PUBLIC

Australian Government
Anti-Dumping Review Panel

ADRP Decision No. 122A

Reconsideration of Power Transformers exported from the People's Republic of China by ABB Chongqing Transformers Co Ltd, Siemens Transformers (Jinan) Co Ltd and Siemens Transformers (Wuhan) Co Ltd.

July 2022

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
ABB Chongqing	ABB Chongqing Transformer Co., Ltd
Act	*Customs Act 1901*
ADA	World Trade Organization Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
ADRP 122/123	Anti-Dumping Review Panel Report No 122 and 123 Power Transformers exported from the People's Republic of China made on 18 May 2020
ATO	Australian Taxation Office
China	The People's Republic of China
Commissioner	The Commissioner of the Anti-Dumping Commission
First Full Court Judgment	Federal Court of Australia: *Wilson Transformer Company v Anti-Dumping Review Panel* [2022] FCAFC 4 Griffiths, O'Callaghan and Thawley JJ.
Frontier Report	The report of Frontier Economics Report dated 18 May 2022.
The Full Court	Full Court of the Federal Court of Australia
Goods	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.
Manual	Dumping and Subsidy Manual December 2021
Minister	Minister for Industry and Science.
MVA	Megavolt ampere
Primary Judgment	*Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel* (No 2) [2021] FCA 591 Kerr, J.

Power Transformers	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.
TER 507	The termination report published by the Commission in relation to Investigation 507 and dated 31 January 2020
Review applications	The applications for review of the decisions dated 28 February 2020
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Commissioner made on 31 January 2020 to terminate the investigation pursuant to s.269TDA(1) in relation to the dumping of power transformers exported from China by ABB Chongqing Transformer Co., Ltd, Siemens Transformer (Jinan) Co., Ltd and Siemens Transformer (Wuhan) Co., Ltd (ADN 2020/010)
SEF 507	Statement of Essential Facts No. 507
Second Full Court Judgment	Federal Court of Australia: *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel* (No 2) [2022] FCAFC 30 Griffiths, O'Callaghan and Thawley JJ.
Siemens Jinan	Siemens Transformer (Jinan) Co., Ltd
Siemens Wuhan	Siemens Transformer (Wuhan) Co., Ltd
TPS Report	The report of Transfer Pricing Solutions dated 20 January 2020.
Wilson	Wilson Transformer Company Pty Ltd, the applicant and Australian industry

Summary

1. Wilson Transformer Company Pty Ltd (Wilson) an Australian industry, lodged an application for an investigation into the alleged dumping of power transformers exported from the People's Republic of China (China) in 2019 with the Anti-Dumping Commission (ADC). Following the termination of the investigation (Investigation 507) by the ADC, Wilson lodged an application for the review of this decision with the Anti-Dumping Review Panel (Review Panel).

2. The Review Panel conducted a review and on 18 May 2020 decided, pursuant to s.269ZZT of the Act, to affirm the termination decision in relation to certain exporters from China and revoke the decision for 'other exporters' from China.[1] The report dealing with the Review Panel's decision is ADRP Report No 122 and 123 (ADRP 122/123). Wilson made an application to the Federal Court of Australia in response to the Review Panel's decision affirming the decision of the Commissioner of the Anti-Dumping Commission (the Commissioner) to terminate its investigation. A summary of the court proceedings is at paragraph 21.

3. This report, REP 122A, is a review of the decision of the Commissioner made on 31 January 2020 to terminate the investigation pursuant to s.269TDA(1) in relation to the dumping of power transformers exported from China by ABB Chongqing Transformer Co., Ltd (ABB Chongqing), Siemens Transformer (Jinan) Co., Ltd (Siemens Jinan) and Siemens Transformer (Wuhan) Co., Ltd (Siemens Wuhan) (ADN 2020/010) (the Reviewable Decision). It has been prepared following the decision of the Full Federal Court dated 8 March 2022 which set aside the Review Panel's decision of 18 May 2020 relating to certain power transformers in so far as it relates to exports by ABB Chongqing, Siemens Jinan and Siemens Wuhan from China. The Court ordered that the matter be remitted back to the Review Panel for reconsideration in accordance with law.

4. The Review Panel has reconsidered the Reviewable Decision in relation to certain exporters the subject of the remittal by the Full Court. Wilson has not established

[1] The ADC recommenced its investigation in relation to the 'revoked decision' (referred to as Investigation 507A) and at the time of writing this report, this investigation has not been finalised. The ADC report relating to ADC Investigation 507A is due with the Minister on or before 20 September 2022.

that the Commissioner erred in the determination of the export price pursuant to s.269TAB(1)(a) of the Act for the three exporters referred to in paragraph 3. For the reasons set out in this report, pursuant to s.269ZZT of the Act, I affirm the Reviewable Decision to terminate the investigation under s.269TDA(1) of the Act in respect of ABB Chongqing, Siemens Jinan and Siemens Wuhan in relation to the export of power transformers from China.

Introduction

5. On 21 January 2022, the Full Court, the majority (Griffiths and O'Callaghan JJ) made orders dismissing the three grounds of appeal: referred to as the First Full Court Judgment.[2] On 8 March 2022, the Full Court set aside its orders of 21 January and replaced it with other orders and supplementary reasons: referred to as the Second Full Court Judgment. The reasons outlined referred to ground 3 of the appeal and indicated there had been a denial of procedural fairness to Wilson.[3]

6. On 31 March 2022, the Full Court set aside the decision of the Review Panel made on 18 May 2020 in so far as it related to power transformers exported by ABB Chongqing, Siemens Jinan and Siemens Wuhan from China. The Full Court ordered that the matter be remitted back to the Review Panel for reconsideration in accordance with law.[4]

7. The Full Court determined that Wilson was denied procedural fairness by not being given the opportunity to consider the non-confidential summary of the 8 May 2020 conference held between the Review Panel and the ADC prior to the Review Panel finalising its decision on the review on 18 May 2020.

8. On 4 March 2020, the Senior Panel Member had directed that Mr Scott Ellis constitute the Review Panel for this review.

[2] Federal Court of Australia, *Wilson Transformer Company v Anti-Dumping Review Panel* [2022] FCAFC 4.
[3] Federal Court of Australia, *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel* (No 2) [2022] FCAFC 30 Griffiths, O'Callaghan and Thawley JJ.
[4] Federal Court of Australia, *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel* (No 2) [2022] FCAFC 30 Griffiths, O'Callaghan and Thawley JJ.

9. On 11 April 2022, the Review Panel recommenced its review of the Reviewable Decision and referred to the Full Court's decision.

10. On 19 April 2022, the Review Panel (constituting Mr Ellis) corresponded with Wilson indicating that a conference could be convened for the purposes of Wilson providing information in response to the substance of the 8 May 2020 conference. From 3 May 2022, Mr Ellis ceased to be a member of the Review Panel.

11. On 3 May 2022, pursuant to s.269ZYB(2) of the Act, the Senior Member of the Review Panel directed that the Review Panel be constituted by me.

12. On 5 May 2022, a notice was published on the Review Panel's website indicating that I would be conducting the review. This notice indicated that the reconsideration would be conducted in accordance with the Review Panel's powers as outlined in division 9 of Part XVB of the Act and the intention was to publish a decision within 60 days of the notice. A letter was also sent to Wilson indicating that a conference would be convened as referred to in the earlier letter sent by the Review Panel (paragraph 10 refers).

Background

13. Wilson lodged the original application for an investigation into the alleged dumping of power transformers exported from China in 2019 with the ADC.

14. The goods the subject of this matter (and referred to as power transformers or the goods in this report) 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. Gas filled and dry type power transformers are not included. The goods are generally classified to the following tariff subheadings and statistical codes in Schedule 3 to the Customs Tariff Act 1995:*
>
> - *8504.22.00: 40; and*
> - *8504.23.00: 26 and 41.*

15. The investigation period for Investigation 507 was 1 January 2016 to 31 December 2018. The injury analysis period was from 1 January 2014.

16. The ADC published a statement of essential facts on 17 October 2019 (SEF 507).

17. On 31 January 2020, the Commissioner published a termination report (TER 507) which set out the investigations and finding of facts underpinning the decisions. The Commissioner must terminate an investigation if dumping margins or countervailable subsidisation are negligible; negligible volumes of dumping or countervailable subsidisation are found; or the export causes negligible injury.[5]

18. Following the termination of Investigation 507 by the ADC, Wilson lodged two applications, pursuant to s.269ZZO of the Act for the review of the decisions with the Review Panel. This included the decisions under s.269TDA(1) of the Act for certain exporters and the other related to s.269TDA(13) for 'other exporters'. The Review Panel initiated its review on 18 March 2020 and dealt with both reviews in ADRP 122/123.

19. The Review Panel held a conference with representatives of the ADC on 8 May 2020 pursuant to s.269ZZRA for the purpose of obtaining further information in relation to the application for review. The non-confidential summary of this conference was published on 25 May 2020.

20. The Review Panel conducted its review and on 18 May 2020 decided, pursuant to s.269ZZT of the Act,[6] to:

    - terminate the Investigation in respect of goods exported by ABB Chongqing Transformer Co., Ltd (ABB Chongqing) and Siemens Transformer (Jinan) Co., Ltd (Siemens (Jinan)) under s 269TDA(1) and affirm it was the correct or preferable decision;

    - terminate the investigation in respect of goods exported by ABB Zhongshan Transformer Co., Ltd (ABB Zhongshan) and Siemens Transformer (Wuhan) Co., Ltd (Siemens (Wuhan)) under s 269TDA(1) because the dumping

[5] Section 269TDA.
[6] This decision was published on the Review Panel's website on 22 May 2020.

margin was less than 2% and affirm it was the correct or preferable decision; and

- revoke the termination decision in respect of the goods exported from China by all other exporters under s.269TDA(13) as this decision was not the correct or preferable decision. The ADC recommenced its investigation (referred to as Investigation 507A) and at the time of writing this report, this has not been finalised.[7]

21. Wilson appealed the Review Panel's decision to the Federal Court. The following table provides a summary of the judicial proceedings relating to this matter.

Reference No	Dates	Summary	Court reference
VID409/2020	4 June 2021	Single Judgment: application dismissed (referred to as Primary Judgment)	FCA 591
VID365/2021	21 January 2022	Appeal dismissed (referred to as First Full Court Judgment)	FCAFC 4
VID365/2021	8 March 2022	First Full Court orders set aside and supplementary reasons given (referred to as Second Full Court Judgment)	FCAFC 30
VID365/2021	28 March 2022	Orders (updated on 31 March 2022) and costs	FCAFC 46

[7] ADC Investigation 507A report to the Minister has been delayed – see the EPR record for 507A.

VID365/2021	31 March 2022	Orders from 28 March 2022 updated as follows: the Review Panel's decision dated 18 May 2020 be set aside in so far as it relates to ABB Chongqing, Siemens Jinan and Siemens Wuhan.	

Conduct of the Review

22. In accordance with s.269ZZT of the Act, if the application is not rejected under ss.269ZZQA, 269ZZR or 269ZZRA, the Review Panel must either affirm the reviewable decision or revoke it. If a decision is revoked, the Commissioner must publish a statement of essential facts (SEF) as soon as practicable, after which the investigation of the application will resume pursuant to s.269ZZT. This decision takes effect as if it were a decision made by the Commissioner.[8]

23. In undertaking the review, s.269ZZT(4) of the Act requires the Review Panel to only take into account information that was before the Commissioner when the Commissioner made the Reviewable Decision, subject to certain exceptions.[9]

24. If a conference is held under s.269ZZRA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the information that was before the Commissioner, and to conclusions based on that information.[10]

25. On 6 May 2022, the Review Panel wrote to Wilson referring to the earlier letter sent to Wilson on 19 April 2022 (see paragraph 12), indicating that a conference could be convened for the purposes of Wilson providing information in response to the

[8] Section 269ZZV.
[9] See ss.269ZZRA(2) and ZZRB(2).
[10] Section 269ZZRA(2).

substance of 8 May 2020 conference. Wilson agreed to the conference being held on 20 May 2022.

26. A conference was held pursuant to s.269ZZRA of the Act with Wilson representatives and the ADC on 20 May 2022. Wilson presented further information in relation to whether the transactions by certain exporters were arms length (s.269TAA(1) of the Act) and referred to the recent full court judgments, particularly to the minority judgment of Thawley, J. A copy of the conference summary is at Attachment One.

27. In conducting this review, I have had regard to:

    - TER 507 and information created during the investigation, including verification reports, submissions, exporter and importer questionnaires;
    - Investigation 219 in so far as it is referred to in one of the importer verification reports (referred to in TER 507);
    - The application for review and its attachments;
    - ADRP 122/123, including information referred to in that Report;
    - Further information obtained at conferences subject to s.269ZZRA(2) of the Act, including references to transfer pricing and two reports commissioned by Wilson; and
    - Federal Court judgments in relation to this matter.

28. On 11 May 2022, Siemens Energy Pty Ltd (Siemens) wrote to the Review Panel requesting information as to whether conferences would be held by the Review Panel, and if so, seeking a conference. The Review Panel directed Siemens to the notice published on 5 May 2022 and, in particular to s.269ZZT of the Act. Siemens responded on 12 May 2022 requesting that any conference summary be placed on the Review Panel's website in a timely manner.

29. On 14 June 2022, Siemens Wuhan and Siemens Jinan submitted a "responsive submission" to the Review Panel regarding the conference held with Wilson, the

ADC and Review Panel on 20 May 2022 (conference summary published on 2 June 2022 on the Review Panel's website).

30. On 28 June 2022, Hitachi Energy Australia Pty Ltd submitted a letter to the Review Panel regarding the conference referred to in the previous paragraph.

31. There is no power for the Review Panel to accept written submissions in a termination review conducted pursuant to Subdivision C of Division 9 of Part XVB of the Act. I therefore did not have regard to the letters referred to in paragraphs 29 and 30 and did not place these letters on the public record.[11]

32. As the Reviewable Decision has been set aside as it relates to the exporters, ABB Chongqing, Siemens Jinan and Siemens Wuhan, it is appropriate to re-consider Wilson's original ground as outlined in its application to the Review Panel in relation to these exporters.

33. I also consider it is worth repeating the words of the former Senior Member of the Review Panel (The Hon Michael Moore) as to the role, scope and powers of the Review Panel: as discussed in an earlier Power Transformers review.[12] They provide an outline of the approach adopted in this reconsideration of the reviewable decision:

> *Rather the Panel's role includes, by way of illustration, assessing whether there has been inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Act or relevant regulations.*
>
> *The Panel's powers to revoke or recommend the revocation of a number of types of reviewable decisions only arises if the reviewable decision was either not the correct decision (when there has been a decision which does not involve the exercise of a discretion) or, alternatively, not the preferable decision (when there has been a decision involving the exercise of a discretion). It is tolerably clear this is the statutory test having regard to the obligation (at various points in*

[11] Pursuant to s.269ZZX of the Act.
[12] Extract from ADRP Report No. 24 – Power Transformers – Former Senior Panel Member of the Anti-Dumping Review Panel, Michael Moore.

Division 9 of Part XVB) on an applicant for review to identify in the application reasons for believing that the decision was not the correct or preferable decision and the power of the Panel to reject an application if this is not done. (my emphasis).

Ground of Review

34. The ground of review relied upon by Wilson, which the Review Panel accepted and published in the s.269ZZRC Notice dated 18 March 2020 is:

> The Commissioner should have determined the export price of the goods by reference to s.269TAB(1)(b) or s.269TAB(1)(c). He failed to apply s.269TAA(1)(b), failed to properly investigate whether transactions were arms length transactions within s.269TAA(1) and failed to consider evidence that the transactions were not arms length transactions.

35. This review relates only to the following exporters, ABB Chongqing, Siemens Jinan and Siemens Wuhan as included in the Court orders dated 31 March 2022.[13]

Consideration of Ground

Claims

36. Wilson contends that the export sales of goods between ABB Chongqing, Siemens Jinan and Siemens Wuhan and its related Australian importers were not arms length transactions given s.269TAA(1)(b) of the Act. It claims that the export price should not have been determined under s.269TAB(1)(a) of the Act.

37. Wilson further claims that due to the incorrect determination of the export price, the dumping margin was incorrect which led to the Commissioner terminating the inquiry pursuant to s.269TDA(1) of the Act.

38. Wilson proposes that:

[13] Wilson Transformer v Anti-Dumping Review Panel Orders dated 31 March 2022 varying the orders dated 28 March 2022 Wilson Transformers Company Pty Ltd No 3. [2022] FCAFC 46.

- the ADC failed to apply s.269TAA(1) of the Act correctly and "… applied a test of whether transactions were arms length transactions in fact." It proposes that s.269TAA(1) imposes a duty not to treat transactions as arms length when the criteria of s.269TAA(1) are met;

- the ADC was required pursuant to s.269TAA(1)(b) to consider whether the price "appears" to be influenced by the relationship between the parties and failed to correctly consider this criterion;

- 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' meets the terms of s.269TAA(1)(b) of the Act";[14] and

- the word 'appears' means 'an appearance, seem or look' and that the relationships of the exporters in question meets this threshold. It refers to other investigations undertaken by the ADC that have correctly applied the test required in s.269TAA(1) of the Act and questions why this approach was not adopted in TER 507. Wilson also claims that the ADC should have had regard to the evidence that transactions between the subsidiaries of multinational power transformer suppliers would fall within the words of s.269TAA(1)(b) of the Act.

39. Wilson refers to the information contained in two reports it had commissioned regarding pricing between related entities and arms length prices in support of its claims. The two reports were:

    - Transfer Pricing Solutions (TPS Report) dated 20 January 2020;[15] and

[14] Wilson's review application, Attachment 2 pages 4 to 9.

[15] The TPS Report was not considered by the ADC in TER 507. It was provided to the ADC more than 20 days after SEF 507 was published. The Commissioner is not obliged to have regard to that submission if in his opinion it would delay the preparation of the report to the Minister (vide s.269TEA(4) of the Act). In REP 122/123, the Review Panel indicated that the TPS Report was considered and commented that it did not consider it assisted Wilson. It did not make a final view of whether regard could be had to the report. It was referred to in the conference held with Wilson and

- Frontier Economics Report (Frontier Report) dated 18 May 2022.[16]

Findings in TER 507

40. Wilson made submissions to the ADC in Investigation 507 regarding whether the export transactions of the three exporters the subject of this reconsideration should be treated as arms length transactions along similar arguments as those presented to the Review Panel.

41. The ADC outlined its approach regarding whether for the purposes of s.269TAB(1)(a) of the Act the transactions should be considered arms length.

42. The ADC stated that:

    - Even if none of the circumstances in s.269TAA are found to exist, the ADC may still examine whether there has been genuine bargaining between the parties; and

    - Related parties are assessed as to whether they are engaged in arms length transactions by consideration of whether they deal with each other as parties at arms length and whether the outcome is the result of real bargaining;

> *The Commission considers that section 269TAA does not exhaustively set out the criteria for determining whether a transaction is, or is not, 'arms length'. Even if none of the circumstances in section 269TAA exist, the Commission may still examine the relevant information in order to determine whether there has been genuine bargain between buyer and seller.*
>
> *In practical terms, the mere fact that parties are legally associated is not taken to automatically mean that they cannot be engaged in 'arms length' transactions. In assessing whether*

the ADC on 20 May 2022 as it was commented on in the Primary Judgment and the Full Court judgments.

[16] Frontier Report titled 'Arms length prices' presented as further information pursuant to s.269ZZRA of the Act to the Review Panel at the conference held with Wilson and the ADC on 20 May 2022.

transactions between related parties comprise 'arms length' transactions, the Commission looks beyond the legal or functional relationship. It will determine whether the parties deal with each other as parties at 'arms length' would, and whether the outcomes are the result of real bargaining.

Based on these considerations, whether a transaction is an 'arms length' transaction is a matter of fact to be determined having regard to all the circumstances of the sale in question…[17]

(I note that the Review Panel in ADRP 122/123 commented as follows 'The Commissioner's discretion under s.269TAA(1)(b) is more limited than this passage contemplates. Section 269TAA provides criteria which, if established, lead to the conclusion that a transaction was not an arms length transaction. If the criterion set out in s.269TAA(1)(b) is satisfied, the transaction is not an arms length transaction. The Commissioner has no residual discretion to treat such a transaction as an arms length transaction.'[18] I agree with this observation).

- The Commissioner assessed the information from the Responses to Exporter Questionnaires and Responses to Importer Questionnaires and undertook verification visits to a number of the importers and exporters. One importer's data was verified during Investigation 219 and the ADC remained satisfied that the findings remained relevant;

- It disagreed with Wilson's observations as to whether it had failed to apply any statutory test with respect to the arms length nature of the transaction. In particular, it disagrees with the proposition that the ADC should not look behind the appearance of the transactions;

- It noted that it had not been able to compare prices of related party transactions with prices of non-related parties as in this matter no such sales existed. It had sought detailed information from the relevant parties to inform

[17] TER 507 Section 6.3.
[18] ADRP 122/123 paragraph 39, page 12.

its consideration of whether the transactions could be considered arms length for the purposes of export price determination;

- Had given consideration to all the circumstances of the transactions on the available evidence;

- It rejected the argument that related corporate entities are incapable of engaging in 'arms length' transactions, solely on the nature of the relationship; and

- It considered that the transactions in question should be considered 'arms length' for the purpose of export price determination.

Previous Review Panel Finding (ADRP 122/123)

43. While the Review Panel is considering the Reviewable Decision 'afresh', and after considering all the information identified at paragraph 27 above, I have extracted comments from ADRP 122/123 with which I agree and consider relevant. For convenience, they are shown here:

    - Pursuant to s.269TAA(1)(b) "…the Commissioner must treat a transaction as falling within s.269TAA(1)(b) if it merely 'appears' that the price is influenced by the relationship. The reference to 'appears' in s.269TAA(1) imports a lower standard than would be necessary if the Commissioner was required to be satisfied that, in fact, price was not influenced by the parties' relationship".

    - "The Commissioner must still act on all the information available to him. If there is some information which gives the appearance of influence and other evidence which establishes that, in fact, the prices were not influenced by the relationship between the parties, the Commissioner is entitled, and indeed obliged, to act on all the information available to him. This is consistent with paragraph 22 of the Explanatory Memorandum. The Minister or Commissioner is to reach a conclusion based on what (all) the available information suggests. Conversely, if there is no evidence from which it 'appears' that the price was influenced by the relationship, the Commissioner may treat the transaction as an arms length transaction".

- The TPS Report did not provide a basis for concluding that the prices 'appeared' to be influenced by the related party export transactions.

- Opined that "I accept that relationships between the exporters and importers provides an opportunity for the price to be influenced and that this might well lead the Commissioner to scrutinise the transactions more carefully than transactions between unrelated parties. It must be borne in mind, however, that the opportunity and the capacity to influence the price, is not the same thing as actually influencing the price. It does not follow that the appearance of influence, such as that which might exist between related exporters and importers, creates the appearance that the influence has been exercised". (my emphasis).

- Noted that "… importers did not purchase the goods on their own account, in the hope that customers would approach them for a power transformer. Power transformers are bespoke products. This background would inform the commercial relationship between exporters and importers who were not members of the same corporate group".

- Noted the inquiries undertaken and confidential documents obtained by the ADC regarding the transactions between the exporters and importers. It outlined at paragraph 53 of ADRP 122/123 specific confidential information considered by the ADC as evidence relevant to the nature of the transactions.

- Considered that "Although the conclusions in the various verification reports were expressed in terms of a lack of evidence to persuade the Commissioner that the export prices were in fact influenced by the relationship between the exporter and importer, the evidence also supports the conclusion that the prices did not *appear* to be influenced by the relationship of the parties". (my emphasis).

- Considered that the Commissioner's conclusion in relation to whether the export sales were arms length transactions within s.269TAA(1) was correct.

Legislation

44. The relevant provision dealing with export price is s.269TAB:

(1) For the purposes of this Part, the export price of any goods exported to Australia is:

(a) Where:

(i) the goods have been exported to Australian otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

(ii) the purchase of the goods by the importer was an arms length transaction;

the price paid or payable for the goods by the importer, other than any part of the price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation; or

(b) Where:

(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

(ii) the purchase of the goods by the importer was not an arms length transaction; and

(iii) the goods are subsequently sold by the importer, in the condition in which they were imported, to a person who is not an associate of the importer;

the price at which the goods were so sold by the importer to that person less the prescribed deductions; or

(c) *in any other case — the price that the Minister determines having regard to all the circumstances of the exportation (my emphasis).*

45. Section 269TAA outlines the provisions associated with the sale or purchase of goods not being treated as arms length transactions. Section 269TAA (1) of the Act (dealing with arms-length transactions) provides that:

> *(1) 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, compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price (my emphasis).*

46. Article 2.3 of the Anti-Dumping Agreement (ADA), the source of the legislative provisions dealing with arms-length transactions and export price states:[19]

> *In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.* (my emphasis).

47. The Explanatory Memorandum for the *Customs Amendment (Anti-Dumping Measures) Bill 2013* (Explanatory Memorandum) inserted the word 'appears' in s.269TAA(1)(b) of the Act. The passage from the Explanatory Memorandum dealing with s.269TAA(1) reads:

[19] World Trade Organization Anti-Dumping Agreement, Article 2.3.

19 *Sub section 269TAA(1)(c), operating with sub-section 269TAA(2), allows 'sales at a loss' to not be treated as arms length transactions during an investigation or a review.*

20 *Subsection 269TAA(1)(b) specifies that where 'the price is influenced' by a relationship between the buyer and seller, it shall not be treated as an arms length transaction. This section can be used to address a range of circumstances where a relationship between the parties affects the price paid or payable for goods.*

21 *Article 2.3 of the Anti-Dumping Agreement sets out procedures for establishing an export price where there is no export price or the export price appears unreliable to the authorities concerned. Specifically Article 2.3 provides that "where it appears" an export price is unreliable because of an association or compensatory arrangement between the parties, an export price may be established by specified alternative means.*

22 *By including the phrase 'the price appears to be' in paragraph 269TAA(1)(b) the Customs Act is better aligned with the Anti-Dumping Agreement, and recognises that the evidence that authorities may have available in an investigative process may not be entirely conclusive as to the effect of a relationship on a price, and instead allows a reasoned and objective approach to such an issue based on what the available information suggests (my emphasis).*

Conference

48. As referred to in paragraph 3 the Second Full Federal Court judgment found that Wilson had been denied procedural fairness in not having had an opportunity to respond to the non-confidential conference summary of the conference held between the Review Panel and the ADC on 8 May 2020.[20]

49. The Review Panel convened a conference with Wilson and the ADC on 20 May 2022 for the purpose of providing Wilson with the opportunity to address the

[20] Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel No 2 [2022] FCAFC 30.

substance of that conference noting that the relevant provisions of s.269ZZRA applied.

50. Outlined below is a summary of the information Wilson referred to at the conference held on 20 May 2022:

- The approach adopted by the ADC (TER 507) and the Review Panel (REP 122/123) in relation to the consideration of arms length transactions under s.269TAA(1)(b) of the Act is incorrect and misunderstands the approach that should be adopted in related parties transactions, it provided its reasons in this regard;

- Wilson considers that the correct approach to arms length transactions and related parties transaction of entities within a multinational group is reflected in the minority judgment of Thawley, J. in both the First Full Court and the Second Full Court judgments. It referred the Review Panel to a series of paragraphs (from the First Full Court judgment) that it considered demonstrated the correct interpretation of related party transactions and the incorrect approach adopted by the ADC and the Review Panel;

- That "… the ADC and the Review Panel had taken the wrong approach by assuming that "within-group" prices are arms length and only looking for evidence that suggested otherwise";

- It proposed that "… there was no evidence of self-interested bargaining of prices between the related parties' and that the transactions should be treated as 'inter-group' transfer prices";

- It referred to the information provided in the TPS Report as evidence "… the prices between the related entities of the multinational suppliers of power transformers listed in appendix one would be influenced by their commercial, structural, and other relationships within the entities";[21]

[21] TPS report dated 20 January 2020.

- It referred to paragraph 27 of the majority decision in the Second Full Court judgement which indicated that Wilson could have provided a response if it had been informed of the non-confidential summary of the conference held between the Review Panel and the ADC on 8 May 2020;

- That it had obtained additional expert economic evidence from the Frontier Report regarding arms length prices. This report considered the question (using a scenario) of whether "the existence of group guidelines enable transactions between the parent company of a global corporation and the Australian subsidiary enable such prices to be characterised as arms length prices". The answer provided indicated 'no'. It also outlined a range of assumptions that would need to be made to consider such transactions arms length. This report also explores in general terms the assumptions that would be necessary to support a conclusion of prices of within-group transactions are market or arms length and it referred to the OECD guidelines for estimating arms length prices;[22] and

- It commented on the brevity of the non-confidential conference summary of the 8 May 2020.

Analysis

51. Section 269TAB(1)(a) of the Act provides that the export price of the goods exported to Australia is based on the price paid or payable by the importer to the exporter at the free on board level in arms length transactions provided the importer did not export the goods to Australia. Where elements of s.269TAB(1)(a) are not met the export price is to be determined under s.269TAB(1)(b) or s.269TAB(1)(c) (paragraph 44 refers).

52. Whether the sales are arms length transactions is a key element of determining the export price. Arms length transactions are not defined in the Act, however s.269TAA(1) outlines the circumstances where the purchase or sale of goods shall not be treated as arms length (paragraph 45 refers).

[22] Frontier Economics Report, paragraph 26, page 9.

53. Wilson's claim centres on whether the Commissioner (and the Review Panel) correctly considered whether the prices of ABB Chongqing, Siemens Jinan and Siemens Wuhan to its related importers met s.269TAA(1)(b). That is, whether the '… *price appears to be influenced by a commercial or other relationship…'* given that each of the importers purchased the goods from related exporters.

54. Wilson refers to information from the TPS and Frontier Reports on transfer pricing and arms length pricing in the context of multinational corporate operations. It suggests that this information supports the fact that in circumstances where a multinational has 'within-group' internal policies and procedures that guide the subsidiaries as to how the organisation operates, including such matters as the pricing approach and how transfer pricing should occur, this is sufficient evidence to satisfy the wording of s.269TAA(1)(b) that the price appears to be influenced by the relationship. Both reports are descriptive and include information such as:

    - general arrangements regarding the operations of multinational organisations,
    - transfer pricing arrangements,
    - economic principles associated with markets and arms length pricing,
    - profit maximisation, and
    - the OECD guidelines on the different methods recommended to estimate arms length prices.[23]

55. It is common practice for multinational groups to have influence over the operations of its subsidiaries, including having policies and practices to ensure that the legal entities in different jurisdictions do not contravene transfer pricing obligations of various jurisdictions in which operations are conducted. However, this does not of itself infer that 'within-group' transactions are not arms length. Wilson considers the information it supplied is evidence that the prices between related parties appears influenced. I do not agree with its claims in this regard.

[23] Non-confidential conference summary dated 20 May 2022 held with Wilson, ADC and Review Panel.

56. In a recent Review Panel decision (REP 138), the Review Panel considered transfer pricing arrangements between a related exporter and importer and whether this required a terms of trade adjustment to enable a fair comparison of the export price and normal value. It was apparent in that case that the process of establishing a 'market-based price' in sales between related corporate entities was designed to replicate what would happen in 'normal' market-place' price setting.[24] The transactions were considered arms length.

57. That report included reference to transfer pricing arrangements. The Review Panel observed that there are clear rules established in most jurisdictions, generally for taxation purposes, to enable businesses in related party international dealings to price in a manner that would be expected from independent parties in the same situation.[25] The international transfer pricing arrangements as outlined by the Australian Taxation Office (ATO) provides guidance as to how related parties ensure that the correct taxation is paid in its jurisdiction and that the arm's length principle is applied to transactions. These types of principles are supported generally by OECD countries.

58. While the ATO does not prescribe the particular methodology to achieve an arms length transaction, it suggests that:

> *… a reasonable business person would seek to:*
>
> - *Maximise the price received for supplying property or services, taking into account their business strategy, economic and market circumstances, and minimise the costs associated with acquiring property or services; and*
>
> - *Be adequately rewarded for any activities carried out*.[26]

59. As indicated above, transfer pricing rules provide guidance as to how to ensure that related party prices are at a level that reflects the arms length principle. Transfer

[24] ADRP Report 138 A4 Copy Paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia (except by PT. Indah Kiat Pulp & Paper Tbk, PT. Pabrik Kertas Tjiwi Kimia Tbk and PT. Pindo Deli Pulp & Paper Mills) and the Kingdom of Thailand.
[25] ATO International Transfer Price Concept and Risk Assessment, ATO website.
[26] ATO Arms Length Methodologies ATO website.

prices of themselves are not an issue, it is whether the transfer price is reflective of an arms length transaction. Furthermore, while there are similarities between transfer pricing and the consideration of arms length export price, there are also differences. In many circumstances, multinational organisations go to significant lengths to ensure that its transfer prices are reflective of the principles of market-based negotiations.

60. However, in my view the references to transfer pricing alone do not necessarily assist in the consideration of whether a transaction is not arms length for the purposes of export price. I considered the issue of transfer prices in some depth, given the reliance Wilson placed on it at the conference held on 20 May 2022.

61. In my opinion, the consideration of 'the price appears to be influenced' is more nuanced than the approach contemplated by Wilson in its claims regarding transfer pricing. I consider that Wilson may have conflated the principles associated with arms length prices in transfer pricing arrangements from a taxation perspective with arms length transactions in export price determination under the anti-dumping provisions. Wilson appears to be suggesting that a 'transfer price' due to the relationship between the parties must be treated as non-arms length as the price appears to be influenced. I do not agree with this claim as all the evidence must be considered in the assessment of whether the price appears to be influenced. Furthermore, I note that s.269TAB(5) of the Act specifically recognises that importers and exporters can be associates and that an export price, pursuant to s.269TAB(1)(a) or (b), can be based on a purchase transaction between associates. This supports the concept that arms length transactions for the purposes of s.269TAB(1)(a) of the Act may occur between related parties.

62. While the TPS and Frontier Reports presented by Wilson are of interest, they are not specific to the particular circumstances of the exporters and importers in this review, given neither take into account the confidential evidence considered by the ADC in its anti-dumping investigation referred to in TER 507. I agree with the comments expressed by the Review Panel in ADRP 122/123 in relation to the TPS Report that 'I am not, therefore, persuaded that ...[it] provides a basis for concluding that the prices 'appeared' to be influenced by the relationships between exporters

and importers in this case within s.269TAA(1)(b).'[27] This conclusion equally applies to the Frontier Report.

63. Wilson's claim that the price "appears to be influenced" was considered in the Primary Judgment in this matter.[28] I note that Kerr, J. referred to *Project Blue Sky Inc v Australian Broadcasting Authority [1988] HCA 28* at [69] and stated that:

> '… *primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute*.'
>
> and
>
> *A construction of s.269TAA(1)(b) as would require an anti-dumping investigation to continue notwithstanding that the Commissioner (and the Panel on review) had been satisfied that the related parties had priced their products for sale in Australia in a genuinely commercial basis would require pointless investigation to continue into a matrix of facts the complete antithesis of what is inherently the vice of dumping. There is nothing in the text of the provision itself to suggest that such an implausible construction is required.* [29]

The Primary Judgment concludes that s.269TAA(1)(b) should be read in the context of the purpose of the statute as well as the intent of the provision. This judgment did not agree with the position advocated by Wilson.

64. Further support on the interpretation of s.269TAA(1)(b) can be found in the text of the Explanatory Memorandum that amended the provision to include the words 'appears to' after price: see paragraph 47. This amendment was to reflect Article 2.3 of the ADA regarding *where it appears to the authorities concerned that the <u>export price is unreliable</u> because of association or a compensatory arrangement between the exporter and the importer.* The Explanatory Memorandum also referred to the need to adopt the following '… a reasoned and objective approach to such an issue

[27] ADRP 122/123 paragraph 48.
[28] Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2021] FCA 591 Kerr, J.
[29] Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2021] FCA 591, paragraphs 75 and 76.

based on what the available information suggests'. I have examined the evidence considered by the ADC and agree with the approach it has adopted of considering all the evidence regarding the transactions. A summary of which is outlined at paragraph 42.

65. I have also had the benefit of reading the majority's reasoning in the First Full Court Judgment in relation to grounds one and two of the appeal that were not reconsidered in the Second Full Court judgment.[30] I refer specifically to the following paragraphs in the majority's reasoning in the First Full Court judgment:

> *56. The Panel did not err in approaching the question whether s.269TAA(1)(b) applied on the basis of whether the whole of the evidence was relevant in ascertaining whether or not there was an appearance of influence on price arising from the commercial or related relationship between the related parties. That is a legally permissible approach to assessing the effect on price of the relevant parties' relationship. There was no legal error in the Panel looking at all the relevant evidence and circumstances, including the particular practices and policies and the manner in which pricing was determined by the relevant parties, in determining whether or not the relationship between the exporter and the importer appeared to influence the price. The material or information which is potentially relevant to this assessment need not include a comparison between the price of unrelated parties' sales. The reference in [47] of the Panel's reasons to s.269TAA(1) being concerned with "the appearance of variation from the price that would have been agreed had the sale been negotiated at arms length" when read fairly, does not mean the Panel proceeded on the basis that, for there to be the requisite appearance of influence on price of a commercial or other relationship it was necessary for the decision-maker to determine, by way of a counterfactual, the price that would have been agreed between unrelated parties. Any other reading cannot be reconciled with the fact that the Panel was well aware that there was no evidence before it relating to prices between unrelated entities (see, for example, the final sentence of [51] and*

[30] Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2022] FCAFC 30, paragraph 9. I note that the appellant (Wilson) acknowledged that this would not require any further consideration of grounds 1 and 2 of its appeal.

the Panel's reference in [52] to the Commissioner's inquiries involving documents being obtained from related parties).

57. For the purposes of s.269TAA(1)(b), the assessment must be directed to the relevant statutory question, namely whether there is an appearance of the price having been influenced by the commercial or other relationship between the buyer (or an associate) and the seller (or an associate).That is the approach taken by the Panel. No appealable error has been established in relation to the primary judge's analysis and conclusion rejecting ground 1 of the judicial review application.

59… Shortly thereafter, however, senior counsel said that it was the appellant's submission "that evidence that a buyer and seller are part of a multinational group would give rise to an inference that prices are influenced by that relationship" The appellant's position was that, having regard to the TPS report, the Panel should have found that evidence as establishing the requisite appearance of price influence and then considered whether there was other evidence which displaced that inference. In our view the Panel did not err in adopting an approach which involved consideration of all the relevant evidence bearing upon the issue of appearance, rather than adopting the appellant's segmented or sequential approach (my emphasis).[31]

The majority in the Full Federal Court did not agree with Wilson's claims regarding the interpretation of s.269TAA(1)(b) of the Act, nor did it consider there had been any legal error in the consideration of all the relevant evidence as referred to in ADRP 122/123.

66. I note that Wilson, however, considers the minority judgment of Thawley, J., (First Full Court Judgment), as the correct interpretation of s.269TAA(1)(b) of the Act. It emphasised this at the conference held on the 20 May 2022 and provided its reasons for agreeing with this interpretation. This is a minority judgment.

67. I acknowledge that the threshold in s.269TAA(1)(b) is low as it has been deliberatively designed to enable an authority to enliven this provision when limited

[31] Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel [2022] FCAFC 4 paragraphs 56, 57 and 59.

evidence is available. However, it is appropriate to look at all the relevant evidence and circumstances when assessing whether transactions are arms length for export price purposes. As referred to in the Explanatory Memorandum, it was designed to support authorities in circumstances where the '… investigative process may not be entirely conclusive as to the effect of a relationship on a price, and instead allows a reasoned and objective approach to such an issue based on the available information'.

68. Wilson, at the conference held on 20 May 2022, also relied on the concept of 'self-interested' bargaining being a requirement of an arms length transaction. This is not a legislative requirement of the Act. There is reference in the Dumping and Subsidy Manual (the Manual) to the need to have evidence of real bargaining in considering whether a transaction is arms length. It suggests a number of factors that may indicate whether there has been real bargaining between the parties.[32] Regardless, the policy supports an approach that prices reflect market-based transactions and acknowledges that different methodologies can achieve this outcome. It also refers to the need to consider all available evidence. The ADC has adopted this approach in my view.

69. I refer to a further example that, in my view, illustrates why it is appropriate to look at all the relevant evidence and circumstances in deciding whether there appears to be an influence on price for the purposes of s.269TAA(1)(b). There are numerous examples where an exporter will appoint an unrelated importer to be its distributor in Australia. Usually, such arrangements lead to a lower price being charged by the exporter to the importer in recognition of the distributor's role in the market as compared to a transaction with say an end user. Section 269TAA(1)(b) says a 'price appears influenced' by an 'other relationship'. In that example, notwithstanding the existence of the relationship between the exporter and importer, after a consideration of all of the relevant evidence, including normal market practice, it might be determined that there is no appearance of influence on price for the purposes of 269TAA(1)(b) of the Act.

70. In my opinion, the legislation is not intending to capture or prevent 'normal' market relationships and arrangements that 'influence' price from being used as an export

[32] Dumping and Subsidy Manual, December 2021, page 21.

price. As referred to earlier, this is consistent with the intent of the provision as outlined in the Explanatory Memorandum. The approach advocated by Wilson suggests that the evidence provided in the TPS and Frontier Reports demonstrates that the corporate guidelines of a multinational group is sufficient evidence of the appearance of influence on the price by a relationship and that such transactions cannot therefore be treated as arms length. I do not agree that this is what is intended by this provision, nor that the evidence outlined is compelling in this regard.

71. Furthermore, it would seem inconsistent for related party transactions to be treated as non-arms length purely on the basis that corporate guidelines exist. The question that I consider more important in assessing whether the 'price appears to be influenced' is what do the corporate guidelines require in relation to pricing. This assessment allows a decision to be made as to whether the price appears to have been influenced and s.269TAA(1)(b) enlivened.

72. Wilson, in its review application, also refers to the approach adopted by the ADC in 'Reinvestigation of Certain Findings in Report 341' (Report 341) in this regard and to its concern that the ADC has limitations when dealing with anti-dumping investigations of offshore multinational suppliers. While I do not disagree with Wilson's position that it is important that the legislation allows certain transactions to be treated as non-arms length when there is an evidentiary gap, I have not concluded that it is apparent in this case. I also note that the circumstances in Report 341 dealt with the treatment of 'sales at a loss' pursuant to s.269TAA(1)(c) not whether the price appears to be influenced.

73. I reviewed for each of the exporters the subject of this remittal the confidential verification reports, confidential work program and supporting attachments, the confidential spreadsheets for each exporter and importer detailing:

    - cost to make and sell;
    - profitability analysis of domestic and export sales; and
    - export price spreadsheets.

This included confidential corporate company documents regarding ownership and its 'within-group' operational activities.

74. I also considered relevant the particular sales processes associated with the sales of power transformers. As outlined in TER 507:

    - the sales by the three Chinese exporters are made to related importers;
    - each importation is made on the basis of it being sold to another entity for installation "… power transformers are custom designed equipment engineered to suit the requirements of each application, and manufactured to the specifications of the individual utilities, generating facilities, and industrial users, that purchase the product".
    - The purchase of power transformers is generally through a competitive tender process. When a purchaser plans a new or replacement transformer, it puts out a request for quotation, detailing the specifications of the unit. Manufacturers, both domestic and international, will then bid on the project and confirm their ability to meet the specifications and required timeline for delivery and installation.'[33]
    - The ADC also noted that some purchasers also approach a supplier directly and there are also standing offer arrangement contracts (panel supply arrangements or panels).[34]

75. I have reviewed the information considered by the ADC. I agree with the conclusions reached with respect to the determination of export price pursuant to s.269TAB(1)(a) of the Act for the three exporters the subject of this reconsideration. I also concur with the statement expressed in REP 122/123 "… the evidence also supports the conclusion that the prices did not *appear* to be influenced by the relationship of the parties".[35]

76. The information in both the TPS and the Frontier Reports provides general information. While I have considered this information I do not consider that it

[33] TER 507 page 34.
[34] TER 507 page 22.
[35] ADRP Report No 122/123 paragraph 54.

changes the conclusion reached by the ADC as referred to in the previous paragraph.

77. In summary, I do not agree with Wilson that the evidence it submitted regarding multinational groups' operational and structure guidelines established that for the purposes of s.269TAA(1)(b) there was "an appearance of influence on price arising from the commercial or other relationship between the related parties" and that the ADC failed to investigate whether the transactions were arms length:

    - The Reports provided by Wilson do not of themselves establish that the exporters' prices were influenced by the corporate relationships;
    - Transfer prices are not necessarily non-arms length: it is necessary to examine whether they appear influenced by the relationship or whether they reflect market prices. I consider the ADC properly considered the available evidence in reaching its finding in this regard;
    - I have considered the reasons expressed in the primary Federal Court, the First Full Federal Court (majority decision) and Second Full Federal Court judgments and have followed the approach it adopted regarding the interpretation of s.269TAA(1)(b) of the Act in relation to Wilson's grounds;
    - I have considered the overall intent of the provision dealing with arms length transactions;
    - I do not agree with the interpretation of s.269TAA(1)(b) of the Act as advocated by Wilson; and
    - I have reviewed the evidence considered by the ADC and agree with its conclusions relating the arms length status of the transactions of the three exporters the subject of this re-consideration.

78. I have considered the review 'afresh'. In my opinion, and for the reasons I have outlined above, Wilson has not established that the Commissioner erred in finding that the export transactions were arms length for the three exporters the subject of this reconsideration. I consider the export price has been correctly determined by

the ADC pursuant to s.269TAB(1)(a) of the Act. Accordingly, the Reviewable Decision is correct or preferable.

Conclusion

79. Pursuant to s.269ZZT of the Act and for the reasons given above, I consider that the Reviewable Decision to terminate the investigation, pursuant to s.269TDA(1) of the Act, in relation to ABB Chongqing, Siemens Jinan and Siemens Wuhan was the correct or preferable decision and therefore affirm it.

80. Interested parties may be eligible to seek a review of this decision by lodging an application with the Federal Court of Australia, in accordance with the requirements in the *Administrative Decision (Judicial Review) Act 1977*, within 28 days of receiving notice.

Jaclyne Fisher
Panel Member
Anti-Dumping Review Panel
4 July 2022.

ADRP Conference Summary

Review No. 122A – Reconsideration of Power Transformers exported from the People's Republic of China (China) by ABB Chongqing Transformer Co Ltd, Siemens Transformer (Jinan) Co Ltd and Siemens Transformer (Wuhan) Co Ltd

Panel Member	Jaclyne Fisher
Review type	Review of Commissioner's decision
Date	20 May 2022
Participants	Robert Wilson, Richard Scheelings and Michele Williams (representing Wilson Transformers Company Pty Ltd (Wilson)); Julien Chadwick and Matthew Williams (representing the Anti-Dumping Commission (ADC))
Time opened	1.30 pm AEST
Time closed	3.03 pm AEST

Purpose

The purpose of this conference was to obtain further information in relation to the review before the Anti-Dumping Review Panel (Review Panel) in relation to Power Transformers exported from the People's Republic of China (China) by ABB Chongqing Transformer Co Ltd (Chongqing), Siemens Transformer (Jinan) Co Ltd (Siemens Jinan) and Siemens Transformer (Wuhan) Co Ltd (Siemens Wuhan) (referred to as Review No 122A).

The conference was held pursuant to section 269ZZRA of the *Customs Act 1901* (the Act).

In the course of the conference, I was able to ask parties to clarify an argument, claim or specific detail contained in their application or submission. The conference was not a formal hearing of the review, and was not an opportunity for parties to argue their case before me.

I may only have regard to further information provided at this conference to the extent that it relates to information that was before the Commissioner when the Commissioner made the reviewable decision. Any conclusions reached at this conference are based on that information that was before the Commissioner when the Commissioner made the reviewable decision. Information that relates to some new argument not previously put in an application or submission is not something that the Review Panel has regard to, and is therefore not reflected in this conference summary.

At the time of the conference, I advised the participants:

- That the conference was being recorded and transcribed by Express Virtual Meetings Pty Ltd, and that the recording would capture everything said during the conference.

- That the conference was being recorded for the Review Panel to have regard to when preparing a conference summary. The non-confidential conference summary would then be published on the Review Panel's website.

- Any confidential information discussed during the conference would be redacted from the conference summary prior to publication.

Prior to the conference, participants were provided with a copy of the Review Panel's Privacy Statement. The Privacy Statement outlines who the conference recording and transcript may be disclosed to. The Privacy Statement is available on the Review Panel's website here. The participants indicated that they understood the Privacy Statement and consented to:

- The recording of the conference; and

- The recording being dealt with as set out in the Privacy Statement.

Background

The Full Federal Court set aside the Review Panel's decision dated 18 May 2020 in relation to exports of power transformers from China by Chongqing, Siemens Jinan and Siemens Wuhan by orders dated 28 March 2022 as varied by its further orders on 31 March 2022. The Court's judgment of 8 March 2022 found that Wilson had been denied procedural fairness in not having had the opportunity to respond to the non-confidential conference summary of the conference held between the Review Panel and the ADC on 8 May 2020.

I note that Wilson had applied to the Review Panel on the following ground: 'The Commissioner should have determined the export price of the goods by reference to s.269TAB(1)(b) or s.269TAB(1)(c). He failed to apply s.269TAA(1)(b), failed to properly investigate whether transactions were arms length transactions within s.269TAA(1) and failed to consider evidence that the transactions were not arms length transactions.'

The Reviewable Decisions in Report 122 and 123 (REP 122/123) related to two termination decisions under section 269TDA(1) and a termination decision under section 269TDA(13) of the Act. The decision set aside by Court, being the Review Panel's decision as it related to certain exporters. The matter remitted back to the Review Panel relates to that part of the

initial Reviewable Decision that comprised of the section 269TDA(1) termination decision in respect of certain exporters.

As advised to Wilson in my letter dated 6 May 2022, I advised that the Senior Panel member had directed that I constitute the Review Panel for the reconsideration of the Reviewable Decision remitted back to the Review Panel.

In that letter, I indicated that a conference would be arranged for the purpose of providing Wilson with the opportunity to provide information in response to the substance of the conference held with the ADC on this matter on 8 May 2020.

The Review Panel also observes that section 269ZZT of the Act details how a review of a termination decision must be conducted. In particular, sub-section 269ZZT(4) provides that subject to sub-sections 269ZZRA(2) and 269ZZRB(2), the Review Panel must have regard only to information that was before the Commissioner when the Commissioner made the Reviewable Decision.

Further Information:

The Review Panel asked Wilson if there is any information it wished to provide in response to the substance of the conference held between the ADC and the Review Panel on the 8 May 2020.

Wilson's representative Richard Scheelings provided the following information:

1. Outlined that the Review Panel's decision had been set aside for consideration according to law. This required that the entire Reviewable Decision in relation to the three exporters referred to above be reconsidered afresh. This means that the Review Panel is required to consider all the facts and evidence according to law from the beginning as a new decision noting it is a continuation of an earlier matter. It referred to a series of judgments that provided authority for remitters being considered afresh. It noted however, that this remained subject to statutory provisions of Division 9 of XVB of the Customs Act and the relevant provisions relating to the determination of the export price and arms length transactions in s.269TAB and s.269TAA respectively. It referred in particular to the nature of the powers in respect of termination decisions, particularly ss269ZZT(4), 269ZZRA(2) and ZZRB(2) of the Act.

2. It proposed that the Court's decision based on the failure to provide procedural fairness, enables Wilson to address this failure by the provision of an extra submission and evidence, noting this remained subject to the relevant provisions of termination decisions in Division 9 of Part XVB of the Act.

3. It proposed that the approach adopted by the ADC (in Termination Report No. 507 (TER 507)) and the Review Panel in REP 122/123 was 'back the front' in relation to its approach to the assessment of arms length transactions (vide s.269TAA) in within-group sales'. It claims that these sales from related parties should be considered as within-group transfer prices and noted that there were no sales to third parties. It suggested that this became apparent to Wilson once the information in the transcript of 8 May 2020 and paragraph 53 of REP 122/123 was assessed. It referenced Kerr, J. observation in paragraph 79 of *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2021] FCA 591* (and referred to as the first judgment in this summary) in this regard. Mr Scheelings noted that the content of this information was confidential and had not been disclosed to his client Wilson, but nonetheless the approach adopted showed a misunderstanding of the approach that should have been adopted in assessing whether transactions were arms length in related parties dealings. He further commented that the minority judgment of Thawley J. in *Wilson Transformer Pty Ltd v Anti-Dumping Review Panel [2022] FCAFC*, referred to as the First Full Court judgment (and referred to as Thawley, J. First Full Court in this conference summary) also agreed with this approach commenting that it was the 'wrong statutory question'.

4. It suggested that in relation to the assessment of arms length transactions pursuant to s.269TAA(1)(b) involving related parties that the ADC assumed the within-group prices are arms length and that unless there is evidence to the contrary that presumption, or that default, will be adopted. Wilson submitted that the correct position is that when dealing with wholly within-group transactions and you're looking at wholly within-group prices, if you're going to make an assumption at all, the assumption should be that it is not arms length, unless there is evidence to the contrary. It claimed that the ADC and Review Panel had taken the wrong approach by assuming the that the 'within-group transactions' are arms length transactions or prices and only looking for evidence that suggested otherwise.

5. It noted that it agreed, in particular with Thawley, J. First Full Court observations, and noted the following paragraphs as being relevant of what it considers the correct

approach to the interpretation of the treatment of related party transactions in respect of s.269TAA(1)(b) of the Act and the incorrect treatment by the ADC and Review Panel:

- Paragraphs 108 - 117;
- Paragraph 119
- Paragraphs 121 - 122;
- Paragraph 129,
- Paragraphs 130 - 132,
- Paragraphs 139 - 140
- Paragraphs 161 – 163.

  (The relevant paragraphs are attached as Appendix A to this conference summary)

6. It also referred to paragraph 27 of *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2022] FCAFC* (referred to as the Second Full Court judgment in this conference summary).

7. It claims that intergroup sales are internal transfers and cannot be considered as market transactions. Furthermore, there was no ability to benchmark against external sales. It suggests that related parties do not typically deal with each other at arms length as they cannot act in its own self-interest but rather act in the best interests of the group as a whole. It referred to a range of observations by Thawley, J. in the First Full Court judgment. It noted that the reference by Thawley, J in the First Full Court judgment to arms length transactions as dealt with under different legislative frameworks (such as the Australian Taxation Office (ATO)) are relevant, noting that arms length transaction is not defined in the Act.

8. It also referred the Review Panel to paragraph 89 of the First Judgment emphasising that Wilson's legal representatives had only become aware of certain confidential information late in the proceedings and that this had not been pursued by Wilson. Furthermore, it suggested that Kerr, J. had considered that the Review Panel had assessed whether price comparisons between related and unrelated parties had occurred. This had not in fact occurred.

9. It indicated that the correct approach to interpreting s.269TAA(1) requires that there be a focus on the use of reliable prices for export price determination which mirrors the intent of the *World Trade Organization Anti-Dumping Agreement Article 2.3*

regarding the 'unreliability of export price because of association or a compensatory arrangement between the exporter and the importer or a third party'. It proposed that the assessment of whether transactions should be treated as non arms length, requires consideration of all the circumstances.

10. It suggests that in this matter, there was no evidence of self-interest bargaining of prices between the related parties. Rather the transactions should be considered as inter-group transfer prices. It referred the Review Panel to Thawley, J. in the First Full Court judgment paragraphs 110 and 114 – 116 where there is a summary of the intent of establishing the export price under s.269TAB(1) and the relationship of s.269TAA(1) that is '… to exclude from what might be an "arms length" under s.269TAB(1) transactions which are unreliable indicators of arm's length price.'

11. In addition, it questions whether the ownership and related nature of the transactions of each of the three exporters with the related Australian importers, the subject of this remitter, enables these transactions to be treated as arms length, given s.269TAA(1) of the Act. It proposes that there is no evidence of self-interest bargaining, whereas there is evidence that the prices between the related parties would be influenced by the nature of the ownership and corporate management arrangements of the importers and exporters. It noted the reference by Thawley, J. First Full Court to the judgment in *Federal Commissioner of Taxation v BHP Billiton Ltd (2011) 244 CLR 325 at [60]* to arms length in related party transactions.

12. It refers to the evidence presented in the Transfer Pricing Solutions report (TPS report) 'the prices between the related entities of the multinational suppliers of power transformers listed in appendix one would be influenced by their commercial, structural and other relationships within the entities'. It considered the influences of price from the perspectives of policies and procedures, operational and legal structure and related party 'group' dynamics. It suggests that this is probative of the prices being influenced by the relationship between the parties, absence of evidence to the contrary.

13. It emphasised that there is legal precedent that supports the Review Panel being able to consider the TPS Report as it was 'before' the Commissioner when the Commissioner made the Reviewable Decision, vide s.269ZZT(4) of the Act. It noted that regardless of whether the Commissioner had regard to the TPS Report, it is still considered to have been 'before' the Commissioner and available for consideration by the Review Panel. It referred to paragraph 98 of Thawley, J. First Full Court that

indicated that the Review Panel had not reached a concluded view as to whether the TPS Report was before the Review Panel, and paragraphs 21 at 46 to 48 of REP 122/123.

14. It suggests that Thawley, J. First Full Court paragraph 132 identified that it should have been recognised that s.269TAA(1)(b) was engaged '… rather than assuming that the price was an arms length price unless the inquiries established otherwise'.

15. It referred to the majority decision in the Second Full Court judgment at paragraph 27 '…we accept its submission that it could have provided responsive expert economic evidence of the correct relationship of profit margins and price determination and/or submissions that relationships and arrangements between corporate entities in the same multinational group were "evidence of (and appearance of) influence" in a market if it had been informed of the non-confidential substance of the 8 May 2020 conference, which material may have persuaded the Panel to reach a different conclusion.'

16. Mr Scheelings emphasised that he was subject to confidentiality undertaking to the Court regarding confidential material as part of the appeal process, and so he could not present certain information at the conference. However, he noted that in general terms paragraph 53 of REP 122/123 succinctly described information regarding mark ups and evidence regarding arms length transactions gleaned through confidential verification reports and the confidential conference held on 8 May 2020 and referenced the Dumping Policy and guidelines.

17. It noted that given the comments (referred to in paragraph 15 above) and the non-confidential conference summary from 8 May 2020 Wilson had obtained an expert report from Frontier Economics that it wished to submit to the Review Panel. It noted that this information related to information that was before the Commissioner when he made the decision. Mr Scheelings referred to the obligation of the Review Panel in terms of procedural fairness in general law to have regard to the evidence being submitted by Wilson at the conference.

18. The Review Panel advised that the purpose of the conference was to obtain further information pursuant to s.269ZZRA(2) of the Act and any further information must relate to information that was before the Commissioner when the Commissioner made the Reviewable Decision. Any 'further information' needed to be provided at the conference rather than as a written submission.

19. It provided a summary of the Frontier Economics report as follows:

> The report comprises of a short scenario with two questions relating to the scenario answered by Frontier Economics. The scenario involved an Australian subsidiary, an importer of bespoke items, owned by and being supplied by a global corporation group. There are group guidelines that apply to the entities. No sales are made by the global corporation to unrelated parties in Australia. All Australian sales have the same markup.
> Question one: Does the existence of group guidelines enable transactions between the parent company of a global corporation and the Australian subsidiary enable such prices to be characterised as arms length prices?
> Answer: No (Commented this is consistent with Thawley, J. First Full court in [108] and noted that such group guidelines usually include details on mark-up percentages on base costs in setting prices and 'mark up' for in-group transactions as compared to sales to unrelated parties.)
> Question two: If the answer to Question one is no, what are the type of assumptions, or pre-conditions, that would need to be made to consider such transactions as arms length?
> Answer: it would require a range of assumptions, but it is highly unlikely that these could exist.
>
> - The challenges relate to the different taxation jurisdictions and implications for transfer pricing arrangements;
> - The difficulties when there are no external (to unrelated parties) sales to enable comparisons;
> - Other group considerations, other than profit or market conditions, that may drive decisions on prices;
> - There are other considerations in setting prices in 'in-group' transactions that are not related to profit or market conditions.
>
> It draws on the economics perspective (referencing certain Economic texts) as background to the answers to the questions posed by Wilson. The report outlines the economic principles associated with establishing prices, the intent of maximising profit in order to satisfy shareholders, supply and demand in market's setting prices, competition conditions in price setting, the competitive conditions in a vertical chain of ownership, the existence of other market distortions of input prices in in-group transactions, and the circumstances of marginal revenue and marginal costing decisions of goods by producers.

20. It referred to paragraph 117 of Thawley, J. First Full Court judgment dealing with the nature of transactions between members of a multinational group, as to whether the price paid for the transfer of goods is reliable evidence of what the arms length price would have been between independent parties without further investigation. Such investigations '… would generally involve an analysis of all of the relevant dealings in the group against a real understanding of the taxation and commercial regimes of the relevant countries in which the groups operated'. Wilson proposes that the words of s269TAA(1)(b) focuses on 'the price appears to be influenced' to enable a lower threshold test to be applied than that described above.

21. It noted that it considered the 8 May 2020 non-confidential conference summary needed to be more fulsome to enable an opportunity for parties adversely impacted by the information to provide comment.

22. The ADC was asked if it has any further information in relation to the conference and responded it had no further information.

After the conference I requested that Wilson provide the following information:

- A copy of a non-confidential version of the Frontier Economics report for attachment to the non-confidential conference summary. This can be found attached as Appendix B to this conference summary.

I advised the participants that the conference summary would be provided within one working day for confirmation of accuracy and identification of any confidential information. Participants are requested to respond within two working days.

Appendix A

Paragraph 3 - *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2021] FCA 591*

79. A curiosity about this proceeding is that some passages of the Panel's reasons at paragraph 53 had remained redacted until late in the hearing—at which time those parts which hitherto had been redacted were disclosed in Court. Those passages are identified in the Panel's un-redacted reasons as having contained information about the way in which the relevant prices had been set.

Paragraph 5 - *Wilson Transformer Pty Ltd v Anti-Dumping Review Panel [2022] FCAFC 4*

108. Entities within a multinational group are not independent. The entities are not "at" arm's length and generally do not deal with each other at arm's length. Rather, the entities usually act in the economic and commercial interests of the group as a whole, taking into account the commercial and taxation regimes of the various countries in which the group operates. Transactions between members of a multinational group are inherently unreliable as indicating what independent parties or entities dealing in their own economic interests would have done.

109. Section 269TAB(5) expressly provides that a transaction between "associates" can be an "arms length transaction" under s 269TAB(1)(b) and (c). It follows that, for the purposes of s 269TAB(1)(b) and (c), a particular transaction can still qualify as an "arms length transaction" when the parties are not "at" arm's length, for example, because they are members of the one multinational group or are otherwise related. However, the transaction must still be an "arms length transaction". In the case of a transfer of property between members of the one multinational group for an amount of money, and having regard to s 269TAB(5), the transaction might be an "arms length transaction" for the purposes of s 269TAB(1)(b) or (c) if the related parties dealt with each other at arm's length (which one might expect to be a rare occurrence) or transacted at an arm's length price.

110. The concern of s 269TAB(1), read with s 269TAA(1), is that the "export price" should, so far as is possible, be determined by reference to a transaction which is a reliable indicator of an arm's length price. The statutory object, evident from the language used, is to exclude transactions which are not reliable indicators of an arm's length export price. The most reliable indicator of an arm's length export price is the price which would have been paid by independent parties, dealing with each other at arm's length, and doing so in the absence of circumstances otherwise affecting the price of the relevant goods.

111. Section 269TAA(1) sets out three circumstances in which a purchase or sale of goods shall not be treated as an "arms length transaction" under s 269TAB. The three circumstance reveal that the concern is to exclude transactions where the price in fact paid would not ordinarily be a reliable indicator of the arm's length price. As noted earlier, s 269TAA(1) provides:

> **269TAA Arms length transactions**

(1) 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.

112. The principal object of s 269TAA(1) is to exclude from what might be an "arms length transaction" under s 269TAB(1) transactions which are unreliable indicators of arm's length price. The object of the provision should be determined against the background of the relevant international instruments. Article 2.3 of the *Agreement on the Implementation of Article VI of General Agreement on Tariffs and Trade 1994*, opened for signature 15 April 1994, 1868 UNTS 201 (entered into force 1 January 1995) (**Anti-Dumping Agreement**) allows an export price to be constructed when the export price is unreliable for use in the consideration of imposing dumping duties because of an "association or compensatory arrangement between the exporter and the importer". It provides (emphasis added):

> In cases where there is no export price or **where it appears** to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

113. In the context of a case concerning s 269TAA(1)(c), Lehane J in ***Nordland*** *Papier AG v Anit-Dumping Authority* [1999] FCA 10; 93 FCR 454 at [29] stated:

> In that Article there is to be found, I think, at least the genesis of pars (b) and (c) of s 269TAA(l). Unless the words of par (c) clearly require another construction, authority supports the proposition that the paragraphs should be construed consistently with the terms of the international instruments: *ICI Australia Operations Pty Ltd v Fraser* (1991) 34 FCR 564 at 569, 570; *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406 at 417. The introductory words of the paragraph ("in the opinion of the Minister") and the words "directly or indirectly" provide, in my view, a further clue. What is sought to be encompassed, I think, is a series of circumstances where price, ascertained in accordance with ordinary principles, is an unreliable indicator because there is an arrangement between the parties under which price is set at a particular level but the buyer, having agreed to

pay the price so established, is to receive some offsetting compensation or benefit or is (directly or indirectly) to receive reimbursement of all or some of the price. The paragraph, strikingly, is not drawn as one intended to operate mechanically having regard to the form of a transaction; it is broadly drawn and is directed to substance, the substance being derived from Art 2.3 of the Marrakesh Agreement [the Anti-Dumping Agreement].

114. Section 269TAA(1)(b) as enacted provided (emphasis added):

269TAA Arms length transactions

(1) For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:

…

(b) the price **is** 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; …

115. The words "appears to be" replaced the word "is" in 2013, such that paragraph (b) now refers to whether "the price **appears to be** influenced by a commercial or other relationship between the buyer … and the seller …" (emphasis added). The explanatory memorandum to the Customs Amendment (Anti-dumping Measures) Bill 2013 (Cth) stated:

Item 6 – Paragraph 269TAA(1)(b)

…

20. Subsection 269TAA(1)(b) specifies that where 'the price is influenced' by a relationship between the buyer and seller, it shall not be treated as an arms-length transaction. This section can be used to address a range of circumstances where a relationship between the parties affects the price paid or payable for goods.

21. Article 2.3 of the Anti-Dumping Agreement sets out procedures for establishing an export price where there is no export price or the export price appears unreliable to the authorities concerned. Specifically Article 2.3 provides that "where it appears" an export price is unreliable because of an association or compensatory arrangement between the parties, an export price may be established by specified alternative means.

22. By including the phrase 'the price appears to be' in paragraph 269TAA(1)(b) the Customs Act is better aligned with the Anti-Dumping Agreement, and recognises that the evidence that authorities may have available in an investigative process may not be entirely conclusive as to the effect of a relationship on a price, and instead allows a reasoned and objective approach to such an issue based on what the available information suggests.

116. Paragraph (b) of s 269TAA(1) focusses attention on the "price" in the relevant transaction and the question whether the price "appears to be influenced by a commercial

or other relationship" between buyer and seller (or associates). It is not limited in its application to transactions between related parties. It is clear from the language of s 269TAA(1)(b), and confirmed by the statutory history and background context, that the amendment was intended to facilitate exclusion of a transaction "where it appears" that the export price in fact paid is unreliable in determining whether dumping has occurred by reason, amongst other things, of an association between importer and exporter. It is not necessary to reach a positive state of satisfaction that the price was in fact so affected; an appearance that the price was so affected is sufficient.

117. None of this should be surprising. The "price" paid for the transfer of goods between members of a multinational group is not, without further investigation, reliable evidence of the price which would have been paid between independent parties dealing with each other at arm's length. Related parties are not at arm's length and they do not typically deal with each other at arm's length. The task of satisfactorily establishing that a price paid was in fact affected by a relationship such as exists between entities in a multinational group would generally involve an analysis of all of the relevant dealings in the group against a real understanding of the taxation and commercial regimes of the relevant countries in which the group operated. The statutory scheme would be undesirably expensive and complex, if not in certain circumstances practically unworkable, if a transaction between entities within the one multinational group were only excluded as an "arms length transaction" if a positive satisfaction were reached that the relationship between the entities in fact affected price in the sense that the relationship was shown in some specific way to have resulted in something other than the arm's length price being paid. Further, if the statutory scheme permitted an approach which assumed a transfer between entities within a multinational group was at an arm's length price, unless satisfied that the relationship in fact affected the price, that would call into question the utility of s 269TAA(1)(b) as amended.

119. However, where there is an appearance of influence on price, such as would almost invariably be the case in respect of a cross border transfer of goods within a multinational group, s 269TAA(1)(b) does not permit the Commissioner to assume that the transaction was an arm's length one, or that the price paid was an arm's length price, unless evidence to the contrary is located. The point of s 269TAA(1)(b) is to facilitate exclusion of those kinds of inherently unreliable transactions despite not reaching a positive satisfaction that the relationship did in fact affect price.

121. In its reasons in Decision No 122 and 123, the Panel stated (footnotes omitted and emphasis added):

> 46. In the present case, the applicant contends that there is information available to the Commissioner which gives the appearance that the sales between the related exporters and importers were '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'. It pointed to the TPS Report. Ms Smits, the author, has extensive experience working as a consultant in the field of transfer pricing. She was asked the question:

Would prices between relevant related entities (ie importers and exporters) of the following multinational suppliers of power transformers … be influenced by their commercial, structural or other relationship?

Ms Smit opined:

…the price between related parties is invariably influenced by the commercial, structural and other relationships between the entities.

However, Ms Smit also said that the question she was asked:

… is not concerned with whether prices between related entities of the multinational PT suppliers are or are not at a level that would pertain in an arm's length transaction.

47. In my opinion, the influence with which s 269TAA(1) is concerned is influence as to price. **It is concerned with the appearance of variation from the price that would have been agreed had the sale been negotiated at arms length**. Any other effect does not provide a reason why the price agreed between the parties should not be adopted as the export price under s 269TAA(1) or result in the transaction not being used for the determination of the normal value under s 269TAC(1).

48. I am not, **therefore**, persuaded, that Ms Smit's report provides a basis for concluding that the prices 'appeared' to be influenced by the relationships between exporters and importers in this case, within s 269TAA(1)(b).

49. I accept that relationships between the exporters and importers provides an opportunity for the price to be influenced and that this might well lead the Commissioner to scrutinise the transactions more carefully than transactions between unrelated parties. It must be borne in mind, however, that the opportunity and the capacity to influence the price, is not the same thing as actually influencing the price. It does not follow that the appearance of influence, such as that which might exist between related exporters and importers, creates the appearance that the influence has been exercised.

122. This reasoning demonstrates that the Panel misunderstood the statutory task in a material way.

129. It is worth observing at this point, because of its relevance to ground 3, that the information referred to above could have been disclosed to Wilson without disclosing confidential information and Wilson could have made the points just made.

130. If the Panel had not approached the matter on the basis that the prices for the intra-group transfers should be treated as arm's length unless a variation from an arm's length price was shown, its conclusion may well have been different. It may have appeared to the Panel that the relevant price was affected by the relationship between the parties. That conclusion was certainly open on the material before the Panel, if not irresistible.

131. The Panel erred in taking the view that it could not exclude the relevant related party transactions unless it found evidence that the opportunity to influence the price had been exercised such that the price was in fact affected. It was permissible to examine the transactions and take the view that the prices were arm's length or that the transactions were "arms length transactions" within the meaning of s 269TAB(1), but it was not permissible to do so on the basis that the related party transactions were to be assumed to be arm's length transactions unless the Panel found material which indicated that the relationship between the parties in fact affected price. This approach materially altered the statutory task by requiring acceptance of inherently unreliable transactions as ones giving rise to an arm's length prices unless material to the contrary was identified. As a matter of substance, the statutory scheme is to permit rejection of the relevant unreliable transaction notwithstanding no positive satisfaction that the price was in fact affected by the relevant circumstance.

132. If the Commission and the Panel had appreciated that s 269TAA(1)(b) was engaged if the whole of the circumstances lead the Commission to the view that the "price appeared to be influenced by a commercial or other relationship", rather than assuming the price was an arm's length price unless the inquiries established otherwise, the investigations may not have been terminated.

139. Although not directly relevant to ground 1, it might also be noted that the transcript of the 8 May 2020 conference between the Panel and representatives of the Commission reveal that the approach which the Commissioner had adopted was to assume that the relevant transactions were arm's length transactions unless, through its investigations, it found information which indicated that the prices were not arm's length prices. By way of example, the Commission's Exporter Verification Report dated 1 October 2019, in addressing paragraphs (a) to (c) of s 269TAA, stated (footnotes omitted and emphasis added):

> **6.3 Arms Length**
>
> In respect of Australian sales of the goods by ABB CQ and ABB ZS during the period, the verification team **found no evidence that**:
>
> - there was any consideration payable for, or in respect of, the goods other than its price; or
> - **the price was 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
> - the buyer, or an associate of the buyer, was directly or indirectly reimbursed, compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.
>
> The verification team therefore considers that all export sales to Australia made by ABB CQ and ABB ZS during the period were arms length transactions.

140. The transcript of the conference expressly confirms the Commissioner's approach was to assume the transactions were arm's length unless evidence to the contrary was found. This approach was erroneous for the reasons stated.

161. Wilson first became aware of the content of the communications in the conference during the hearing before the primary judge: J[20] and [79]. If it had known of the substance of what had been communicated during the meeting, Wilson could have adduced evidence which addressed various of the matters summarised by the Panel at P[53]. Wilson could also have made submissions about the cogency of the information which the Panel had received and how it should be used in determining whether there was an appearance of influence on price or what the information said about whether the relevant transactions were arm's length or reflected an arm's length price.

162. Wilson could have submitted to the Panel that the information obtained during the conference revealed that the Commissioner was using evidence of influence to conclude the opposite (J[84]); that the Commissioner had no evidence of genuine bargaining between the related parties; and as to whether the Commissioner's internal manual should be understood as covering or being applicable to wholly within-group pricing (P[51]).

163. The circumstances were such that, in this statutory context, the Panel ought to have informed Wilson of the substance of the information communicated during the conference. It ought to have done so in a way which appropriately preserved confidentiality – see: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; (2005) 225 CLR 88 at [25] and [29] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). The possibility of a different outcome cannot be excluded because Wilson may have responded. Any such response would have related to the information that was before the Commissioner when the Commissioner made the reviewable decision and so would not have been excluded from consideration by s 269ZZRA(2)(a). As the discussion above shows, a number of points could have been made by Wilson which might have led to the conclusion that: (a) the relevant cross border transactions were likely to have been influenced by the fact that they occurred between entities within the one multinational group; (b) the Commissioner's approach that the transactions should be assumed to be arms length transactions unless he found evidence of actual influence on price was wrong; and (c) it might be unsafe to conclude that the transfers occurred at arm's length prices.

Paragraph 6 - *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2022] FCAFC 30*

27. In any event, assuming without deciding that the appellant had to demonstrate that it was deprived of a realistic possibility of a successful outcome (*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 560 at [2]-[5] per Kiefel CJ, Gageler, Keane and Gleeson JJ), we accept its submission that it could have provided responsive expert economic evidence on the correct relationship of profit margins and price determination and/or submissions that relationships and arrangements between corporate entities in the same multinational group were "evidence of (and appearance of) influence" in a market if it had been informed of the non-confidential substance of the 8 May 2020 conference, which material may have persuaded the Panel to reach a different conclusion.

We do not accept the Panel's submission to the effect that the non-confidential summary would not have disclosed anything that the appellant had not already had an opportunity to address.

Paragraph 8 - *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2021] FCA 591*

89. Having regard to the Court's analysis at [69]-[78] the facts the Panel summarised did not require it to treat those transactions as appearing to have been relevantly "influenced" by those parties commercial or other relationships. In any event there is no ground advanced that the Panel's conclusion on the merits was legally unreasonable

Paragraph 10 - Wilson Transformer Pty Ltd v Anti-Dumping Review Panel [2022] FCAFC 4

Provided above

Paragraph 13 - *Wilson Transformer Pty Ltd v Anti-Dumping Review Panel [2022] FCAFC 4*

98. The Panel proceeded on the basis that, although the Commissioner had not had regard to the TPS Report, for the purposes of s 269ZZT(4) it might have been "before" the Commissioner. The Panel did not reach a concluded view about whether it could have regard to the TPS Report: see the Panel's reasons in Decision No 122 and 123 (**P**) at [21] (compare J[19]).

Paragraph 14 - *Wilson Transformer Pty Ltd v Anti-Dumping Review Panel [2022] FCAFC 4*

Provided above

Paragraph 15 - *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2022] FCAFC 30*

Provided above

Paragraph 19 - *Wilson Transformer Pty Ltd v Anti-Dumping Review Panel [2022] FCAFC 4*

Provided above

Paragraph 20 - *Wilson Transformer Pty Ltd v Anti-Dumping Review Panel [2022] FCAFC 4*

Provided above

Appendix B

frontier economics

Arms length prices

Prepared for Wilson Transformer Company | 18 May 2022

Frontier Economics Pty Ltd is a member of the Frontier Economics network, and is headquartered in Australia with a subsidiary company, Frontier Economics Pte Ltd in Singapore. Our fellow network member, Frontier Economics Ltd, is headquartered in the United Kingdom. The companies are independently owned, and legal commitments entered into by any one company do not impose any obligations on other companies in the network. All views expressed in this document are the views of Frontier Economics Pty Ltd.

Contents

1 Introduction

1.1 The author

1. This report has been prepared by Warwick Davis. I am an economist with over 25 years of experience working for government economic regulators and in economics consulting. I hold Bachelor's and Master's degrees in economics from Monash University and the University of Melbourne respectively (both with first class honours).

2. I am a past employee of the Australian Competition and Consumer Commission (**ACCC**), and the telecommunications regulator in the United Kingdom, Ofcom. Since 2006 I have been an employee at Frontier Economics. My role at Frontier Economics has been to advise policy makers, regulators, regulated firms and access seekers on matters of economic regulation and competition policy.

3. My expertise is primarily in the application of micro-economics including pricing and costing issues. Since working at Frontier Economics I have developed experience from working on matters involving the development or review of arms length[1] transfer pricing between multi-national entities, and have advised the Anti-Dumping Commission and private clients on the economics relating to Australia's anti-dumping system.

4. I have attached my CV as Appendix A.

1.2 Background and instructions

1.2.1 Relevant background

5. I have been provided with relevant background information on the applications by Wilson Transformer Corporation relating to anti-dumping measures. This includes decisions by Federal Court[2] and Full Federal Court[3] which provide an outline and explanation of the key issues.

6. An issue of dispute relates to the calculation of the "export price" of goods and whether, and in what circumstances, within-group sales might qualify as arms length transactions (as per 269TAB of the ***Customs Act 1901*** (Cth)).

7. I have attached my instructions as Appendix B.

[1] I follow the spelling convention in the Customs Act regarding 'arms length' prices.

[2] ***Wilson Transformer Company Pty Ltd v Anti-dumping Review Panel*** (No 2) [2021] FCA 591.

[3] ***Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel*** [2022] FCAFC 4.

2 Response to questions

2.1 Supplied scenario

8. I have been asked two questions. The questions refer to the following scenario:

> ***A global corporate group (XYZ Pty Ltd) transacts with its Australian subsidiary. It sells a bespoke, high-priced product to that Australian subsidiary. It does not make (and has never made) such transactions with any third party Australian entity – only to its subsidiary. XYZ Pty Ltd has a 'group guideline' requiring the same 'mark-up' in all its transactions with Australian entities, whether to its own subsidiary or to a third party entity (even though it has never transacted with a third party).***

2.2 Question 1

Does the existence of such a group 'guideline' (if always enforced) mean that the price of within-group transactions can be characterised as a 'market' (or 'arms-length') price?

9. No. In my opinion, a group guideline—whether enforced or not—provides no information relevant to whether the within-group transactions are at 'market' or 'arms length' prices.

10. An approach of marking up a base cost[4] on a consistent basis could readily involve distortions from genuine arms length prices through either:

    (i) the choice of base cost component that is marked up,

    (ii) the choice of markup percentage, or

    (iii) both.

11. The fact that the guideline is ***consistently*** applied to non-arms length entities offers no additional comfort. Any motivations to deviate from an arms length pricing arrangement could well apply to each transaction with related Australian entities.

2.3 Question 2

If the answer to the first question is 'no', what are the type of assumptions that would need to be made (or the pre-conditions that would need to exist 'on the ground') in order for an economist to be able to reasonably conclude that the price of the within-group transactions is characterizable as a market (or 'arms-length') price?

[4] I understand a markup takes the following approach to pricing: = (1 +) where C is the base cost which would vary by product and m is a constant markup percentage.

12. Economic analysis of firm behaviour predominantly assumes that firms are motivated to maximise economic profits for their shareholders.[5] Profit maximisation would therefore be expected to motivate the setting of (within-group) input prices in a vertical chain.

13. The question of the comparability of prices therefore amounts to asking: under what conditions would ***profit-maximising*** within-group transaction prices be the same as or comparable with prices from a market (or arms-length) transaction?

14. In my view, there are likely to be two kinds of assumptions or conditions required for an economist to be able to reasonably conclude that the price of the within-group transactions is characterizable as a market (or 'arms-length') price:

    - the first kind of assumptions relate to competitive conditions in a vertical chain; and
    - the second kind of assumptions relate to the (non) existence of other market factors that would cause distortions in the firm's choice of profit maximising input prices.

Profit maximisation between related group entities in a vertical chain

15. It is well established in the economics literature that profit maximisation for an integrated firm (with upstream and downstream units) requires an internal transfer price set at marginal cost.[6] Only this price allows the downstream unit to set the correct profit-maximising price in the downstream market.

16. The rationale for this result is as follows. All profit-maximising firms set their expected revenue from selling an additional unit of output ('marginal revenue') equal to the additional cost of selling that unit ('marginal cost'). This can be found in any elementary economics textbook.[7] In a vertical chain of supply, the price that would maximise the firm's group profits is found by setting marginal revenue equal to the ***sum*** of the internal transfer price (upstream marginal cost) and the downstream unit's marginal cost.[8]

17. When would the internal transfer price reflect the upstream unit's marginal cost? The only circumstance in which an economist would expect that to occur would be if the upstream market was perfectly competitive. In perfectly competitive markets, competition means the upstream firm has no influence on price and sells all units at a price equal to its marginal costs to all customers, including those that are not arms length. This is known as price taking.[9] In imperfectly competitive markets, where there is some firm discretion on price, one could not be confident about the comparability of internal and external prices.

18. In summary, one set of circumstances where one might be able to conclude that the price for within-group transactions is likely to be a market or arms length price is where the group's upstream market is perfectly competitive. Although the facts in the postulated scenario are limited, it is unlikely that the scenario put to me, where the global corporate group (XYZ Pty Ltd) transacts with its Australian subsidiary for a bespoke, high-priced product would be perfectly competitive. This is because of the strong assumptions required for perfect competition,

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5 P. Milgrom and J Roberts, ***Economics, Organization and Management***, 1992, p. 40.

6 See for example, P. Milgrom and J Roberts, ***Economics, Organization and Management***, 1992, p. 550.

7 See for example, H. Varian, ***Intermediate Microeconomics: A modern approach***, 3rd ed., 1993, p. 400.

8 P. Milgrom and J Roberts, ***Economics, Organization and Management***, 1992, p. 550.

9 The pricing taking assumption is discussed in J Tirole, ***The Theory of Industrial Organisation***, MIT Press, 1988, p. 7.

including the assumption that firms in the market have no influence on price (are price takers). In such a competitive scenario, it would also be very likely that external prices were widely known which would allow for direct checking of internal with external prices.

Other market factors that distort internal pricing

19. Any economist would also recognise that in realistic market scenarios, there a range of commercial factors which will affect a profit-maximising firm's incentives to set internal transfer prices consistent with true arms length or market prices.

20. The most obvious distortion relates to corporate income tax. Different rates of income tax in different jurisdictions mean that there is benefit in earning higher profits in the lower-taxing jurisdiction. If uncontrolled, internal transfer prices will be chosen to maximise after-tax returns rather than pre-tax returns, and this can result in over- or under-pricing compared with a market price. As a consequence, the ATO applies the arms length principle under Australia's transfer pricing rules and this principle uses the behaviour of independent parties as a guide or benchmark.[10]

21. The Organisation for Economic Co-Operation and Development (OECD) produces guidelines for member countries (including Australia) with respect to transfer pricing by multi-national entities. The OECD notes that a key reason for transfer pricing distortion between related entities is to minimise overall tax, but identifies other distorting factors:

> ***1.4 Factors other than tax considerations may distort the conditions of commercial and financial relations established between associated enterprises. For example, such enterprises may be subject to conflicting governmental pressures (in the domestic as well as foreign country) relating to customs valuations, anti-dumping duties, and exchange or price controls. In addition, transfer price distortions may be caused by the cash flow requirements of enterprises within an MNE group. An MNE group that is publicly held may feel pressure from shareholders to show high profitability at the parent company level, particularly if shareholder reporting is not undertaken on a consolidated basis.***[11]

22. This list itself warns that the potential imposition of anti-dumping duties could distort internal prices. But even putting that to one side, if one wished to accept internal prices as arms length prices (without reference to an external market price) it is clear that assumptions would need to be made regarding factors including:[12]

- the tax treatment of profits earned in both jurisdictions, so that there would be no motive to earn higher revenues and returns in the lower-taxed jurisdiction;
- the imposition of any exchange controls, which might other incentivise lower or higher transfer prices to preserve or gain more foreign currency;
- the imposition of price controls, which might prevent maximisation of returns in the upstream or the downstream markets and so favour lower or higher internal prices;

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10 https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/

11 OECD Transfer Pricing Guidelines, 2010, at 1.4.

12 These factors overlap at least to some degree with the factors in s 269TAA.

- the imposition of other taxes or duties that would otherwise affect the marginal returns from domestic or foreign sales, such as excises, tariffs or quotas;
- internal managerial pressures of the kind mentioned by the OECD that are not related to overall profit maximisation, but that might otherwise cause decisions on internal pricing to deviate from prices expected in an unconstrained market transaction; and
- other payments or financial arrangements between the upstream and downstream entities that might influence price - such as rebates, conditional discounts or side-payments.

23. The OECD warns that we should not assume that conditions between associated enterprises invariably deviate from open market conditions[13]:

> ***1.5…Associated enterprises in MNEs sometimes have a considerable amount of autonomy and can often bargain with each other as though they were independent enterprises. Enterprises respond to economic situations arising from market conditions, in their relations with both third parties and associated enterprises. For example, local managers may be interested in establishing good profit records and therefore would not want to establish prices that would reduce the profits of their own companies.[14]***

24. Notwithstanding this warning, it is by no means obvious that even autonomously-bargained transfer prices would approximate market, arms length prices. For example, the degree of bargaining power held by the upstream party may differ depending on whether the sales were internal or external to the firm. Relying on internal transactions in that instance would provide an unreliable guide to arms length prices, and so in my view, internal transfer prices that approximate arms length prices may well occur only by coincidence. In a similar vein, Milgrom and Roberts (1992) highlight that:

> ***An alternative [to using market transfer prices] is to let the managers involved bargain over the transfer price and the quantities to be transferred. Because each is likely to be privately informed about the costs and benefits of the transaction to his or her department, however, there is the possibility that …bargaining problems …will create inefficiencies. The supplying division will be inclined to overstate the cost of production in order to get a higher price, and the purchasing division will be inclined to understate the marginal value of the transferred good in order to reduce the price it pays.[15]***

Methods for reasonable estimation of arms length prices

25. To conclude that the price of an XYZ Pty Ltd internal transaction was characterizable as a market or arms length price, I would seek or require some confirmation that the price had been

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13 A similar warning appears in the decision of Kerr J, ***Wilson Transformer Company Pty Ltd v Anti-dumping Review Panel (No 2) [2021] FCA 591***, at 67 and 68

14 OECD Transfer Pricing Guidelines, 2010, at 1.5.

15 P. Milgrom and J Roberts, ***Economics, Organization and Management***, 1992, p. 550.

determined or checked against one of the standard methods recommended by the OECD for estimating arms length prices.[16]

26. The OECD's Guidelines refer to five different methods:[17]

    a ***Comparable Uncontrolled Price***: internal prices should be consistent with prices charged between independent entities for the same or similar products, adjusted where necessary to reflect any significant differences between internal transactions.

    b ***Cost plus***: internal prices should be consistent with the costs of production plus a mark up for an independent entity, adjusted where necessary to reflect any significant differences between internal transactions.

    c ***Resale margin***: internal prices should be consistent with those calculated by deducting a retail margin from the retail price that is consistent with the margin that an independent firm would earn for the same or similar products, adjusted where necessary to reflect any significant differences.[18]

    d ***Transactional net margin***: internal prices should produce net margins relative to an appropriate base (e.g. cost, sales, assets) consistent with those that should be earned in an independent transaction.

    e ***Transactional profit split***: internal prices should reflect a reasonable division of the profits that would be expected to be realised by independent entities from engaging in the transaction.

27. Without further information, I am unable to form an opinion on which particular method would be most appropriate. As the OECD identifies, the Comparable Uncontrolled Price method is the most straightforward to apply, and so generally to be preferred where it can be reliably applied.[19] However, I agree with the OECD that other approaches may be more suitable "in view of the nature of the controlled transaction, determined in particular through a functional analysis; the availability of reliable information (in particular on uncontrolled comparables) needed to apply the selected method and/or other methods; and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate material differences between them."[20]

16 I understand from the provisions of 269TAB(1) that there are prescribed approaches for determining the export price in the circumstances that a price is not an arms length import price. Subclauses (1)(b) provides for the use of the subsequent sale price less prescribed deductions, and (1)(c) for the determination of price by the Minister having regard to all the circumstances of the exportation. One of the OECD methods that I describe is similar or identical to the approach in (1)(b) while other methods could be applied in a Ministerial determination of export price.

17 OECD Transfer Pricing Guidelines, 2010, p. 60.

18 This approach is also cited in Article 2.3 of the Agreement on the Implementation of Article VI of General Agreement on Tariffs and Trade 1994, 1868 UNTS 201 and appears similar or identical to the method prescribed in 269TAB(1)(b).

19 OECD Transfer Pricing Guidelines, 2010, p. 60.

20 OECD Transfer Pricing Guidelines, 2010, p. 60.

A CV

Warwick Davis

EXPERTISE: **Competition, Regulation**

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Warwick advises clients on economic regulation and competition issues, with a focus on the telecommunications and transport sectors.

Warwick has more than 20 years of experience as a professional economist. This includes over 15 years in consulting and six years working for telecommunications and competition regulators in Australia and the United Kingdom.

He has particular expertise in the areas of regulated pricing and market analysis. Warwick has applied his knowledge of economic theory and quantitative techniques to issues in network industries such as telecommunications, taxis, ports, airports, and rail. The issues have included scope of access regulation, pricing of access, allegations of anti-competitive conduct and options for structural reform.

Warwick has published a number of articles on contemporary economic issues in telecommunications, including structural separation and access pricing. Warwick is a member of the Competition and Consumer Committee of the Law Council of Australia, and the Economic Society of Australia.

Warwick Davis

RELEVANT EXPERIENCE

Competition and public policy

- For the **Anti-Dumping Commission**, developed an economic framework to assist the Commission undertake its assessment of material injury and causation in dumping or subsidisation investigations (2017).
- Advised **BHP Billiton** Iron Ore on an anti-dumping investigation into harm caused by dumping of ammonium nitrate by Chinese, Swedish and Thai importers (2018).
- Advised the **Department of Foreign Affairs and Trade** on the financial sustainability of the Solomon Islands Submarine Cable Corporation (SISCC). (2020-21).
- Advised the **Department of Communications** on the economic benefits of NBN Co's business fibre services, including price and competition benefits (2021).
- Advised **Facebook** on the substitution of messaging services for the purposes of submitting to the ACCC's ongoing digital platform service inquiries (2020-21).

Warwick Davis

- Advised **TPG** and **Vodafone Hutchison Australia** on their proposed merger, including submitting of an expert report to the Federal Court on the modelling of TPG's entry options (2019), analysis of counterfactual and reviewing empirical evidence on "4-to-3" mobile mergers
- Analyse differences in pricing trends between mobile telecommunications and other comparable industries for **Vodafone Hutchison Australia**. Our analysis was used by VHA to highlight the effectiveness of competition between mobile operators in passing on the gains of technological change to consumers. (2019)
- Advised **Brookfield** on the Proposed Acquisition of Asciano: Competition concerns expressed by the ACCC focused on vertical relationships in rail networks and coal loading terminals. (2016).

Regulatory analysis

- Currently advising fixed line broadband supplier **NBN Co** on its variation proposal for its long term special access undertaking which governs revenue and price controls that will be assessed by the ACCC (2021-).
- Advised **Vodafone Fiji** Limited to analyse proposals put to the Fijian regulator by Telecom Fiji on the pricing of mobile backhaul services (2019).
- Advised the **ACMA** on numbering charges levied for the supply of numbering services, which had been subject to demand and cost recovery uncertainty (2017).
- Peer reviewed the **ACMA's** economic analysis of the benefits of the introduction in 2011 of a consumer protection code.
- Advised **Vodafone New Zealand** to advise on appropriate cost allocation principles and methods for the allocation of common costs on Chorus' fibre and copper networks (2018).
- Advised **Vodafone** on the ACCC's mobile roaming declaration inquiry. This included modelling of the potential consumer benefits from declaration of a roaming service, and the appropriate methodology or methodologies for setting regulated prices for access to a domestic mobile roaming service.
- Advised **CBH (WA)** on proposed pricing amendments to the WA rail access regime, which was being reviewed by WA Treasury (2019-20).
- **Qantas** engaged Frontier Economics to analyse the extent of its countervailing power with respect to significant Australian airports (2019).
- Assisted Airlines for Australia and New Zealand (**A4ANZ**) to draft its submission to the Productivity Commission (PC) inquiry into airport regulation. This included a detailed economic analysis of the profitability of the Australian monitored airports (2017-18).
- For **A4ANZ**, analysed the expected operation of the revised Part IIIA declaration criteria introduced at the end of 2017.

Career

2006-present	Consultant, Frontier Economics
2004-2006	Director, Telecommunications Group, ACCC
2002-2004	Economic Adviser, Office of Telecommunications (UK), Ofcom
1999-2002	Various positions to Assistant Director, ACCC
1997-1999	Competition and Regulation Group, KPMG Consulting

Education

1998-2000	M.Commerce (Economics), with 1st class honours, University of Melbourne
1993-96	B.Economics (Hons), with 1st class honours, Monash University, Melbourne

Publications

- "From Futility to Utility: Recent developments in fixed line access pricing in Australia", Telecommunications Journal of Australia, Vol 61, No 2, 2011.
- (With Philip Williams AM), "Structural separation in Australia, economic and policy issues", Telecommunications Journal of Australia, Vol 58, May 2008, 11.1-11.13.
- Vertical price squeezes - lessons from New Zealand, Paper presented at 8th Australian Business Law Workshop, November 2009
- Competition in the Oil Industry and petrol prices in New Zealand, Presentation at 9th Annual Competition Law & Regulation Review conference, Wellington, February 2009.
- (With Allan Fels AO), A new approach to taxi licence reform - the Victorian Taxi Industry Inquiry proposal, Paper prepared for OECD Roundtable on Transport Reform, February 2013.

B Letter of instructions

[Attached]

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May 2022

Warwick Davies,
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3000

Expert Opinion: Arms Length Transactions

Dear Warwick,
Further to our conversations, I attach the following documents:

1. A report by Shannon Smit ;
2. Appendix to the above report;
3. Orders of the Federal Court dated 28 March 2022;
4. Orders of the Federal Court dated 31 March 2022;
5. Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2) [2021] FCA 591 (Redacted);
6. Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel [2022] FCAFC 4 Redacted); and
7. Panel letter to parties re error in Full Federal Court Decision dated 15 February 2022.

In order to form your opinion for the purposes of the expert report, the below sets out the questions that we would like you to consider based on the scenario outlined below:

Scenario: A global corporate group (XYZ Pty Ltd) transacts with its Australian subsidiary. It sells a bespoke, high-priced product to that Australian subsidiary. It does not make (and has never made) such transactions with any third party Australian entity – only to its subsidiary. XYZ Pty Ltd has a 'group guideline' requiring the same 'mark-up' in all its transactions with Australian entities, whether to its own subsidiary or to a third party entity (even though it has never transacted with a third party).

Question: Does the existence of such a group 'guideline' (if always enforced) mean that the price the within-group transactions can be characterised as is a 'market' (or 'arms-length') price?

Ancillary Question: If the answer to the first question is 'no', what are the type of assumptions that would need to be made (or the pre-conditions that would need to exist 'on the ground') in order for an economist to be able to reasonably conclude that the price of the within-group transactions is characterizable as a market (or 'arms-length') price?

Yours sincerely,

Michèle Williams

Michèle Williams

General Counsel

Frontier Economics

Brisbane | Melbourne | Singapore | Sydney

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