18.

Guiding Opinion). Customs found that this document indicate that SIEs had played an integral role in implementing Government of China policies and plans.

279. Customs referred to Article 14 of the *Interim Measures for the Supervision of and Administration of the Assets of State-Owned Enterprises*, which vests in SASAC certain obligations pertaining to increased controlling and competitive power in the State economy and improving its overall quality.[60] Customs considered that there was a contradiction between this provision and s 7, which requires that all levels of government 'persist' in the separation of government functions from the functions of investors in State-owned assets, and the management of enterprises.[61]

280. Customs found that the evidence was sufficient to establish that aluminium industry SIEs, including those that produce aluminium and/or alloy, are public bodies and play a 'leading and active role in implementing Government of China policies and plans for the development of the aluminium industry'.[62]

281. For the third test, Customs had regard to the policies and plans discussed in relation to the market situation analysis, and in particular the mandatory terms in which certain of the policies are expressed. Customs considered that these policies and plans amounted to evidence that the Government of China was exercising meaningful control over Chinese SIEs generally, and SIEs that produce aluminium and/or alloy.[63]

282. Customs considered statements from the Form 20-F Return of CHALCO for 2010 that expressly referred to the central and local PRC government exercising a substantial degree of control and influence of the aluminium industry in China, including

> As a significant majority of our assets and operations are located in the PRC, we are subject to a number of risks relating to conducing business in the PRC, including the following:
>
> * The central and local PRC government continues to exercise a substantial degree of control and influence over the aluminium industry in China and shape the structure and development of the industry through the imposition of industry policies governing major project approvals…."[64]

283. Having had regard to the totality of the evidence, Customs considered that the Government of China exercised meaningful control over aluminium and/or alloy producers.[65]

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60 The Report, Appendix B, pages 20 to 21

61 The Report, Appendix B, page 21.

62 The Report, Appendix B, page 21 to 22.

63 The Report, Appendix B, pages 22 to 25.

64 The Report, Appendix B, page 23 to 24.

65 The Report, Appendix B, page 25.

284. Customs therefore found that SIEs that produce or supply aluminium and/or alloy should be considered to be public bodies 'in that the [Government of China] exercises meaningful control over SIEs and their conduct'.[66]

Consideration

285. There is no suggestion that any benefit under Program 1 is provided by the Government of China in a way that would fall within paragraph (a)(i) of the definition of subsidy. Instead, Customs found that aluminium producers in which the Government of China had invested were "public bodies" within the meaning of paragraph (a)(ii) of that definition.

286. As noted above, the Customs Act contains no definition of "public body". Customs instead relied on the meaning attributed to that term by the Appellate Body in decision DS379. I consider that meaning accords with the ordinary English usage of the term public body as understood in Australia and is what a court would likely settle upon if the issue came before it.

287. As noted above, the Appellate Body meaning comprised three alternative tests. Customs, rightly in my view, acknowledged that there was no evidence of any legal instrument expressly vesting government functions and authority in any Chinese aluminium producer. The real question is therefore whether Customs has properly applied either the second or third tests propounded by the Appellate Body.

288. The Appellate Body in decision DS379 described government functions and authority as being concerned with the power to control, compel, direct or command private bodies and persons. In my view, this aptly summarises the nature of government authority. The evidence analysed by Customs indicates that certain producers of aluminium and/or alloy are actively taking steps to comply with the policies promulgated by the Government of China, and display an awareness that there may be negative consequences to their business if they fail to do so. However, in my view, active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. It does not evidence the essential element of exercising a power of government over third persons.

289. Customs substantially relied on s 36 of the Company Law, which requires SIEs making investments to comply with National Industrial Policies. But in my view this section requires no more than compliance with the policies of the Government of China. It falls short of establishing that State-Invested aluminium or alloy producers are invested with the power to control, compel, direct or command private bodies and persons.

290. Accordingly, I consider that Customs had no basis to conclude that the second limb of the Appellate Body test was met.

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[66] The Report, Appendix B, page 26.

291. Moreover, even if it were accepted that the Government of China exercises meaningful control over State-Invested aluminium or alloy producers, the third test drawn from DS379 would again not be met, in my view, because the evidence again fails to establish that the enterprises are exercising governmental authority.

292. Finally, while Customs did not give express consideration to paragraph (a)(iii) of the definition of subsidy, I consider for the same reason that there is no evidence that any Chinese HRC-producer had been entrusted or directed to carry out a governmental function.

Was a benefit provided for less than adequate remuneration?

293. In addressing CITIC Dicastal's submission that Program 1 is not a subsidy it is necessary to consider whether the provision of goods by the SIEs amounted to a financial contribution for the purpose of the Customs Act.

Legislation

294. Section 269T(1) defines the word 'subsidy' as provision of a 'financial contribution'.[67]

295. Section 269TACC(1) relevantly provides that:

> (1) If
>
> (a) a financial contribution referred to in paragraph (a) of the definition of subsidy in subsection 269T(1); or
>
> (b) […]
>
> is received in respect of goods, the question whether that financial contribution or income or price support confers a benefit, and, if so, the amount of subsidy attributable to that benefit, are to be worked out according to this section.

296. Subsections 269TACC(4) and (5) then relevantly provide that:

> (4) In determining whether a financial contribution confers a benefit, the Minister must have regard to the following guidelines:
>
> […]
>
> (d) the provision of goods or services by the government or body referred to in subsection (3) does not confer a benefit unless the goods or services are provided for less than adequate remuneration;
>
> […]
>
> (5) For the purposes of paragraphs 4(d) and (e), the adequacy of remuneration in relation to goods or services is to be determined having regard to prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased.

297. The term 'adequate remuneration' is not defined in the Customs Act.

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[67] See definition extracted at paragraph 267.

298. Section 269TACC was inserted in the Customs Act by the *Customs Legislation (World Trade Organization Amendments) Act 1994* (Cth). The associated Explanatory Memorandum provides that s 269TACC reflects article 14 of the *Agreement on Subsidy and Countervailing Measures*. Article 14 relevantly provides that:

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> […]
>
> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

299. There is a notable absence in s 269TACC(5) of the words in parentheses in Article 14(d). Although no definitive guidance can be gained from the article, these words indicate that more needs to be considered than the price in an open market.

300. The WTO Panel considered article 14(d) in its report DS236/R, titled *United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*. In this decision, the Panel said that:

> In our view, there is no basis in the text of the SCM Agreement to conclude that the market conditions in the country of provision could mean anything else than the conditions prevailing in the market of that country, and not those prevailing in some other country. Article 14(d) SCM Agreement does not just refer to "market conditions" in general, but explicitly to those prevailing "in the country of provision" of the good.[68]
>
> […]
>
> In our view, however, the "prevailing market conditions" of Article 14(d) SCM Agreement do not refer to a theoretical market free of government interference as the US seems to be suggesting. […] Considering that the only qualifier used to the "market conditions" in question is that they be "prevailing", we are of the view that the text of Article 14(d) SCM Agreement does not in any way require the "market" conditions to be those of a hypothetical undistorted or perfectly competitive market.[69]
>
> We do not consider that the goal of the examination of the benefit enjoyed by the recipient is to determine what the market price would have been absent the government's financial contribution, as the US is suggesting, or to measure the trade-distorting potential of the government's financial contribution. The text of Article 14 SCM

[68] DS236/R, at paragraph 7.46.

[69] DS236/R, at paragraph 7.50.

> Agreement does not require a general "but for" test to the prevailing market conditions. We are thus of the view that Article 14(d) SCM Agreement does not require that the authority construct a market price that could have existed but for the government's involvement, nor does it allow the authority to decline to use in-country prices because they may be affected by the government's financial contribution.[70]

301. Section 15AB of the *Acts Interpretation Act 1901* (Cth) permits regard to be had to extrinsic material, including 'any treaty or other international agreement that is referred to in the Act'[71] to confirm the ordinary meaning conveyed by the text of a provision. I consider that the text of Article 14 of Agreement on Subsidies and Countervailing Measures and the interpretation of that article advanced by the Panel as cited above confirm the ordinary meaning of 'prevailing market condition' in s 269TACC(4) and (5).

302. In its report DS257 titled *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, the Appellate Body said that:

> […]an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods. When an investigating authority resorts, in such a situation, to a benchmark other than private prices in the country of provision, the benchmark chosen must, nevertheless, relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).[72]

303. Despite the apparent focus on the price of sale in that paragraph, the Appellate Body had earlier said that:

> … the term 'adequate' in the context means 'sufficient, satisfactory'. 'Remuneration' is defined as 'reward, recompense, payment pay'. Thus, a benefit is conferred when a government provides goods to a recipient and, in return, receives insufficient payment or compensation for those goods.[73]

304. It is therefore apparent, although the price at which goods are sold is a relevant consideration, the Appellate Body's view was that the price was only one aspect to be considered when determining whether sufficient return has been made on the provision of the goods.

Customs findings

305. Customs considered that a competitive market price constitutes adequate remuneration of aluminium in China. In order to determine a competitive market

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70 DS236/R, at paragraph 7.51.

71 *Acts Interpretation Act 1901* (Cth), s 15AB(2)(d).

72 WT/DS257/AB/R, paragraph 103.

73 WT/DS257/AB/R, paragraph 84.

price, Customs determined a benchmark price by reference to the LME prices during the investigation period, with adjustments to take account of differences in delivery terms observed in China.[74]

306. Having calculated this competitive market price, Customs determined that Program 1 involved the conferral of a benefit by the Government of China through SIEs for less than adequate remuneration, having regard to the prevailing market conditions in China.[75] Customs found that the benefits were 'equal to the amount of the difference between the purchased price and the adequate remuneration.'[76]

Customs' submission

307. During a meeting with Customs as part of my review of its decision, I queried whether or not Customs was correctly interpreting the phrase "adequate remuneration", by having regard to prices that might prevail in a market unaffected by government action as opposed to rates of return achieved by market participants.

308. Customs subsequently provided a submission in which it advised that it did not consider that adequacy of remuneration should in fact be determined as the difference between the selling price and costs of each individual SIE that provide these goods to ARW manufacturers in China.[77] Customs informed me that it had extensively reviewed any relevant WTO Panel or Appellate Body decisions, but had found no examples of where WTO dispute settlement bodies considered adequate remuneration to be determined by reference to the costs of, or other internal factors of, the entity that suppliers that good or service.

309. Customs referred to the Appellate Body report DS257, where the Appellate Body said, at paragraph 90, that:

> […] the starting-point, when determining adequacy of remuneration, is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods.

Consideration

310. In my view the WTO materials to which Customs referred do not provide support for Customs' interpretation of the phrase "adequate remuneration".

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74 The Report, Appendix B, page 33 to 34.

75 The Report, Appendix B, page 36.

76 The Report, Appendix B page 7.

77 My query to Customs was in the context of its decision in relation to publish a dumping duty notice and a countervailing duty notice for certain hollow structural sections exported to Australia from China, the Republic of Korea and Malaysia (Report 177 refers) and in the context of its decision in relation to ARWs. I have taken Customs' submission, in respect of "adequate remuneration" to apply to its findings in relation to both these decisions.

311. Consistent with the views expressed by the WTO Appellate body (see paragraph 304 above), the Macquarie Dictionary defines 'remuneration' as:

> 1. the act of remunerating
>
> 2. that which remunerates; reward; pay

The word 'remunerate' is defined as:

> 1. to pay, recompense, or reward for work, trouble, etc.
>
> 2. to yield a recompense for (work, services, etc.).

312. In my view, when given its ordinary English meaning, s 269TACC requires a determination of the question whether Chinese producers provided aluminium and/or aluminium alloy to exporters of ARWs for less than adequate recompense or reward for the costs, work or trouble incurred by them in their production of aluminium and or aluminium alloy. The section is not concerned with whether or not the prices at which those producers supply aluminium are the prices that would prevail in a competitive market unaffected by government intervention. Notably, where the legislation intends this concept to be applied, it uses far more direct language - see regulation 180(2).

313. I consider that the term 'adequate remuneration' in s 269TACC(4)(d) requires an assessment of the adequacy of the return on investment. This requires a comparison between the cost to make and sell and the price of sale of the goods. The comparison may take account of price, quality, availability, marketability, transportation and other conditions of purchase or sale in assessing the adequacy of the difference between cost and price.

314. Because regard must be had to the prevailing conditions in the domestic market, it would also be appropriate to consider 'the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision' in order to obtain 'an appropriate measure of the adequacy of remuneration' (see paragraph 306 above). This simply means that adequacy of remuneration must be determined in the particular market context. But this is very different from an assessment of the difference between actual prices and prices that might apply in a notional competitive market unrelated to the prevailing conditions in the domestic market.

315. Customs had no evidence as to the rates of return which aluminium producers were achieving and was therefore unable, in my view, to reach any conclusion about the adequacy of their remuneration.

Decision

316. Given the above analysis that aluminium producers were not public bodies and that there was no evidence that their sale prices led to less than adequate remuneration, I therefore recommend that the Minister direct the CEO of Customs to re-investigate

the finding that there was a countervailable subsidy of the type described as Program 1.

PART 5 - OTHER GROUNDS OF REVIEW

Non-exclusion of Chinese goods that are exported to Australia by a third country

317. Taleb Tyres submitted that all ARWs imported from other countries, where the ARW originate from China, should be exempt from any dumped or countervailing duties or measures.

318. The measures applied as a result of the findings of this investigation apply in relation to all exporters of the goods and like goods from China to Australia (other than Zhejiang Shuguang Industrial Co Ltd). Whether or not goods manufactured in China, but exported to Australia via a third country are captured by the notice will depend on the circumstances of export. For instance, if it is the case that the goods merely pass in transit through a third country, they will be captured by the notice pursuant to s 269T(2B), which provides:

> For the purpose of this Part, where, during the exportation of goods to Australia, the goods pass in transit from a country through another country, that other country shall be disregarded in ascertaining the country of export of the goods.

319. If property in the goods passed to an entity in the third country, rather than merely passed through the third country in transit, then it may be the case that the notice does not apply, but the particular circumstances of that exportation would need to be examined. In any event, I do not regard Taleb Tyre's submission as a basis for recommending that the Minister direct the CEO of Customs conduct any reinvestigation.

Voluntary uplift

320. Holden submitted that it advised Customs that it makes a voluntary "uplift" on Customs duty payable on its imports of ARW to take into account certain "production assist". That uplift, it said, had not been taken into account by Customs when determining the level of any alleged dumping or subsidy margins payable by Holden. Holden submitted that any measures imposed upon it should be adjusted to take into account the voluntary uplift.

321. Holden have not provided enough information on this "production assist" or developed any line of argument for me to properly consider this submission. It is conceivable that there may be an issue. Ordinarily the value of a "production assist" should be included in the dutiable value of an importation and will attract customs duty. Whether it should also attract dumping duty by inclusion in the export price may be a separate issue. If Holden would like to pursue this point further, it is open to Holden to lodge an application with the CEO of Customs initiating a review of anti-dumping measures pursuant to s 269ZA of the Customs Act, or an assessment application under s 269V of the Customs Act.

Procedural fairness

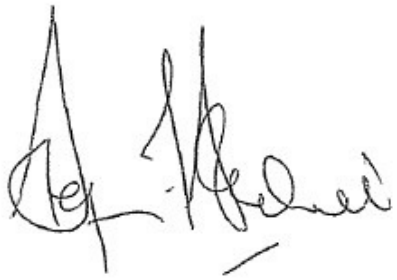
322. Some of the review applicants submitted grounds of review directed at the process undertaken by Customs, rather than the findings reached by Customs in respect of its investigation. For instance:

322.1. Holden and Samad Tyres each submitted they were denied natural justice by Customs because it took into account a response from Arrowcrest to the Statement of Essential Facts made after the closing date of 17 May 2012 and failed to verify information with Holden;[78]

322.2. Samad Tyres submitted that Customs did not consult broadly enough with other exporters, importers, distributors or retailers regarding the alleged dumping and subsidisation of ARWs; and

322.3. Ford submitted that Customs failed to acknowledge receipt of particular submissions it had made.

323. I consider investigation of these matters to fall outside the scope of my powers of review. I am limited to recommending that the Minister affirm a reviewable decision or direct a reinvestigation of a finding or findings that formed the basis of a reviewable decision. A finding is relevantly defined by s 269ZX of the Customs Act as a material question of fact or a conclusion based on that fact.



Stephen Skehill
Trade Measures Review Officer

December 2012

[78] The matters contained in Arrowcrest's submission to Customs that Holden objected Customs having regard to, have been considered in relation to a separate ground of review at paragraphs 164 to 171.