Australian Government
Anti-Dumping Review Panel

Application for review of a Commissioner's decision

Customs Act 1901 s 269ZZQ

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 19 February 2020 for a review of a reviewable decision of the Commissioner of the Anti-Dumping Commission.

Section 269ZZO of the *Customs Act 1901* sets out who may make an application to the ADRP for a review of a decision of the Commissioner.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after the applicant was notified of the reviewable decision.

Conferences
The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

Further application information
You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 10, 11, 12 and/or 13 of this application form (s269ZZQA(1)). See the ADRP website for more information.

Withdrawal
You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

[1] By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

Contact

If you have any questions about what is required in an application, refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: **Wilson Transformer Company P/L (WTC)**
Address: **PO Box 5, Glen Waverly, Victoria 3150**
Type of entity (trade union, corporation, government etc.): **Corporation**

2. Contact person for applicant

Full name: **Robert Wilson**
Position: **Executive Chairman**
Email address: **robert.wilson@wtc.com.au**
Telephone number: **03 8544 2300 or 0419 338 978**

3. Set out the basis on which the applicant considers it is entitled to apply for review to the ADRP under section 269ZZO

WTC is the person who made the application for the dumping duty notice leading to Investigation 507. Investigation 507 was terminated under sections 269TDA(1) and (13).

4. Is the applicant represented?

Yes ☒ **No** ☐

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☐ Subsection 269TC(1) or (2) – *a negative prima facie decision*

☐ Subsection 269TDA(1) – *a termination decision*

☐ Subsection 269TDA(2) – *a termination decision*

☐ Subsection 269TDA(3) – *a termination decision*

☐ Subsection 269TDA(7) – *a termination decision*

☒ Subsection 269TDA(13) – *a termination decision*

☐ Subsection 269TDA(13A) – *a termination decision*

☐ Subsection 269TDA(14) – *a termination decision*

☐ Subsection 269TDA(14A) – *a termination decision*

☐ Subsection 269X(6)(b) or (c) – *a negative preliminary decision*

☐ Subsection 269YA(2), (3), or (4) – *a rejection decision*

☐ Subsection 269ZDBEA(1) or (2) – *an anti-circumvention inquiry termination decision*

Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed**.

6. Provide a full description of the goods which were the subject of the reviewable decision:

The goods are liquid dielectric power transformers with power ratings of equal to or greater than 10 MVA (mega volt amperes) and a voltage rating of less than 500kV (kilo volts) whether assembled or unassembled, complete or incomplete.

7. Provide the tariff classifications/statistical codes of the imported goods:

Tariff code 8504.22.00, statistical code 40 – Liquid dielectric transformers having a power handling capacity exceeding 650kVA but not exceeding 10,000kVA.

Tariff code 8504.23.00, statistical code 26 – Liquid dielectric transformers having a power handling capacity exceeding 10,000kVA and having a primary systems highest voltage (SHV) exceeding 36,000V. **Tariff code 8504.23.00, statistical code 41 – Liquid dielectric transformers having a power handling capacity exceeding 10,000kVA and having a primary SHV not exceeding 36,000V.**

8. **If applicable, provide the Anti-Dumping Notice (ADN) number of the reviewable decision:**

Anti-Dumping Notice (ADN) number: **ADN 2020/10**
Date ADN was published: **31 January 2020**

9. **Provide the date the applicant received notice of the reviewable decision:**

31 January 2020

Attach a copy of the notice of the reviewable decision to the application

PART C: GROUNDS FOR YOUR APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

10. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

Please see separate document attached to this application.

11. **Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10:**

Please see separate document attached to this application.

12. **Set out how the grounds raised in question 10 support the making of the proposed correct or preferable decision:**

Please see separate document attached to this application.

13. **Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision:**

Only answer question 13 if this application is in relation to a reviewable decision made under subsection 269X(6)(b) or (c) of the Customs Act 1901.

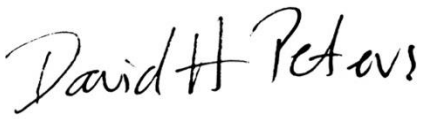
14. **Please list all attachments provided in support of this application:**

1. **Copy of the notice of the reviewable decision being ADN 2020/10.**
2. **Document containing WTC's responses to questions 10, 11 and 12 (this is the same document for the 3 termination decisions set out in ADN 2020/10).**

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* beginning to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: 

Name: **David Peters**

Position: **Principal Lawyer**

Organisation: **Kinsman Legal**

Date: **28** / **February** / **2020**

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative: **David Arthur Peters**
Organisation: **Kinsman Legal**
Address: **54 Bunbury Street** **Footscray** **VIC 3011**
Email address: **david.peters@kinsmanlegal.com**
Telephone number: **04 3424 2594**

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature: 

(Applicant's authorised officer)

Name: **Robert Wilson**

Position: **Executive Chairman**

Organisation: **Wilson Transformer Company P/L**

Date: 28 / 02 / 2020

PUBLIC RECORD

Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

Customs Act 1901 – Part XVB

ANTI-DUMPING NOTICE NO. 2020/010

Power Transformers

Exported to Australia from the People's Republic of China

Termination of Investigation No. 507

Public notice under subsection 269TDA(15) of the Customs Act 1901

On 18 March 2019, I, Dale Seymour, the Commissioner of the Anti-Dumping Commission, initiated an investigation into the alleged dumping of power transformers (the goods) exported to Australia from the People's Republic of China (China), following an application lodged by Wilson Transformer Company Pty Ltd (WTC, the applicant) under section 269TB(1) of the *Customs Act 1901* (the Act) [1].

Public notice of my decision to not reject the application and to initiate the investigation was published on the Anti-Dumping Commission's (Commission) website on 18 March 2019. The Anti-Dumping Notice (ADN No. 2019/035) is available at www.industry.gov.au.

As a result of the Commission's investigation, I am satisfied that:

- there has been no dumping of the goods by ABB Chongqing Transformer Co., Ltd and Siemens Transformer (Jinan) Co., Ltd,. Therefore I must terminate the investigation in accordance with section 269TDA(1)(b)(i) in so far as it relates to these exporters;
- the dumping margins for ABB Zhongshan Transformer Co., Ltd and Siemens Transformer (Wuhan) Co., Ltd, worked out under section 269TACB, when expressed as the weighted average of export prices used to establish that dumping margin, was less than two per cent. Therefore, I must terminate the investigation in accordance with section 269TDA(1)(b)(ii), in so far as it relates to these exporters; and
- the injury to the Australian industry that has been caused by exports of the goods from China from all other exporters is negligible. Therefore, I must terminate the investigation as it relates to China in accordance with section 269TDA(13).

The effect of the above decisions is that Investigation No. 507 is terminated in its entirety.

In making the decisions to terminate, I have had regard to the application, submissions from interested parties, the *Anti-Dumping Commission Statement of Essential Facts*

[1] All legislative references in this report are to the *Customs Act 1901*, unless otherwise specified.

No. 507 (SEF 507), submissions in response to SEF 507 and other relevant information as outlined in the *Anti-Dumping Commission Termination Report No. 507* (TER 507).

TER 507 sets out reasons for the termination decisions, including the material findings of fact or law upon which the decisions are based, and has been placed on the Commission's public record at www.industry.gov.au.

The applicant may request a review of the decisions to terminate the investigation by lodging an application with the Anti-Dumping Review Panel in the approved form and manner within 30 days of the publication of this notice.

Enquiries about this notice may be directed to the Case Manager on telephone number +61 3 8539 2437 or investigations3@adcommission.gov.au.

Dale Seymour
Commissioner
Anti-Dumping Commission

31 January 2020

In the Anti-Dumping Review Panel (ADRP)

28 February 2020

Attachment 2 to applications for review of termination decisions in Anti-Dumping Notice 2020/10 (ADN 2020/10) – Termination Report 507 (TER 507)

Power transformers (PTs) from the People's Republic of China (China)

Wilson Transformer Company Pty Ltd (WTC)

1. The grounds on which WTC submits that the termination decisions were not the correct or preferable decisions (set out in full in section 1) are:

    a. The Commission failed to apply s 269TAA(1),[1] and in particular the criterion in s 269TAA(1)(b) (criterion b), as written (see section 1.1).

    In particular the Commission wrongly substituted the criteria in s 269TAA(1) with a test for arms length transactions in fact (see section 1.1.1). That the criteria in s 269TAA(1) are not tests or considerations for assessing arms length in fact is clear from the words of the statute, the statutory context and case law (see section 1.1.2).

    The evidentiary threshold for criterion b is expressly and justifiably low and criterion b was arguably satisfied without more; the Commission disregarded that threshold (see section 1.1.3).

    b. At the very least, the commercial, ownership and managerial relationships between related subsidiaries of multinational PT suppliers (relationships likely to influence prices between those subsidiaries) put the Commission on notice that it should properly inquire as to whether criterion b was satisfied; the Commission did not so inquire (see section 1.2).

    c. Expert evidence obtained by WTC established that criterion b was satisfied for multinational PT suppliers. The Commission treated transactions between related subsidiaries of multinational PT suppliers as arms length;[2] because criterion b was satisfied the Commission was instead required by s 269TAA(1) *not* to treat those transactions as arms length. See section 1.3. The Commissioner should have had regard to that evidence and the ADRP may do so in this review (see section 1.3.1).

[1] References to statutory provisions in this document refer to statutory provisions in the *Customs Act 1901* unless stated otherwise.
[2] See TER 507 at sections 6.4.2, 6.6.2, 6.7.2, 6.8.2, 6.10.2, 6.11.2.

d. The Commission failed to properly assess injury suffered by WTC due to dumped PTs from China in the form of lost commercial opportunities (see section 1.4). Loss of commercial opportunities suffered by WTC were actual losses (see section 1.4.1) that the Commission rejected on an incorrect basis (see section 1.4.2). WTC submits that it is clear on the facts and the Commission's own "threshold" analysis that WTC lost real and valuable commercial opportunities of being the successful tenderer due to dumping (see section 1.4.3).

2. WTC's submits that the correct and preferable decision was that the Commission ought not to have terminated any part of Investigation 507 (see section 2).

3. The grounds raised support making the correct and preferable decision because, correcting for those grounds, the Commission would have reached materially different findings. See section 3.

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1 The grounds on which the applicant believes that the reviewable decisions are not the correct or preferable decisions

1.1 The Commission failed to apply s 269TAA(1), in particular criterion b, as written

4. WTC submits the Commission failed to apply the terms of s 269TAA(1), in particular criterion b, as written.

5. The Commission in TER 507 applied a test different to the express terms of s 269TAA(1), namely, it applied a test of whether transactions were arms length transactions *in fact*. Such a test is an impermissible substitution for the express terms of s 269TAA(1). In particular, TER 507 substantially misstates and fails to apply criterion b as written. See section 1.1.1 below.

6. WTC submits the criteria in s 269TAA(1) are not criteria for whether a transaction is arms length in fact, nor are they matters to be taken into account when considering making an assessment of whether a transaction is arms length. Rather, satisfaction of any one of the statutory criteria in s 269TAA(1) imposes on the Commission a duty <u>not to treat</u> ("shall not be treated as") the transaction as an arms length transaction. That is plain from the express terms of the provision, its statutory context, existing case law and further is supported by the policy of the statute. See section 1.1.2 below.

7. The evidential threshold for criterion b is expressly low. A 2013 amendment to the Act changed "price is" to "price appears to be". That material change was evidently not factored into Investigation 507 prior to TER 507. TER 507 itself challenged WTC's use of the statutory language and disregarded criterion b as amended. See section 1.1.3 below.

1.1.1 The Commission wrongly substituted the criteria in s 269TAA(1) with a test for arms length transactions <u>in fact</u>

8. The approach taken in TER 507 is that a transaction "will not be *considered* to be" (emphasis added) an arms length transaction if any of the criteria in s 269TAA(1) are satisfied.[3] In contrast, the statute at s 269TAA(1) states that a transaction "shall not be *treated* as an arms length transaction" (emphasis added) if any of the criteria in s 269TAA(1) are satisfied. The distinction is important because the statute stipulates that, if any of the criteria in s 269TAA(1) are satisfied with respect to a transaction, then the transaction shall *not be treated* as an arms length transaction (even if a transaction is or could be *considered* an arms length transaction).

9. The Commission's approach in TER 507, stated above in paragraph 8, is not merely inconsequential loose language, as the following additional passages from TER 507 demonstrate:

    a. TER 507's stated approach is that "section 269TAA does not exhaustively set out the criteria for determining whether a transaction *is, or is not*, arms length" (emphasis added).[4]

[3] TER 507 at page 47.
[4] TER 507 at page 48.

WTC submits that s 269TAA is concerned with whether a transaction is not to be *treated* as an arms length transaction, not with determining whether a transaction "is or is not" an arms length transaction (a question of fact about the transaction). See section 1.1.2 below.

b. TER 507's approach is that "section 269TAA(1)(b) directs the Commission to interrogate the nature of the commercial relationships, as between the parties, to assess whether their transactions are 'arms length', by examining whether the commercial relationship between the parties has, in fact, influenced the negotiated/settled price of a given transaction".[5]

WTC submits that this statement of the Commission's understanding of the provision indicates plain legal error in that it misstates the statutory criterion in criterion b; criterion b is not a statutory direction to the Commission to interrogate relationships in order to assess whether transactions are arms length transactions as a matter of fact; rather, the Commission is required to assess whether "the price appears to be influenced by a commercial or other relationship" between buyer and seller. The criteria in s 269TAA(1) are not tests for a factual determination of whether transactions are arms length transactions (see section 1.1.2 below).

In addition, this approach wrongly states that criterion b is concerned with whether the relationship "*has*, in fact, influenced" prices, whereas criterion b by its terms is concerned with whether "price *appears* to be influenced"; so TER 507, in substance, repeats the erroneous formulation of criterion b that was in the exporter visit reports (as WTC pointed out following the publication of SEF 507).[6]

c. TER 507 took issue with WTC's submission on the basis that "WTC also asserted that 'the correct statutory application is whether price *appears* to be influenced by those relationships'. In other words, WTC asserted that the Commission should not look behind the appearance of the relevant transactions in making its assessment as to whether or not they were made at arms length" (emphasis in original).[7]

Firstly, TER 507 misquotes WTC as making a statement about the correct "application" of the statute (without providing a reference to the source document); WTC's actual statement, in response to the wrongly stated test in the exporter visit reports, was "[t]he correct test (contained in s 269TAA(1)(b)) is whether price *appears* to be influenced by those relationships" (emphasis in original).[8]

Secondly, and most importantly, TER 507 here proposes an approach whereby if price appears to be influenced by a commercial or other relationship then the

[5] TER 507 at page 49.
[6] WTC submission of 26 November 2019 at page 4.
[7] TER 507 at pages 48 to 49.
[8] WTC submission of 26 November 2019 at page 4.

> Commission is then at liberty to "look behind" that appearance and to substitute its own assessment of whether the transaction is in fact an arms length transaction in place of the statutory requirement; that approach ignores the express terms of s 269TAA269(1).

10. TER 507 states how it would apply criterion b in the following terms: "[t]o assess whether a price appears to be influenced by a relationship, the Commission will seek to compare the price of related party sales to the price of non-related party sales" and references the Manual in support of that approach.[9] However, the Commission abandoned that exercise in Investigation 507 because for each multinational PT supplier "the exporter did not sell the goods to both related and unrelated parties in Australia".[10] WTC submits the problems evident in this approach are as follow:

    a. TER 507 wrongly substitutes the statutory test with a note on practice: to say, in effect, that criterion b can only be assessed by comparing related and non-related prices impermissibly substitutes the statutory criterion with another, narrower, test. The Manual cannot be used as a substitute for the statute.

    b. TER 507 wrongly releases the Commission from making a proper criterion b investigation into whether prices have been influenced by the commercial relationship: if the Commission is unable to make the comparison referred to in the Manual then, according to TER 507, it may simply abandon the exercise.

11. The Commission has, on at least one occasion, correctly applied the statutory criteria in s 269TAA(1) by their terms, and distinct from a factual test of whether a transaction is an arms length transaction (in the ordinary sense of that term). In REP 419 the Commission made separate findings 1) on whether any of the criteria in s 269TAA(1) were satisfied,[11] 2) whether transactions were arms length in the ordinary sense of that term[12] and 3) whether sales at a loss allowed the Commission to exercise a discretion to treat transactions not as arms length under s 269TAA(2).[13] In that case the Commission found that the prices between related companies appeared to be influenced by commercial, management and ownership relationships and accordingly the Commission observed that it "must treat sales as not arms length under section 269TAA(1)(b)".[14]

12. TER 507 substantially misstates WTC's position on criterion b. TER 507 states WTC's position in the following terms:

> Section 269TAA does not require the Commission to disregard a sale or purchase between two related entities solely because they are related as such. The Commission considers that the argument submitted by WTC is founded on the principle that related corporate entities are incapable of engaging in 'arms length' transactions, solely because of the nature of the commercial relationship. The Commission rejects this argument.

[9] TER 507 at page 49.
[10] TER 507 at page 49.
[11] REP 419 at page 22.
[12] REP 419 at page 23.
[13] REP 419 at page 23.
[14] REP 419 at page 23.

13. This has never been WTC's position. WTC's firm position was and remains that the Commission should simply apply criterion b as it is written.[15] However it should have been abundantly clear to the Commission that criterion b is much more likely to be satisfied when parties are related; the Commission did not address or acknowledge that likelihood in Investigation 507 despite WTC's submissions.[16] Those relationships should at the very least have put the Commission on notice that it should properly inquire into whether criterion b was satisfied for related subsidiaries of multinational PT suppliers (see section 1.2 below).

1.1.2 The criteria in s 269TAA(1) are not tests or considerations for arms length in fact

14. WTC submits that there are three circumstances where the Commission might not treat transactions as arms length transactions.[17] Firstly, the Commission may find that the transactions were not (as a matter of fact) arms length transactions (in the ordinary sense of the term);[18] secondly, the Commission has a discretion under s 269TAA(2) to treat sales of goods at a loss as indicating that the criterion in s 269TAA(1)(c) has been satisfied; thirdly, and most relevant here, is if one or more of the criteria in ss 269TAA(1)(a) to (c) have been satisfied – in that case, WTC submits, the Commission must not treat transactions as arms length transactions (regardless of how they are characterisable in fact).

15. Section 269TAA(1) states:

> For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:
>
> (a) there is any consideration payable for or in respect of the goods other than their price; or
>
> (b) the price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or
>
> (c) in the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

16. The words of the statute are clear, the statute does not direct the Commission to have regard to these matters in making an assessment of arms length matters;[19] rather, if any of the criteria are satisfied then the Commission is bound not to *treat* the transactions ("shall not be *treated*") as arms length transactions. 'Treat' means "to act or behave towards in some specified way";[20] on that basis the Commission must not act or behave toward those transactions as though they were arms length transactions. This is confirmed by case law on s 269TAA(1).

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[15] See WTC submission of 26 November 2019 generally and in particular at sections 2, 3 and 7; WTC submission of 12 December 2019 at section 10.
[16] See WTC submission of 26 November 2019 generally.
[17] See for example REP 419 at pages 22 to 23.
[18] The term "arms length" is not defined in the legislation.
[19] As it does for other matters elsewhere in the section, see s 269TAA(3) and in Part XVB generally, see for example s 269TAAC(4), s 269TACD(3) and elsewhere.
[20] Macquarie Dictionary, definition of "treat".

17. In *Nordland Papier AG v Anti-Dumping Authority* Lehane J stated that the effect of s 269TAA(1) was that any transaction described in ss 269TAA(1)(a), (b) or (c) is deemed not to be an arms length transaction (emphasis added):[21]

> In the ordinary sense of the term, a transaction of a kind described in any of the paragraphs of s 269TAA(1) might, or might not, be an arms length transaction. Even paragraph (b), which comes closest to the ordinary concept of "arms length transaction", is not, I think, an exception: the fact that there is a commercial relationship between buyer and seller which influences price does not necessarily result in the purchase or sale being other than an arms length transaction in the ordinary sense. However that may be, the effect of each of the three paragraphs is that, for the purpose of ascertaining normal value, *any sale or purchase described by any of the three paragraphs of subs (1) is deemed not to be an arms length transaction*.

18. The Commission itself has correctly described the effect of s 269TAA(1) in a previous case in the following terms:[22]

> It seems clear that a finding under s269TAA(1) requires an assessment of certain facts that might be available to the Commission that satisfy one of the criteria in ss269TAA(1)(a) to (c). However a finding under s269TAA(1) is not a finding that a transaction has not been arms length, rather if there is a finding that any of the criteria in s269TAA(1) have been satisfied then that transaction "shall not be treated as an arms length transaction"; there is no discretion.

19. The immediate statutory context confirms that the criteria in ss 269TAA(1)(a), (b) and (c) are not tests for whether transactions are arms length transactions in fact. Section 269TAA(1A) provides that the Minister may make an assessment and form an opinion of whether transactions are arms length "in spite of" the criterion in s 269TAA(1)(c) being satisfied. The immediate statutory context of criterion b therefore makes it clear that transactions may or may not be arms length transaction in fact even if one of the criteria in s 269TAA(1) is satisfied.

20. The Act accords primary importance to identifying arms length issues and ensuring that dumping margins are not affected by any non-arms length transactions.[23] The underlying policy position of the statute is clearly evident in s 269TAA(1): the risks that the transactions described in ss 269TAA(1)(a) to (c) would not be arms length were sufficiently high that the drafters considered they should be not in any circumstance be treated as arms length transactions.[24] In anti-dumping investigations of offshore multinational suppliers where the substance of intra group transactions are peculiarly within the knowledge of those suppliers and the Commission has no information gathering powers the deeming effect of s 269TAA(1) can be further justified on grounds of administrative efficiency.[25]

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[21] *Nordland Papier AG v Anti-Dumping Authority* [1999] FCA 10 at [19].

[22] *Reinvestigation of Certain Findings in Report 341* at page 19.

[23] Sections 269TAA, 269TAB(1), 269TAC(1); *Reinvestigation of Certain Findings in Report 341* at page 54.

[24] Other than for transactions described in s 269TAA(1)(c) in the circumstances described in s 269TAA(1A).

[25] See section 1.1.3; the argument in favour of per se breaches in competition law may apply here, some conduct (such as price fixing) is so likely to lessen competition that it is deemed to be anti-competitive thus releasing investigative agencies from the burden of proving that the conduct has

1.1.3 Evidential threshold for criterion b is low, TER 507 disregarded criterion b as amended

21. WTC considers that the evidential threshold for criterion b is low. That low evidential threshold is justified on policy grounds.

22. In a previous case the Commission correctly stated that the evidential requirements may be low in the circumstances coming within s269TAA(1), and for criterion b in particular (emphases in original, footnotes omitted):[26]

> The criterion in s269TAA(1)(b) requires only that the price *appears* to be influenced by a commercial or other relationship between buyer and seller. This lowering of the normal (civil) standard of proof of the balance of probabilities is consistent with Article 2.3 of the Anti-Dumping Agreement (setting procedures where export price "appears" unreliable) and requires that the Commission approach the issue, as stated in the relevant explanatory memorandum, "based on what the available information *suggests*" (emphasis added).

23. The Australian parliament changed the words in s 269TAA(1)(b) from "price is" to "price appears to be" in 2013.[27] The amendment was made to be "better aligned with the Anti-Dumping Agreement" and allow the Commission to take an "approach … based on what the available information *suggests*" (emphasis added).[28]

24. That change in the legislation was evidently not factored into Investigation 507 prior to TER 507 being published; the test in s 269TAA(1)(b) was stated as it was prior to the 2013 amendment (where the test was stated at all).[29] Even following WTC's submissions on the issue, the Commission in TER 507 challenged WTC's reliance on the statutory language and appeared stubbornly resolute in disregarding criterion b as amended.[30]

25. WTC submits that the Commission should have followed the principle of statutory interpretation that all words in a statute should be accorded meaning and effect, and that principle is "more compelling" if words have been added by amendment.[31] The dictionary meaning of the word "appears" in criterion b is to have an appearance, seem or look.[32] On that basis criterion b would be satisfied when there is a commercial or other relationship between transacting parties that is a relationship that would merely *seem* to influence prices in the transactions. That would arguably, without more, describe the commercial, structural and managerial relationships between subsidiaries of modern multinational suppliers; indeed, it is difficult to conceive of a commercial or other relationship that is *more* likely to influence prices.

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lessened competition, see the discussion in the US case *FTC v Superior Court Trial Lawyers Assn* 493 US in *Official Reports of the Supreme Court* vol 498 at page 430 ff.

[26] *Reinvestigation of Certain Findings in Report 341* at page 20; see also REP 419 at pages 22 to 23.

[27] *Customs Amendment (Anti-dumping Measures) Act 2013.*

[28] Explanatory Memorandum to the *Customs Amendment (Anti-dumping Measures) Bill 2013* at [22].

[29] See section 1.2 of this document and WTC submission of 26 November 2019 at section 2.

[30] See para 9.c of this document.

[31] *Statutory Interpretation of Legislation*, 8ed, Pearce and Geddes at [2.26].

[32] Macquarie Dictionary, definition of "appear".

26. A low or even reversed evidential burden is frequently justified on policy grounds; policy grounds that are relevant in anti-dumping investigations generally and in assessing criterion b in particular:

    a. Criminal sanctions may ordinarily be applied only after the facts of an offence have been proven beyond reasonable doubt whereas civil sanctions require only that the facts of a breach are proven on the balance of probabilities.[33] A finding of dumping under Part XVB is neither an offence nor a breach of the statute; there is no fine or penalty attached, rather the result is a duty designed to adjust the export price for the extent of dumping.

    b. A reversal of the evidential burden is justified when the nature of an inquiry or proceeding is such that the circumstances of the matter are peculiarly within the knowledge of a respondent.[34] The circumstances of whether prices between its related subsidiaries are influenced by the relationships would be peculiarly within the knowledge of a multinational supplier; further, the Commission has no powers to compel parties to an inquiry to provide information or documentary evidence.[35]

27. On that basis WTC submits that it made significant concessions in the face of the Commission's reluctance to engage with criterion b to the extent that, during Investigation 507, WTC:

    a. urged only that the relationships between multinational PT importers and exports should put the Commission on notice that it should inquire further as to whether criterion b was satisfied, seeking evidence regarding the relationships (see section 1.2 below); and

    b. when the Commission made no such inquiries, WTC itself obtained expert opinion evidence that prices would be influenced by those relationships (see section 1.3 below).

1.2 The Commission did not properly inquire as to whether criterion b was satisfied

28. WTC submits that the fact of the commercial and ownership relationships between related subsidiaries of multinational PT suppliers should, at the very least, have put the Commission on notice that it should properly inquire as to whether criterion b was satisfied. The Commission did not so inquire.

29. In its submission of 26 November 2019 WTC observed that properly assessing arms length matters was crucial in Investigation 507 because each of the main exporters is related to an Australian importer.[36] In spite of that the statutory tests in s 269TAA(1) for whether

[33] See for example *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49 per Gleeson CJ at [46].
[34] *Police Federation of Australia v Nixon* [2008] FCA 467;
[35] Indeed, the Commission has in substance stated this as the policy underpinning for its discretion to treat sales at a loss as indicating that s 269TAA(1)(c) is satisfied (and so treat those sales as not arms length), see *Reinvestigation of Certain Findings in Report 341* at page 26.
[36] WTC submission of 26 November 2019 at section 2.

transactions should be treated as arms length were not stated or even referred to in SEF 507 or any importer reports.[37] The statutory test for criterion b was wrongly stated in the exporter reports.[38] Elsewhere, arms length issues were given scant attention by the Commission, for example in the exporter questionnaires and responses.[39]

30. In particular, the Commission did not adequately inquire, as criterion b directs, into whether prices were influenced by the commercial and structural relationships between related subsidiaries of multinational PT suppliers.[40] The Commission should have made that inquiry because to a casual observer it might reasonably be expected that a typical multinational PT supplier *would* influence prices between its subsidiaries.[41] If such an expectation was insufficient to satisfy criterion b, then the Commission (as the primary investigatory body of such matters) was at least on notice that it should inquire as to whether or not prices were influenced by those relationships.

31. WTC urged the Commission that it should, as a minimum, ask the multinational PT suppliers for any internal policies, guidelines or directives concerning transfer prices between related entities.[42] Those documents may have provided positive evidence that prices were influenced between related entities. There is every indication that the Commission did not ask for such documents[43] and the Commission did not respond to that submission in TER 507.

32. Similarly, it was open to multinational PT suppliers to back up assertions with evidence, for example by having group CFOs or similar personnel make statutory declarations to the effect that there were no internal policies, guidelines or directives that would influence transfer prices between the group's related entities.[44] The multinational PT suppliers put on no such evidence and instead made carefully curated statements about evidence.[45] GE stated that its related party transactions had been closely reviewed in recent years by customs and taxation authorities; the obvious inference is that such reviews would invariably lead or require a multinational PT supplier to exert influence on prices (in the unlikely event it had not done so previously).[46] Expert evidence obtained by WTC confirms that satisfying government authorities regarding regulatory compliance is one reason why prices between related

[37] WTC submission of 26 November 2019 at section 2.
[38] WTC submission of 26 November 2019 at section 2.
[39] WTC submission of 26 November 2019 at section 2.
[40] WTC submission of 26 November 2019 at section 3.
[41] WTC submission of 26 November 2019 at section 3.
[42] WTC submission of 12 December 2019 at section 5.
[43] See generally the exporter and importer questionnaires and visit reports on the EPR.
[44] WTC submission of 12 December 2019 at section 5.
[45] For example Siemens stated "…if there is no evidence that the price was influenced in the way referred to in section 269TAA of the Act, then the price cannot 'appear to be influenced' in that way", Siemens submission of 29 November 2019 at [2]; that statement only raised the question as to whether such evidence exists when Siemens was in a position to definitively provide such evidence, WTC submission of 12 December 2019 at section 7.
[46] WTC submission of 12 December 2019 at section 5.

entities of the multinational PT suppliers would invariably be influenced by the relationship.[47]

33. A frequent refrain of Siemens and GE was that the Commission found no evidence that would satisfy criterion b or otherwise require the Commission to treat transactions as not arms length.[48] WTC considers that no such evidence was found because little or no effort was made by the Commission to obtain such evidence and claims by PT multinational suppliers were accepted uncritically.[49] The claims that prices between subsidiaries of a multinational PT supplier were set in a manner that was not influenced by the relationship would surprise a casual observer;[50] unsurprisingly those claims were unequivocally contradicted by expert evidence obtained by WTC (see section 1.3).

1.3 Expert Evidence before the Commission established that criterion b was satisfied

34. Expert evidence obtained by WTC and provided to the Commission established that criterion b was satisfied for transactions between related subsidiaries of multinational PT suppliers. The Commission in Investigation 507 treated transactions between related subsidiaries of multinational PT suppliers as arms length;[51] because criterion b was satisfied the Commission was instead required by s 269TAA(1) *not* to treat those transactions as arms length.

35. WTC sought the opinion of transfer pricing expert Shannon Smit as to whether prices between related subsidiaries of multinational PT suppliers were influenced by their relationship. Shannon Smit's expert opinion (the Expert Evidence) stated unequivocally that prices between related entities of the multinational PT suppliers would be influenced by the commercial, structural and other relationships.[52]

36. Shannon Smit has very substantial hands-on professional experience in dealing with transfer pricing for multinational companies.[53] She has over 25 years' experience consulting to multinational companies on transfer pricing, taxation and accounting, including 11 years with Ernst & Young in Australia and internationally.[54] Shannon Smit currently heads Transfer Pricing Solutions, a specialist transfer pricing consultancy, which she founded in 2007.[55] Shannon and Transfer Pricing Solutions have been recognised with awards for expertise in transfer pricing both in Australia and internationally.[56]

[47] See section 1.3.
[48] Siemens submission of 29 November 2019 at [2]-[3]; GE submission of 29 November 2019 at p3; Siemens submission of 14 January 2020 at [1.2(b)] and [1.3].
[49] WTC submission of 26 November 2019 at section 3.
[50] WTC submission of 26 November 2019 at section 3.
[51] See TER 507 at sections 6.4.2, 6.6.2, 6.7.2, 6.8.2, 6.10.2, 6.11.2.
[52] Expert evidence at page 2.
[53] Although Shannon also teaches the transfer pricing subject in the Melbourne University International Tax Masters program (a course which she helped develop) and has done so since 2007, see expert evidence, Appendix 2 at page 4.
[54] Expert Evidence at page 1; Expert Evidence, Appendix 2 at pages 4 and 5.
[55] Expert Evidence at page 1; Expert Evidence, Appendix 2 at pages 1 and 4.
[56] Expert Evidence at page 2; Expert Evidence, Appendix 2 at page 3.

37. Shannon Smit's extensive experience with multinational companies' related party transactions and pricing informed her that the price between related parties is "*invariably* influenced by the commercial, structural and other relationships within the entities" (emphasis added).[57] Her opinion was that prices between related companies of multinational PT suppliers (Siemens, GE, ABB and Toshiba) would be influenced by their commercial, structural and other relationships.[58]

38. Shannon observed that it is common practice that companies such as the multinational PT suppliers have in place clear policies and procedures guiding management on operations.[59] These will include an intercompany transactions policy with instructions to management on how transactions should be conducted, the pricing approach and any required approval processes.[60] Such policies and procedures are usually prepared by the parent company to ensure consistency in global operations and to meet regulatory requirements in local operations.[61]

39. Shannon observes that intellectual property will often be a key business driver for the multinational group influencing prices between its entities and ultimately to achieve overall "common gain" for the group.[62] Shannon also observes that the OECD and tax authorities have guidelines and regulations that oblige multinational companies to influence transfer pricing;[63] pricing of transactions is always influenced by the relationships within multinational entities because the regulatory requirement "forces" that.[64]

1.3.1 Commissioner should have considered the Expert Evidence, ADRP may have regard to the Expert Evidence

40. WTC submits that the Commissioner should have considered the Expert Evidence in making the decisions to terminate Investigation 507. In any event the ADRP may have regard to the Expert Evidence in reviewing the termination decisions.

41. The Expert Evidence was not considered by the Commissioner in terminating Investigation 507. The reasons given in TER 507 for not considering the Expert Evidence were as follows:[65]

> The submissions recorded as EPR item nos. 73-75 [which included the Expert Evidence] were not considered because the Commissioner is required to terminate the investigation (or particular aspects of the investigation) if satisfied of one or more of the matters in section 269TDA. When the Commissioner reached the requisite state of satisfaction, he took steps to terminate the investigation and did not consider any further submissions or proceed to providing a report to the Minister as would otherwise be required by section 269TEA(1). If the Commissioner had not terminated the investigation, he was scheduled to provide a report to the Minister on or before 31 January 2020.

[57] Expert Evidence at page 2.
[58] Expert Evidence at page 2.
[59] Expert Evidence at page 2.
[60] Expert Evidence at page 3.
[61] Expert Evidence at page 3.
[62] Expert Evidence at pages 3 to 4.
[63] Expert Evidence at page 4.
[64] Expert Evidence at pages 4 to 5.
[65] TER 507 at page 24.

42. WTC makes the following observations regarding these reasons:

    a. The Commission disregarded the Expert Evidence without a statutory basis. Section 269TEA(4) provides that the Commission is not obliged to have regard to any submission made in response to the SEF that is received after the 20 day period "if to do so would, in the Commissioner's opinion, *prevent the timely preparation of the report to the Minister*" (emphasis added). A report to the Minister was not prepared in Investigation 507 and so having regard to the Expert Evidence could not have prevented the timely preparation of such a report. There is no provision that would allow the Commission to disregard the Expert Evidence as it did when preparing to terminate the investigation.

    b. The Expert Evidence was before the Commissioner when he made his decision to terminate Investigation 507. WTC provided the Expert Evidence on Monday, 20 January 2020 and the Commissioner made his decision to terminate the investigation by notice on Friday, 31 January 2020.[66] Section 269ZZT(4) provides that, in making its decision in this review, the ADRP must have regard only to information that was before the Commissioner when the Commissioner made the termination decision; accordingly, the ADRP may have regard to the Expert Evidence in reviewing the termination decision.

    c. Absent a statutory basis for not doing so, the Commissioner should have made his decision to terminate Investigation 507 on the basis of material available to him at the time of his decision, that material included the Expert Evidence.[67]

43. WTC submits that the Expert Evidence was evidence squarely addressing criterion b; that evidence was provided when the criterion b issue was being agitated before the Commission by WTC and other interested parties were saying that the Commission had no such evidence.[68] WTC had told the Commission that it would provide evidence on criterion b. There was no statutory basis to disregard the Expert Evidence, it was centrally relevant to an issue before the Commission and it should have been considered by the Commissioner at the time the decision was made to terminate.

44. WTC submits that the ADRP may consider the Expert Evidence because the Expert Evidence was before the Commissioner when he made his decision on 31 January 2020 (s 269ZZT(4)).[69]

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[66] ADN 2020/10, 31 January 2020.

[67] As stated by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 at [20]:

- The general principle is that "an administrative decision-maker is required to make his decision on the basis of material available to him *at the time the decision is made*" (emphasis added).
- That principle is "a reflection of the fact that there may be found in the subject matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker".

See also *Judicial Review of Administrative Action and Government Liability*, 6ed, Aronson et al, at [5.100] and the other cases cited there at footnote 56.

[68] See section 1.3 in this document.

[69] It seems clear as a matter of statutory construction that termination of an investigation is effected by the Commissioner's decision, not the satisfaction referred to in ss 26TDA(1) and (13); the

WTC does not consider that the Commission's reasons and ADN 2020/10 can be read otherwise; however, if the Commission or another party puts a contrary position to the ADRP and seeks to exclude the ADRP from having regard to the Expert Evidence in this review then WTC would urgently seek the opportunity to make further submissions on that issue.

1.4 The Commission failed to properly assess injury suffered by WTC, loss of commercial opportunities

45. WTC submits that the Commission failed to properly assess injury suffered by WTC that was in the form of lost commercial opportunities. The law recognises that loss of commercial opportunity is an actual loss and such loss may be regarded as injury from dumping (see section 1.4.1).

46. Following SEF 507, WTC observed that the Commission had failed to recognise the nature of injury suffered by WTC, namely the loss of commercial opportunities.[70] In TER 507 the Commission did not reject the concept of loss of commercial opportunities but rejected WTC's claim that it had suffered such loss. The Commission's rejection of WTC's claim was made on an incorrect basis and so the Commission failed to proceed to properly assess injury to WTC arising from loss of commercial opportunities (see section 1.4.2 below).

47. WTC submits that it is clear on the facts that it suffered injury from losing real and valuable commercial opportunities due to dumped PTs from China. The Commission failed to observe that its own "threshold" analysis in TER 507 amply demonstrates that WTC lost real and valuable commercial opportunities in 5 of the 8 projects examined in section 8.4.2 of TER 507. See section 1.4.3 below.

1.4.1 Loss of a commercial opportunity is actual loss and can be regarded as injury from dumping

48. WTC considers that the Commission's assessment of injury in Investigation 507 failed to properly take account of actual loss suffered by WTC in the form of loss of commercial opportunity. WTC makes the following observations regarding the loss of commercial opportunity:

    a. It is settled law that loss of a chance or opportunity is to be regarded as actual loss.[71]

Commissioner's decision is not referred to in ss s26TDA(1) and (13). The Commissioner's decision is rather tied by the statute to the requirement that the Commissioner give public notice of his decision (s 269TDA(15)). The Commission's termination documents are consistent with that view: notice of the Commissioner's decisions (ADN 2020/10) is dated 31 January 2020 and the notice states that the Commissioner's reasons for the decisions are set out in TER 507 (which is also dated 31 January 2020); neither document refers to any decision to terminate taken earlier than that date. Indeed, TER 507 at page 24 states that the Commissioner had reached the satisfaction required but that, at some unspecified date prior to 31 January 2020, the Commissioner had only taken "steps to terminate the investigation" ie termination had not been effected prior to 31 January 2020.

[70] WTC submission of 19 December 2019 at section 1.

[71] *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [20] and *Naxakis v Western General Hospital* [1999] HCA 22, per Gaudron J at [29].

b. The principle has broad application: the courts have recognised that damages for such loss may be awarded for deprivation of any commercial opportunity whether resulting from breach of contract, tort or statutory contravention.[72]

c. The loss of a chance of being the successful tenderer for a commercial undertaking is expressly recognised in the case law as an example of such an actual loss.[73]

d. The resulting loss or injury suffered can be quantified by reference to the degree of likelihood of the outcome of the tender (or other commercial opportunity).[74]

e. Loss is recognised even if the realisation of the opportunity (eg winning the tender) was improbable, even as little as a one per cent chance of realisation.[75]

It was open to the Commission to assess injury arising from the loss of commercial opportunities caused by dumping

49. The matters the Commission may have regard to in assessing injury are broad. In particular the ADC may have regard to:[76]

> *any* effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the relevant economic factors in relation to the Australian industry

50. In any event s 269TAE(1) expressly provides that the broad matters to which the ADC may have regard should not limit the generality of the question of whether material injury has been caused to the Australian industry.

51. Siemens and GE objected to WTC claiming injury from loss of commercial opportunities, arguing that such losses were relevant to contract law not anti-dumping.[77] WTC makes the following observations regarding those objections:

a. Siemens and GE seek to narrow the broad matters to which the Commission may have regard and the express generality of the injury provisions (see paragraphs 49 and 50 of this document).

b. The ADRP and Commission generally have regard to and apply the general law in their deliberations (for example applying corporations law in the separate treatment of related companies in determining dumping margins). That confirms that anti-dumping law does not exist in a legal vacuum.

[72] *Cheshire & Fifoot, Law of Contract*, 10th Australian Ed at 23.14; *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [38].
[73] *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [11].
[74] *Cheshire & Fifoot, Law of Contract*, 10th Australian Ed at 23.14.
[75] *Cheshire & Fifoot, Law of Contract*, 10th Australian Ed at 23.15.
[76] See s 269TAE(1)(g).
[77] TER 507 at 98; Siemens submission of 14 January 2020; GE submission of 15 January 2020.

c. Contract law forms a major and indispensable part of commercial dealings in Australia, including dealings involving imported goods (for example, a company who wins a tender to supply a PT in Australia is, in fact awarded a contract to supply the PT). Siemens and GE arbitrarily seek to exclude parts of that law.

d. The principle has broad application (see paragraph 48.b of this document). The High Court has said that the deprivation of commercial opportunity may arise by reason of breach of contract, tort or contravention of a statutory provision stating that "there is no secure foundation for confining the principle to cases of any particular kind".[78]

52. Accordingly, WTC considers that it was open to the Commission to assess injury that is caused by dumped imports depriving the Australian industry of the loss of commercial opportunities (ie in tenders). Many PTs are sold in the Australian market by tender and so WTC considers that that would have been a correct and preferable approach to assessing injury causation in Investigation 507.

1.4.2 Commission rejected claims of lost commercial opportunities on an incorrect basis

53. The Commission in TER 507 correctly did not reject loss of a commercial opportunity as a valid form of injury from dumping; however, at page 98 the Commission stated that it did not agree that WTC had experienced injury in that form because (emphasis added):[79]

> In the Commission's analysis of lost tenders in section 8.4.2, *the Commission concluded that WTC would have been unlikely to be successful in winning these tenders even in the absence of dumping*. In other words, even if it was competing with competitors that were not dumping (which the Commission analysed by adjusting for dumping margins), *it is unlikely to have won these tenders*.

54. WTC submits that this statement is simply incorrect. In section 8.4.2 at page 87 of TER 507 the Commission said of Project 8 that it could *not* come to a conclusion:

> In this instance, *the Commission cannot come to a conclusion concerning the outcome of this tender in the absence of dumping*.

55. At page 100 of TER 507 the Commission said, again of Project 8:

> As such, the Commission maintains its view that, on the basis of the evidence before it, *the Commission cannot come to a conclusion concerning the outcome of this tender in the absence of dumping*.

56. And at page 87 of TER 507 the Commission said of Project 7:

> As such, on the basis of the evidence before the Commission, the Commission *cannot come to a conclusion concerning the outcome of this tender in the absence of dumping*.

57. On that basis WTC submits that TER 507 simply contradicts itself on an issue crucial to the analysis of injury in Investigation 507. TER 507 rejects a lawful and logical approach proposed by WTC to assess injury in Investigation 507 on the basis of an incorrect statement

[78] *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [38].
[79] TER 507 at 98.

that is contradicted (more than once) by the Commission in the same document. WTC submits that that cannot form the basis of a correct and preferable decision to terminate, and without more, should suffice for the ADRP to revoke the termination decisions.

58. In any event, the law is clear that loss of a commercial opportunity is recognised even if the realisation of the opportunity was improbable.[80] So, even for projects where the Commission found that WTC would have been unlikely to win the tender but adjusting for dumping moved WTC to within the Commission's threshold[81] (ie projects 1, 5 and 6), there were losses of valuable and quantifiable commercial opportunities.

1.4.3 WTC lost real and valuable chances ie commercial opportunities of being the successful tenderer

59. WTC considers that it is clear on the facts that were before the Commission that WTC lost real and valuable chances of being the successful tenderer of its PTs.[82] That loss was caused by dumped PTs and it materially injured WTC for projects 1, 5, 6, 7 and 8. That loss was substantial for projects 8 and 6 (the largest projects).

60. WTC strongly disagrees with the likelihoods ascribed by the Commission to WTC winning these projects and submits that the detailed information WTC provided with its submission of 10 November 2019 amply explains why WTC would have been much more likely to win those projects.[83] However WTC submits that even if the likelihoods ascribed by the Commission to WTC winning the projects were accepted there was still real loss suffered by WTC due to dumping; that loss was materially injurious to WTC.

WTC was deprived of a real and valuable chance to win Project 8

61. In particular, WTC was effectively deprived of a real and valuable chance of being the successful tenderer for Project 8 by substantially dumped PTs. TER 507 states that for Project 8 the "significant price difference" influenced the purchaser and that price was the "deciding factor".[84] It is clear that adjusting the price of dumped PTs to an undumped price substantially lessened the price difference[85] and, by the Commission's own analysis, brought the price difference within the threshold where WTC might have won the tender notwithstanding some remaining price difference.[86]

62. The Commission's own analysis proposed a price difference threshold at which WTC might win a tender notwithstanding its price was higher than its competitors.[87] Being within the Commission's threshold where it might win a tender is *the very definition* of having a commercial opportunity; being precluded from the Commission's threshold by a substantial level of dumping is the very definition of *a loss* of commercial opportunity. By the

[80] See paragraph 48.e of this document.
[81] The Commission's threshold is described in TER 507 at page 85.
[82] See *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [11].
[83] See WTC submission of 10 November 2019 (confidential version) at section 7.d and Confidential Attachment 3.
[84] TER 507 at page 87; SEF 507 at page 80.
[85] TER 507 at Figure 19.
[86] TER 507 at page 86.
[87] TER 507 at page 85.

Commission's own analysis, correcting the dumped price in Project 8 moves WTC from outside the Commission's threshold to within the Commission's threshold.[88] That is the very injury that WTC seeks to be addressed in Investigation 507, not an iron clad guarantee that it will win every bid but *the opportunity to compete fairly against undumped PTs*.[89]

63. The Commission abandoned its assessment of Project 8, declining to reach a conclusion (when it was open on the facts to find that WTC likely would have won the bid).[90] The Commission at the least should have conceded that dumping in Project 8 deprived WTC of a real and valuable chance of being the successful tenderer; on that basis WTC suffered actual loss,[91] that loss was quantifiable[92] and, given the size of Project 8, that loss was very substantial (see table at paragraph 69 of this document).

64. WTC submits that it was highly likely to win project 8 in the absence of dumping,[93] with 95 per cent likelihood.[94] But even if the Commission did not accept WTC's assessment of likelihood, its view is that absent dumping the result could have gone either way;[95] that assessment is readily translated into an even or 50 per cent chance that WTC would have won Project 8. That loss of commercial opportunity is readily quantified[96] as 50 per cent of the value of Project 8; given the high value of Project 8 that is injury that is very substantial and not immaterial, insubstantial or insignificant.[97]

WTC was deprived of a real and valuable chance in Project 6

65. It is clear from the facts of Project 6 that the substantial adjustment for dumping to the winning bid opened up the bidding for undumped PTs;[98] indeed the Commission considered that the second placed (presumed non dumping) bidder would have been awarded the tender. Again, adjusting for dumping moved WTC from out of contention for Project 6 into within the Commission's threshold; so, again, using the Commission's own threshold analysis the dumping had deprived WTC of the real and valuable opportunity to bid against undumped PTs.

[88] TER 507 at 85; as was also true for Projects 1, 5, 6 and 7; WTC submission of 19 December 2019 at section 1.
[89] WTC submission of 19 December 2019 at section 2.
[90] TER 507 at 87; WTC considers it more likely than not that it would have won because, adjusted for dumping and per kW cost of losses (and other costs), WTC's bid was the lowest bid as demonstrated in Attachment 4 of WTC's 10 November 2019 submission.
[91] See paragraph 48.a of this document.
[92] See paragraph 48.d of this document.
[93] Attachment 4 of WTC submission of 10 November 2019.
[94] See WTC submission of 10 November 2019 (confidential version) at section 7.d and Confidential Attachment 3. The Commission failed to, among other things, account for a substantial loss cost differential of over $400,000 between WTC and GE; GE's contract bid should have been loaded by that amount.
[95] TER 507 at page 100.
[96] See paragraph 48.d of this document).
[97] *Ministerial Direction on Injury 2012*.
[98] TER 507 at Figure 19.

66. WTC submits that it would have had an even chance of winning Project 6 in the absence of dumping.[99] But even if the Commission's view is accepted, that WTC was unlikely to have won Project 6 (ie less than a 50 per cent chance), the Commission could have (and WTC submits, should have) quantified WTC's loss of opportunity injury. If, for example, WTC was assessed as having only a 25 per cent chance of winning Project 6, the loss (as 25 per cent of a very large project) would be substantial and certainly not immaterial, insubstantial or insignificant.[100]

67. In any event, taking dumped PTs out of the bidding for Project 6 would have resulted in WTC achieving a higher ranking in the shortlisting with resulting likely further commercial opportunities such as being included on the panel for future bids.[101] As WTC observed following SEF 507[102] the supplier of dumped PTs in Project 6 was a member of at least one panel[103] and that inclusion on panels is based, in part, on bids from potential suppliers.[104] On that basis, given that bids are based on dumped prices[105] WTC might well be displaced on panels by suppliers of dumped PTs; it can be readily inferred that that would result in WTC being deprived of valuable opportunities to bid for projects (this is mitigated only in part by the fact that purchasers will sometimes go "off panel").[106] This broader loss of commercial opportunities was not addressed in TER 507.

68. The Commission's response in TER 507 regarding loss of a commercial opportunity for Project 6 can only be described as trite. WTC had observed that, absent dumping, WTC would have had the "real and valuable opportunity to bid against undumped PTs"; to which the Commission responded that "WTC did, in fact, bid against all parties to the tender".[107] The winning bid in Project 6 was dumped by a substantial margin; that was always going to deprive WTC of the real and valuable chance of being the *successful* tenderer.[108] The Commission's own threshold analysis shows that correcting for dumping would move WTC's Project 6 bid from a position outside the Commission's threshold (where it had no chance of being the successful tenderer) to within the Commission's threshold (where it had a real and valuable chance of being the successful tenderer).[109] Of course WTC did in fact bid against other parties in the tender; but that would always be a fruitless exercise given the substantial dumping that deprived WTC of the real and valuable chance of being the successful tenderer (as the Commission's threshold analysis amply shows).

[99] For the reasons in WTC submission of 10 November 2019 (confidential version) at section 7.d and Confidential Attachment 3.
[100] *Ministerial Direction on Injury 2012*.
[101] The purchaser in Project 6 had gone "off panel" to get WTC's bid, see TER 507 at page 86.
[102] WTC submission of 19 December 2019 at section 1.
[103] SEF 507 at page 86.
[104] SEF 507 at page 85.
[105] As the facts of Projects 1 – 8 show, see Figure 19.
[106] SEF 507 at page 86.
[107] TER 507 at page 98.
[108] The example given in the High Court case was being deprived of the opportunity of being the *successful* tenderer, see *Sellars v Adelaide Petroleum NL* [1994] HCA 4 at [11].
[109] TER 507 at section 8.4.2.

Substantial and material injury from losses of commercial opportunities illustrated

69. The following table illustrates on a *highly conservative basis* that there was substantial and material injury to WTC from the loss of commercial opportunities. The table uses the Commission's own threshold analysis and (to the extent discernible from TER 507) the likelihoods that may have been ascribed by the Commission to WTC winning the 8 projects considered in section 8.4.2 of TER 507; namely 25 per cent for projects the Commission considered WTC was unlikely to win and 50 per cent for projects where the Commission could not make a call on the outcome.

Project	**WTC within price threshold absent dumping?**	***Commission's* likelihood of WTC winning**[110]	**Size of project**	**Value of loss of commercial opportunity**
Project 1	Yes	25%	Medium	Material
Project 2	No		Small	No loss
Project 3	No		Small	No loss
Project 4	No		Medium	No loss
Project 5	Yes	25%	Medium	Material
Project 6	Yes	25%	Large	Substantial
Project 7	Yes	50%	Medium	Material
Project 8	Yes	50%	Large	Very substantial

70. Even on this highly conservative basis WTC submits that it is clear that losses for 5 of the 8 projects ranged from material to very substantial.

1.5 The Commission's injury assessment was narrow, myopic and static

71. WTC submits that the Commission's injury assessment was in any event unduly narrow, myopic and static.

72. In both SEF 507 and TER 507 the Commission proceeded on the overly narrow basis that it must definitively find that, absent dumping, WTC would have won a tender before it ascribed any injury to the dumping.[111] WTC submits that that can be cured at least in part by accounting for the loss of commercial opportunities described in section 1.5 of this document. But problems with the Commission's injury analysis do not end there.

[110] WTC considers that the Commission highly understates the likelihood of WTC winning projects in the absence of dumping for the reasons in WTC submission of 10 November 2019 (confidential version) at section 7.d and Confidential Attachment 3. For example, WTC estimates the likelihood of it winning Project 1 in the absence of dumping as 75 per cent.

[111] See SEF 507 and TER 507 section 8.4.2 generally and the analysis of Projects 1, 5. 6 and 8 in particular.

73. The Commission's narrow and myopic view of what constitutes injury in Investigation 507, at least for volume injury, is starkly illustrated at page 90 of TER 507:[112]

> The decision point, where any injury in the form of lost volumes are crystallised, is when a tender is evaluated and a winning party is chosen.

74. The Commission's injury assessment remained mired in the myopic and static view of what happens within individual tenders. The most extraordinary claim by the Commission in this respect concerned the fact that tenders are generally blind tenders (emphasis added):[113]

> The Commission notes from information gathered during the investigation that tenders in the power transformers market are generally blind tenders, and that purchasers are seeking bids from both local and Chinese manufacturers, as well as a range of other international suppliers. The Commission considers that it is a key feature of the process that suppliers may provide multiple revised bids, either voluntarily, or in response to purchaser prompting. The Commission considers that *the opaque nature of the tender process during the investigation period, as discussed in the section above, reduces the potential for a causal link between dumped prices, and the bids submitted by the Australian industry*. Consequently, the Commission does not find that dumping has caused injury in the form of price depression experienced during tender negotiations.

75. The Commission's position could be summarised as "what they didn't know couldn't hurt them". The position was clearly key to the Commission's views on causation with the Commission further elaborating that the Commission "found that the opaque nature of tenders in this industry means that *a bidder is unaware of its competitors at the time of bidding*"[114] and therefore the Commission "did not find a causal link between dumping and injury".[115] Responding to WTC's challenge on this point the Commission thought that a causal link would rather be found in "less opaque tender processes, and where participants are generally aware of their competitors' pricing and factor this into their own bids".[116]

76. The approach might be at home in an undergraduate text on game theory but it simply denies the commercial reality and the ability and practice of real-life suppliers such as WTC to learn about competitors' pricing, including pricing of dumped goods, *over time*. The information obtained by such learning may not be the perfect information of economic text book models but is broadly effective in the Australian market for PTs. That such learning is broadly effective is amply demonstrated by WTC's initial allegations that Chinese PTs were being dumped in the Australian market; as it turns out the Commission found dumping by half of the Chinese PT suppliers at margins of between 16 and 42 per cent;[117] if the Commission's assumption of WTC's myopia in tenders is correct then that was a remarkable guess.

77. There is nothing in the legislation that restricts causation to be so contemporaneous and so direct that injury can only occur by prices being lowered in response to prices submitted

[112] Unchanged from SEF 507, see page 83.
[113] TER 507 at page 101.
[114] TER 507 at page 103.
[115] TER 507 at page 104.
[116] TER 507 at page 104.
[117] TER 507 at page 6; WTC considers that dumping and non negligible levels of dumping are even more prevalent than the Commission found in TER 507 for the reasons set out in this application.

within the same tender. That restriction precludes, for example, the more realistic scenario where the Australian PT industry learns of low and dumped pricing through market intelligence during tenders, say, in 2016 and responds with injuriously low pricing during 2017 and 2018.

78. Such a restriction runs directly against the expressly broad matters to which the Commission may have regard in s 269TAE(1),[118] in particular s 269TAE(1)(g) which provides that the Commission may have regard to "any effect" on the relevant economic factors. The term "any effect" could clearly include lagged or delayed effects (such as are evident in the real world). The chapeau of s 269TAE(1) expressly provides that the broad matters to which the ADC may have regard should not limit the generality of the question of whether material injury has been caused to the Australian industry.

79. WTC submits that the Commission's narrow, myopic and static approach to injury causation cannot have been the correct or preferable approach.

2 The applicant's opinion of what the correct or preferable decisions ought to be

80. WTC's opinion of the correct and preferable decisions is that the Commission ought not to have terminated any part of Investigation 507.

81. Rather, the Commission ought to have continued the investigation, applying the statutory criterion in s 269TAA(1)(b) as it is written (see section 1.1 above), properly inquiring into whether transactions should not be treated as arms length under criterion b (see section 1.2 above), considering the Expert Evidence (see section 1.3 above), properly assessing WTC's loss of commercial opportunities (see section 1.4 above) and approaching the assessment of injury in a manner that was not narrow, myopic and static (see section 1.5 above).

82. WTC submits that the termination decisions ought to be revoked.

3 How the grounds raised support the making of the proposed correct or preferable decisions

83. If the Commission had continued the investigation, applying the statutory criterion in s 269TAA(1)(b) as it is written (see section 1.1 above), properly investigating whether transactions should be treated as arms length under criterion b (see section 1.2 above) and considering the Expert Evidence (see section 1.3 above) then it is likely that:

    a. The Commission would not have treated transactions between related entities of multinational PT suppliers as arms length as required under s 269TAA(1) and so would have calculated deductive export prices under s 269TAB(1)(b) or s 269TAB(1)(c).[119]

    b. Deductive export prices would have resulted in materially different dumping margins to those proposed in TER 507; the dumping margins calculated using

[118] In particular s 269TAE(1)(g)

[119] WTC submission of 26 November 2019 at section 4.

deductive export prices would likely be higher than those proposed in TER 507 and multinational PT suppliers not previously found to be dumping or found to be dumping at negligible levels may then have been found to have been dumping or found to be dumping at non negligible levels.[120]

c. Materially different, and higher, dumping margins and more exporters found to have been dumping and dumping at non negligible levels would have resulted in materially different findings regarding the materiality and causation of injury.[121]

84. If the Commission had continued the investigation, properly assessing the injury to WTC arising from the loss of commercial opportunities (see section 1.4 above) and taking an approach that was not narrow, myopic and static (see section 1.5 above) then it is likely that:

a. The Commission would have found that material injury was caused by dumped PTs from China.[122]

Sincerely

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[120] WTC submission of 26 November 2019 at section 5.
[121] WTC submission of 26 November 2019 at section 6.
[122] WTC submission of 26 November 2019 at section 4.