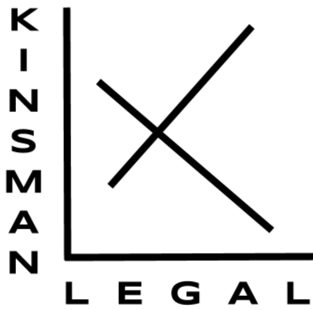

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15 January 2020

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PUBLIC DOCUMENT

Review of Minister's Decision following Continuation Inquiry 504
Power Transformers (PTs) exported from the Republic of Indonesia (Indonesia) and Taiwan
Submission on behalf of Wilson Transformer Company (WTC) on applications to the Anti-Dumping Review Panel (ADRP) by Fortune Electric Co Ltd (Fortune) and PT CG Power Systems Indonesia (CGP)

Kinsman Legal acts for WTC in relation to this review.

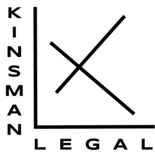
WTC is an interested party in relation to the reviewable decision being the applicant in relation to the application under s 269ZHB of the *Customs Act 1901* (Act) that led to the making of the reviewable decision (s 269ZX, definition of "interested party" at (ab)).

WTC makes the following submissions regarding Fortune's application to the ADRP:

1. Fortune wrongly interprets s 269T(5A) in arguing that the formula there could not be applied to a single unit (see section 1 below).
2. The ADC was required by the regulation to calculate Fortune's profits in the manner it did (see section 2 below).

WTC makes the following submissions regarding CGP's application to the ADRP:

3. CGP's assurances that it will not dump in future should not be relied upon (see section 3 below).
4. CGP overstates the evidential requirements for the ADC's satisfaction under s 269ZHF(2) (see section 4 below).
5. Prior findings of CGP dumping are highly relevant to the inquiry (see section 5 below).
6. Nothing precludes the ADC's finding that a CGP PT was likely dumped and the finding is highly relevant to the continuation inquiry (see section 6 below).
7. CGP's continued presence and activity on the Australian market is highly relevant to the question of whether it will dump PTs in the Australian market should measures expire (see section 7 below).
8. CGP's injury complaint cannot use facts from a different anti-dumping case (see section 8 below).



Contents

1. Fortune wrongly interprets s 269T(5A) in arguing that the statutory formula cannot be applied to a single unit 3

2. The ADC was required by the regulation to calculate Fortune's profits in the manner it did . 5

3. CGP's assurances that it will not dump in future should not be relied upon 7

4. CGP overstates the evidential requirements for the ADC's satisfaction under s 269ZHF(2) ... 9

5. Prior findings of CGP dumping are highly relevant to the inquiry 12

6. Nothing precludes the ADC's finding that a CGP PT was likely dumped and the finding is highly relevant to the continuation inquiry 13

7. CGP's continued presence and activity in the Australian market is highly relevant to the question of whether it is likely to dump PTs in Australia should measures expire 13

8. CGP's injury complaint cannot use facts from a different anti-dumping case 14

1. Fortune wrongly interprets s 269T(5A) in arguing that the statutory formula cannot be applied to a single unit

1. WTC considers that Fortune wrongly interprets s 269T(5A) of the Act in arguing, in effect, that the formula there cannot be applied to a single unit.

2. Subsection 269T(5A) of the Act provides that:

   For the purposes of this Part, the weighted average of prices, values, costs or amounts in relation to goods over a particular period is to be worked out in accordance with the following formula:

   $$\frac{P_1 Q_1 + P_2 Q_2 + \ldots + P_n Q_n}{Q_1 + Q_2 + \ldots + Q_n}$$

   where:

   P_1, P_2 ... P_n means the price, value, cost or amount, per unit, in respect of the goods in the respective transactions during the period.

   Q_1, Q_2 ... Q_n means the number of units of the goods involved in each of the respective transactions.

3. WTC considers that Fortune has failed to interpret s 269T(5A) in accordance with s 23(b) of the *Acts Interpretation Act 1901*. Subsection 23(b) of the *Acts Interpretation Act 1901* provides, absent a contrary intention, that "[i]n any Act … words in the singular number include the plural and *words in the plural number include the singular*" (emphasis added). The drafter of legislation is likely to refer to the most common form of conduct to which the conduct relates whether this be singular or plural; however, it should not be assumed from this that there is an intention to exclude the other.[1]

4. WTC considers that the most common form of the formula in s 269T(5A) would relate to multiple units however there is no evident intention that the statutory formula should be abandoned in circumstances where it might be applied to only one unit. The ADC's reasoning in Report 504 on the topic is not clear at times however WTC considers the ADC is correct when it states that "[t]he definition of weighted average under section 269T(5A) does not preclude the possibility that *n* can equal 1".[2]

Fortune fails to give precedence to the words of the statute

5. Fortune states its preferred meaning of a weighted average and on that basis opines that a weighted average calculation "can only be achieved with multiple observations".[3] Fortune then states that its preferred meaning of a weighted average "is confirmed" by the "definitions" at s 269T(5A).[4]

6. WTC considers that Fortune's use of the statutory formula as a mere confirmation of its preferred meaning fails to give precedence to the words of the statute. Those words are

[1] Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at 6.39.
[2] Report 504 at page 42.
[3] Fortune application at page 10.
[4] Fortune application at page 10.

subject to the usual rules of statutory interpretation including the rule in s 23(b) of the *Acts Interpretation Act 1901*.

The ADC's previous misapplication of the statute is no basis for continued misapplication

7. The primary basis for Fortune's argument is the ADC's treatment of weighted average costs during the original investigation.[5] In the original investigation the ADC decided that a weighted average cost could not be meaningfully calculated in circumstances where each unit is uniquely constructed with significantly different costs and prices.

8. WTC considers that the ADC misapplied the statute in original investigation. The ADC issues paper[6] quoted by Fortune in support of its position considered that a weighted average cost could not be meaningfully calculated for PTs; however, the issues paper does not address the statutory formula in s 269T(5A) and how that formula might apply in the circumstances. Accordingly, the ADC did not endeavour to bring the normal rules of statutory interpretation to bear on s 269T(5A) and, as a result, WTC considers that it misapplied the statute (indeed, on the face of the issues paper the ADC did not apply s 269T(5A) at all).

9. Accordingly, WTC considers that the ADC correctly did not follow the approach it used in Investigation 219 (the ADC is not bound by its own previous decisions).

EC – Bed Linen does not support Fortune's argument

10. WTC considers that the Appellate Body in *EC – Bed Linen* does not support Fortune's preferred approach to assessing OCOT under s 269TAAD and s 269T(5A).

11. The Appellate Body in *EC – Bed Linen* was considering the application of Article 2.2.2(ii) of the Agreement.[7] The analogous provision to Article 2.2.2(ii) in the Australian legislation is Regulation 45(3)(b) however, Regulation 45(3)(b) is not being considered in the current matter.

12. The current matter is primarily concerned with the application of s 269TAAD of the Act (through the reference to "goods in the ordinary course of trade" in Regulation 45(2)). The analogous article in the Agreement to s 269TAAD is Article 2.2.1. The reasoning in *EC – Bed Linen* simply does not apply to Article 2.2.1 (and s 269TAAD): the Appellate Body was persuaded to its view in *EC – Bed Linen* by the words "amounts" and "exporters or producers" in Article 2.2.2(ii)[8] – the words "amounts" and "exporters or producers" do not appear in Article 2.2.1. Accordingly, *EC – Bed Linen* does not support Fortune's preferred approach to assessing OCOT under s 269TAAD and s 269T(5A).

The ADC's approach to OCOT and the s 269T(5A) formula was reasonably practicable

13. WTC considers that the task undertaken by the ADC in working out the amount of profit (including its approach to OCOT and the s 269T(5A) formula) was reasonably *practicable*; on that basis the ADC was required to work out the amount of profit by using data relating to

[5] Fortune application at pages 9, 10, 12.
[6] ADC Issues Paper 2014/1.
[7] WT/DS141/AB/R, EC – Ben Linen.
[8] See excerpt of the Appellate Body's decision in Fortune's application at page 11.

Fortune's production and sale of goods in the ordinary course of trade (see section 2 of this submission).

14. Fortune contemplated a somewhat different test; Fortune's test was concerned with whether it was reasonably *possible* to work out the amount of profit by using data relating to Fortune's production and sale of goods in the ordinary course of trade.[9] Fortune's test was the test in s 181A(2) of *Customs Regulations 1926* which was in force during the original investigation.[10]

15. It is unclear to WTC if anything turns on the difference between the regulatory test being reasonably *practicable* as opposed to reasonably *possible*. The earlier wording may have led the ADC to query in Investigation 219 whether the task before it was possible whereas the current wording would tend to clarify that the ADC should assess the practicality of the task, including as in this case through a practical adaptation of the statutory formula in s 269T(5A) to circumstances where there is a single unit (as the provision allows for the reasons stated above).

16. WTC understands that, as a general principle, all legislative words must be given meaning and effect and that the principle is more compelling if the word has been added by amendment; that is the case here with the term "reasonably possible" being replaced by the term "reasonably practicable".[11]

2. The ADC was required by the regulation to calculate Fortune's profits in the manner it did

17. WTC considers that the ADC was required by the regulation to calculate Fortune's profits in the manner it did, namely by using data relating to Fortune's production and sale of like goods in the ordinary course of trade.

18. Regulation 45(2) provides that the ADC:

> … must, if reasonably practicable, work out the amount [of profit] 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

19. WTC considers that the provision is clear on its terms, if it is reasonably practicable to work out the amount of profit in the manner stated then the ADC *must* work out the amount of profit in that manner; there is no discretion for it to do otherwise.

20. The Cambridge dictionary defines practicable as "able to be done or put into action". The regulation 45(2) test is conditioned by whether the task is *reasonably* practicable; that would indicate that the ADC is not required to take every possible step that could be taken.[12]

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[9] Fortune application at page 12.
[10] The Minister accepted the ADC's recommendations for the original investigation in December 2014; the current regulations, *Customs (International Obligations) Regulation 2015*, with the change from "reasonably possible" to "reasonably practicable" commenced on 1 April 2015.
[11] See Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at 2.26.
[12] Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at 12.25.

21. Fortune appears to accept that the ADC has access to suitable data relating to Fortune's production and sale of like goods; rather Fortune argues, in effect, that it is not reasonably practicable to assess whether such sales were made in the ordinary course of trade under s 269TAAD because a weighted average cost calculation contemplated by s 269TAAD(3) "cannot meaningfully be calculated for power transformers".[13]

22. Once it is accepted that the s 269T(5A) formula can legally be applied to a single unit (see section 1 of this submission), and that that approach is reasonably practicable, Fortune's objection regarding the weighted average cost calculation falls away. It clearly was reasonably practicable for the ADC to adapt the s 269T(5A) formula to the case in hand, where *n* equals 1, and apply it to suitable and available data relating to Fortune's production and sale of like goods.

23. Accordingly, on that basis the ADC *must* calculate Fortune's profits in the manner it did, namely by using data relating to Fortune's production and sale of like goods in the ordinary course of trade.

Fortune's loss-making sales were not in the ordinary course of trade in the ordinary sense of the term

24. WTC considers in any event that Fortune's loss-making sales were not in the ordinary course of trade in the ordinary sense of the term.

25. It appears that applying the s 269T(5A) formula to Fortune's data inexorably leads to the conclusion reached by the ADC, namely that Fortune's loss-making sales must be *taken* under s 269TAAD(1) not to have been in the ordinary course of trade.

26. However, WTC observes that s 269TAAD does not define the term "ordinary course of trade", neither is it defined elsewhere in the Act. On that basis, even supposing Fortune's argument is correct and the s 269T(5A) formula may not be used, it would be open to the ADC to assess Fortune's loss-making sales as not being in the ordinary course of trade: it could not reasonably be said that loss-making sales of capital-intensive goods such as PTs by an experienced producer of PTs such as Fortune were made in the ordinary course of trade, particularly where the bespoke nature of such PTs means that those losses cannot be recovered through repeat sales of the same unit. If such sales reflected the ordinary course of trade then Fortune would have gone broke.[14]

27. It is telling that Fortune has not argued that its loss-making sales are in the ordinary course of trade (in the ordinary sense of that term). If that was a tenable position then Fortune would have argued that its loss-making sales should be included in a calculation of profits under Regulation 45(2).

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[13] Fortune application at page 10.
[14] This assessment tends to support the use of s 269T(5A) and s 269TAAD in making a finding of non OCOT where *n* in the statutory formula equals 1.

3. CGP's assurances that it will not dump in future should not be relied upon

28. WTC considers that CGP's assurances that it will not dump in future should not be relied upon.

29. CGP seeks to assure the ADRP that it will not dump PTs on the Australian market if measures are allowed to expire and it has "no incentive" to do so.[15]

30. WTC considers that CGP's conduct in relation to Australia's anti-dumping system has been beyond cynical. In particular:

    - CGP did not cooperate with the ADC in the original investigation, Investigation 219.
    - When CGP did provide sufficient information (in applying for Review 383) that information indicated that it was dumping to a substantially greater extent than the ADC originally assessed.
    - Data provided by CGP later in the course of Review 383 in efforts to reduce its dumping margin was found by the ADC not to be accurate and reliable.
    - The Commissioner did not accept CGP's assurances made during Continuation Inquiry 504[16] and was rather satisfied that dumping would continue absent the measures.

31. Now it appears that CGP is again "throwing the dice" by, in part, asking the ADRP to accept its assurances that it will not dump its PTs in Australia should the measures be allowed to expire. WTC considers that accepting those assurances would be ill advised.

Investigation 219 – CGP failed to rectify deficiencies in its data despite repeated opportunities to do so

32. In Investigation 219 CGP was given repeated opportunities to provide satisfactorily relevant and reliable data; it did not do so.[17] The ADC repeatedly engaged with CGP, including meeting with CGP representatives at CGP's request.[18]

33. CGP's conduct in Investigation 219 is a litany of broken promises:

    - CGP requested and was granted an extension to 20 September 2013 for its exporter questionnaire response;[19] that response was not provided until 30 September 2013.[20]
    - On 2 October 2013 the ADC notified CGP of deficiencies in the exporter questionnaire response and gave it until 9 October 2013 to remedy the deficiencies; CGP provided further information but the deficiencies were not adequately addressed, CGP was then given until 6 December 2013 to remedy the outstanding deficiencies and after a request

[15] CGP application at page 9 and 10.
[16] See for example Report 504 at pages 47 to 48.
[17] Report 219 at 6.8.1.
[18] EPR 219, document 176.
[19] EPR 219, document 5.
[20] EPR 219, document 55.

by CGP, this date was extended to 13 December 2013; CGP provided further information only on 19 December 2013, that information was also deficient.[21]

34. Instead of taking the opportunities offered to provide reliable and relevant data, CGP rather treated the ADC to regular combative argumentation from its lawyers.[22] Apparently at limit of its patience, the ADC treated CGP as an uncooperative exporter.[23]

35. The ADRP did not find merit in CGP's subsequent request for review.[24]

Review 383 – CGP provided data showed that REP 219 understated CGP's dumping, revised CGP data not accurate or reliable

36. In Review 383 CGP provided data that was sufficiently complete and relevant for the ADC to undertake on site verification at CGP. Verified CGP data showed that the dumping margin calculated for CGP in Investigation 219 (8.7 per cent) using WTC provided data significantly understated the extent to which CGP was dumping and the ADC instead recommended much higher dumping duties (28.3 per cent dumping duties were imposed following the subsequent ADRP review).[25]

37. Immediately following completion of the ADC's visit to CGP to verify its data, CGP sought to foist "updated" CTMS data on the ADC.[26] The updated CTMS data would have had significant effects on CGP's domestic profitability and flow through downward impacts on its dumping margin; the ADC was rightly sceptical.[27] The ADC's comments on the updated CTMS data are telling:

- The ADC was not provided the opportunity to verify the updated CTMS data at the onsite verification.[28]
- Inconsistency of the updated CTMS data with other CGP data caused the ADC to "query its reliability".[29]
- CGP's claimed allocation of raw materials to production for domestic sales in the updated CTMS data was "materially disproportionate" to the allocation of raw materials to production for export sales.[30]

[21] EPR 219, document 90.
[22] EPR 219, documents 184, 166, 158, 155.
[23] Report 219 at page 34.
[24] ADRP Report No 24 at [19] to [30].
[25] ADRP Report 60.
[26] Report 383 at 4.2.1; CGP submission of 6 April 2017 at page 1.
[27] Report 383 at 4.2.1.2.
[28] Report 383 at 4.2.1.2.
[29] Report 383 at 4.2.1.2.
[30] Report 383 at 4.2.1.

38. Under the heading "Accuracy, relevance and completeness of information supplied by CG Power" the ADC rejected CGP's updated domestic CTMS[31] and was not satisfied that CGP's revised CTMS figures were accurate and reliable.[32]

39. On review the ADRP upheld the ADC's rejection of CGP's revised CTMS data and accepted its reasons for doing so.[33]

4. CGP overstates the evidential requirements for the ADC's satisfaction under s 269ZHF(2)

40. WTC considers that CGP overstates the evidential requirements for the ADC's satisfaction under s 269ZHF(2).

41. CGP loftily cites WTO jurisprudence in aid of its preferred view of the requirements of s 269ZHF(2). However, CGP omits to mention the importance of *context* in statutory interpretation and its particular importance in understanding how s 269ZHF(2) is intended to operate.

42. In addition, CGP does not refer to case law that the term "likely" can in an appropriate context refer to a real or not remote chance or possibility. WTC considers that that case law is compelling for the purpose of interpreting s 269ZHF(2).

Statutory context dictates that a s 269ZHF(2) inquiry is broad and may operate without "smoking gun" evidence

43. It is not controversial that the intention of the legislature has to be found in an examination of the statute as a whole.[34] The modern approach to statutory interpretation gives primacy to context:[35]

    - First it provides that the statutory context is to be considered from the beginning of the interpretive process, not merely when ambiguity has been observed.
    - Second it uses "context" in its widest sense to include such things as the mischief which the statute was intended to remedy.

44. The context for s 269ZHF(2) and Division 6A of Part XVB generally is that these provisions sit alongside and *complement* the provisions relating to an initial investigation in Division 3 and are intended to operate *following* in time the operation of Division 3 in an initial investigation. On that basis: a Division 6A continuation inquiry is not intended as a complete replication of the process under a Division 3 investigation;[36] a narrow construction of the

[31] Report 383 at 4.2.1.
[32] Report 383 at 5.5.
[33] ADRP Report 60 at [39] to [45].
[34] Higgins J in *Amalgamated Soc of Engineers v Adelaide Steamship Co Ltd* (1920) CLR 129 at 161-162.
[35] See Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at 2.6 citing the majority judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; Article 31 of the Vienna Convention on the Law of Treaties which provides general rules of interpretation in international instruments (such as the Agreement on Implementation of Art VI of the GATT 1994) also gives primacy to context.
[36] *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838 at [41].

continuation provisions would not achieve the purpose of the Parliament;[37] and the formation of a state of satisfaction under s 269ZHF(2) may involve a question of opinion.[38]

45. That statutory context serves to emphasise the condition stated in s 269ZHF(2) that governs whether the Commissioner may recommend the measures continue. The condition in s 269ZHF(2) is broadly stated in terms of the Commissioner's satisfaction, likelihood and a forward looking assessment. This is in contrast to the exacting and highly prescriptive provisions contained in Divisions 2 and 3 (and, by reference, the provisions in Division 1 relating to prescriptive details of the calculation of variable factors, arms length, ordinary course of trade etc) that operate in an initial investigation.

46. Further, the condition in s 269ZHF(2) recognises, with the word "recurrence", that the continuation inquiry follows in time the initial imposition of measures. If the initial measures were effective then there would be no dumping, and possibly no importations, by an entity found to be dumping during the inquiry period. That would mean that there would be no smoking-gun evidence of actual dumping during the continuation inquiry period.

47. WTC considers that narrowing the form of evidence allowed to be considered by the ADC or requiring evidence providing some high degree of likelihood under s 269ZHF(2) as CGP generally urges would deprive Division 6A of meaningful effect. That cannot have been the intention of the Parliament.[39]

48. Rather, WTC considers that the s 269ZHF(2) inquiry must operate as a broad inquiry, based on likelihoods and involving the opinion of the Commissioner informed by the available facts and notwithstanding that there may be no "smoking gun" evidence of dumping.

CGP approach is not in accordance with a s 269ZHF(2) inquiry

49. WTC considers that CGP rather misses the point of an inquiry under s 269ZHF(2). CGP stares fixedly and in isolation at each piece of evidence that was before the ADC and argues, in effect, that that piece of evidence does not prove CGP will dump if measures expire. However, as outlined above, the s 269ZHF(2) inquiry must operate as a broad inquiry, based on likelihoods and involving the opinion of the Commissioner informed by all available facts.

50. A single factor alone may not have sufficed to satisfy the Commissioner however WTC considers that, on the basis of all of the factors taken together, the ADC clearly reached the correct and preferable position. While framed in different terms that is in substance exactly the approach the ADC took.[40]

[37] *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838 at [44].
[38] *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838 at [76], provided of course there is a sufficient "substratum of fact" on which the opinion can be entertained.
[39] Nor, for that matter, the drafters of Article 11.3 of the Agreement on Implementation of Art VI of the GATT 1994 when considered in context of the rest of that Agreement.
[40] Report 504 at 7.3.

Likely may mean a real or not remote chance or possibility

51. CGP claims that the term “likely” has been “defined” under Australian law as “more probably than not”.[41]

52. WTC considers that the ADC’s finding is sound even if the term “likely” in s 269ZHF(2) were to mean “more probably than not” as CGP argues. However WTC considers that it would be open to the ADRP to interpret the term “likely” in s 269ZHF(2) to mean a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent.

53. The most frequently cited explanation of the term “likely” is that of Dean J in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (emphasis added):[42]

> The word "likely" can, in some contexts, mean "probably" in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a fifty per cent chance ("an odds-on chance", per Lord Hodson in Koufos v. C. Czarnikow Ltd. (1969) 1 AC 350, at p 410 and see, as to the meaning of the word "probable", Eggleston Evidence, Proof and Probability (1978), p. 10 et seq). *It can also, in an appropriate context, refer to a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent*. When used with the latter meaning in a phrase which is descriptive of conduct, the word is equivalent to "prone", "with a propensity" or "liable".

54. An example relevant to this review of the context in which “likely” would refer to a real or not remote chance was stated by French J in *AGL v ACCC (No. 3)* in the following terms:[43]

> The collocation ‘... would have the effect, or be likely to have the effect, of substantially lessening competition’ appears in similar and identical versions in other provisions of Pt IV [of the *Trade Practices Act 1974*]. … In any event as a matter of construction if ‘likely’ simply meant more probable than not, it would be difficult to distinguish the application of that limb of the formula from the application of the first limb which, having regard to the onus of proof applicable in proceedings under Pt IV, could be established on the balance of probabilities.

55. CGP refers to *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838 in support of its preferred interpretation of “likely”.[44] However, as CGP correctly notes, the interpretation was not argued by the parties in that case.[45] On that basis the interpretation of “likely” in *Siam* does not form part of any binding *ratio decidendi* in the case.[46]

56. If the Judge in *Siam* had had the benefit of argument then the cogent logic of French J in *AGL v ACCC*, which logic also applies to s 269ZHF(2), may well have prevailed:[47] namely, as a matter of construction if the term “likely” in s 269ZHF(2) simply meant more probable than

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[41] CGP application at page 3.
[42] *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* [1979] FCA 85; (1979) 42 FLR 331 at [10] per Dean J.
[43] *Australian Gas Light Company v Australian Competition & Consumer Commission (No. 3)* [2003] FCA 1525 at [347].
[44] CGP application at page 3.
[45] CGP application at footnote 6, neither was it argued on appeal.
[46] See for example Mansfield J in *Taylor v Rudaks* [2007] FCA at [39].
[47] The *Siam* judgment did not cite *Tillmans Butcheries* or *AGL v ACCC*.

not, it would be difficult to distinguish the application of that limb ("would be likely to lead") from the application of the first limb ("would lead") which, having regard to the onus of proof applicable under Part XVB, could be established on the balance of probabilities.

57. Accordingly, WTC considers that it would be open to the ADRP to interpret the term "likely" in s 269ZHF(2) to mean a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent.

5. Prior findings of CGP dumping are highly relevant to the inquiry

58. WTC considers that prior findings that CGP was dumping are highly relevant to the inquiry.

59. CGP claims that its past dumping is treated by the ADC as "a scarlet letter to be worn forevermore".[48] WTC considers however that no amount of flowery language detracts from the fact that past conduct is frequently a predictor of future conduct; to preclude this from the ADC's consideration would unduly narrow the matters that inform the Commissioner in his recommendation to the Minister (see generally section 4 of this submission).

60. In any event, WTC observes that:

- CGP was found to be dumping to a substantial degree, 28 per cent (which only became clear when the ADC was able to see its way clear of CGP's prevarications in Investigation 219 and Review 383, see section 3 of this submission).
- Review 383 in which CGP was found to be dumping by 28 per cent was only concluded on 26 October 2017,[49] barely more than 2 years before the Minister made her decision in Continuation Inquiry 504. WTC considers that 2 years is less than forevermore.

61. CGP apparently struggles to see how historic findings of CGP's dumping bear on an assessment of whether CGP will dump in future.[50] Again, past conduct is frequently a predictor of future conduct and to preclude this evidence would unduly narrow the matters that inform the Commissioner's recommendation to the Minister (see section 4 of this submission).

62. CGP also takes issue with the fact that the historic dumping considered by the ADC in Report 504 occurred prior to measures being imposed.[51] On the contrary, WTC rather considers that CGP's conduct in that period, when no measures were in place, is a very good indicator of CGP's likely conduct if no measures were in place in the future.

63. CGP claims in support of its position that every exporter involved in a continuation will have been found to have dumped in the past.[52] That is not the case – companies that were in "all

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[48] CGP application at page 6.
[49] Notice under section 269ZZM(4), Power Transformers Exported to Australia from the Republic of Indonesia by PT CG Power Systems, Indonesia, 26 October 2017.
[50] CGP application at page 6.
[51] CGP application at page 6.
[52] CGP application at page 5.

other exporters" in an investigation, whose exports were not examined, or that were residual exporters will not have been found to have dumped.

6. Nothing precludes the ADC's finding that a CGP PT was likely dumped and the finding is highly relevant to the continuation inquiry

64. WTC considers that nothing in Division 6A precludes the ADC's finding that a CGP PT was likely dumped and the finding is highly relevant to the continuation inquiry.

65. CGP takes issue with the ADC's finding that a PT imported to Australia was "likely dumped".[53] CGP is in high dudgeon that the Commission has even used the term "dumping" in terms of likelihood because, according to CGP, "[d]umping has a legal meaning" and cannot be used apart from a "legally recognised analysis".[54]

66. So, CGP would have the ADC (and the ADRP) adhere to its strict rules regarding any use of the term "dumping", in particular that it must only be used with a calculation under s 269TACB[55] and that a suggestion of dumping in terms of likelihood "is wrong and meaningless".[56]

67. However, WTC considers that it is inconvenient to CGP's argument that:

    a. subsection 269ZHF(2) *requires* an assessment of the likelihood of dumping, namely whether expiry of measures "would be *likely*, to lead to a continuation of, or a recurrence of, the *dumping*"; and

    b. the dumping calculation under s 269TACB is expressly only required "if application is made for a dumping duty notice" (s 269TACB(1)(a)) and so is not mandatory in a continuation inquiry.

68. In any event a finding by the ADC that CGP likely dumped a PT shortly following the inquiry period appears to fall squarely within the inquiry intended under Division 6A. As set out in section 4 of this submission WTC considers that an inquiry under Division 6A is a broad inquiry, based on likelihoods and involving the opinion of the Commissioner informed by available facts and notwithstanding that there may be no "smoking gun" evidence.

69. Accordingly, ADC considers that the finding that the PT was likely dumped was open to the ADC and highly relevant to the inquiry.

7. CGP's continued presence and activity in the Australian market is highly relevant to the question of whether it is likely to dump PTs in Australia should measures expire

70. WTC considers that CGP's continued presence and activity in the Australian market is highly relevant to the question of whether it will dump PTs in the Australian market should measures expire.

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[53] CGP application at page 6.
[54] CGP application at page 7.
[55] CGP application at page 7.
[56] CGP application at page 8.

71. CGP complains that its continued presence in the Australian market is regarded as a “black mark” by the ADC[57] and argues that its continued participation in tenders should not evidence that dumping will recur absent measures.[58] Nonetheless CGP admits that these things evidence CGP’s desire to sell PTs into the Australian market.[59]

72. Again, WTC considers that CGP rather misses the point of an inquiry under s 269ZHF(2). As WTC outlines in section 4 of this submission, the s 269ZHF(2) inquiry must operate as a broad inquiry, based on likelihoods and involving the opinion of the Commissioner informed by available facts and notwithstanding that there may be no “smoking gun” evidence. That is the approach the ADC took.[60]

73. CGP’s continued presence and activity in the Australian market is highly relevant to the question of whether it is likely to dump PTs in Australia should measures expire because it has an existing and continuing PT supply business here. It would face none of the difficulties usually faced by a supplier entering the market afresh and so it would be better able to quickly ramp up its Australian capacity. That quick ramp up would facilitate CGP importing dumped PTs and inflicting injury on the local industry.

8. CGP’s injury complaint cannot use facts from a different anti-dumping case

74. WTC considers that CGP’s complaint regarding the ADC’s injury analysis in Continuation Inquiry 504 cannot use the facts from a different anti-dumping case to make its case in the current matter.

75. CGP claims that the ADC’s injury causation analysis in SEF 507 should be applied by the ADRP in the current review.[61] That would result, CGP claims, in there being no basis to be satisfied that material injury is likely to recur in this continuation inquiry.[62]

76. WTC considers that CGP’s argument is ambitious to say the least: CGP’s application spends 12 pages lecturing the ADRP on the need for evidence and an appropriate factual basis and then seeks to import the highly fact and evidence specific reasoning from a different case currently being considered by the ADC. Of course, Investigation 507 and Continuation Inquiry 504 both involve PTs but are concerned with *different* exporters from *different* countries.

77. In making inquiries an administrative decision maker should seek and obtain evidence that is centrally relevant to the decision,[63] not some other decision. WTC considers that a decision maker is tasked with making a decision in a matter on the particular facts before the decision maker in the matter, not on the facts of some other matter; to proceed otherwise would confound decision makers and interested parties alike.

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[57] CGP application at page 12.
[58] CGP application at page 13.
[59] CGP application at pages 12 and 13.
[60] Report 504 at 7.3.
[61] CGP application at pages 16 to 18.
[62] CGP application at page 18.
[63] Administrative Review Council, *Best Practice Guide 3: Decision Making: Evidence, Facts and Findings* at page 5.

78. The drafters of Part XVB of the Act may have had such problems in mind when they defined "relevant information" in s 269ZZK. The ADRP may only have regard to relevant information as defined (s 269ZZK(4), subject to ss 269ZZK(4A) and (5)). On that basis the ADRP may only have regard to information the Commissioner had regard to or was required to have regard to when making the findings in Report 504 (s269ZZK(6)(d)), subject to the terms of s 269ZZK(4). The Commissioner quite properly did not have regard to, nor was he required to have regard to, factual matters relating to Investigation 507 when making findings for Continuation Inquiry 504.

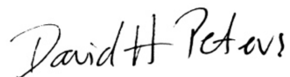
CGP's claim that the size of the dumping margin and resulting pricing advantage does not cause injury defies commercial reality and economic theory

79. CGP claims on the basis of SEF 507 that the size of the dumping margin and resulting pricing advantage in the current inquiry does not cause injury.[64]

80. WTC considers that the SEF 507 injury analysis is problematic and flies in the face of commercial reality and settled economic principles. WTC considers that the ADRP should not rely on a controversial statement from a document that does not represent the ADC's final considered view. WTC also observes that Investigation 507 is ongoing and interested parties in that case will properly have opportunity to seek review of any resulting decision; CGP's use of the analysis in SEF 507 invites the ADRP to preclude interested parties from that opportunity.

81. WTC considers that the firmer ground in the present matter is to proceed on the facts in the current matter and on the usual basis that price matters in markets for PTs (as it does in other markets).

Sincerely



David Peters
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Kinsman Legal

[64] CGP application at pages 16 to 18.