APPLICATION FOR REVIEW OF A DECISION BY THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR A COUNTERVAILING DUTY NOTICE

Anti-Dumping Review Panel
c/o Legal Services Branch
Department of Industry and Science
10 Binara Street
Canberra City
ACT 2601
P: +61 2 6276 1781
F: + 61 2 6213 6821
E: ADRP_support@industry.gov.au

INFORMATION FOR APPLICANTS

WHAT DECISIONS ARE REVIEWABLE BY THE ANTI-DUMPING REVIEW PANEL?

The role of the Anti-Dumping Review Panel (the ADRP) is to review certain decisions made by the Minister responsible for the Department of Industry and Science, or by the Anti-Dumping Commissioner (the Commissioner).

The ADRP may review decisions made by the Commissioner:

- to reject an application for dumping or countervailing measures
- to terminate an investigation into an application for dumping or countervailing measures
- to reject or terminate examination of an application for duty assessment, and
- to recommend to the Minister the refund of an amount of interim duty less than the amount contended in an application for duty assessment, or waiver of an amount over the amount of interim duty paid.

The ADRP may review decisions made by the Minister, as follows:

Investigations:

- to publish a dumping duty notice
- to publish a countervailing duty notice
- not to publish a dumping duty notice
- not to publish a countervailing duty notice

Review inquiries, including decisions

- to alter or revoke a dumping duty notice following a review inquiry
- to alter or revoke a countervailing duty notice following a review inquiry
- not to alter a dumping duty notice following a review inquiry
- not to alter a countervailing duty notice following a review inquiry
- that the terms of an undertaking are to remain unaltered
- that the terms of an undertaking are to be varied
- that an investigation is to be resumed
- that a person is to be released from the terms of an undertaking

Continuation inquiries:

- to secure the continuation of dumping measures following a continuation inquiry
- to secure the continuation of countervailing measures following a continuation inquiry
- not to secure the continuation of dumping measures following a continuation inquiry
- not to secure the continuation of countervailing measures following a

continuation inquiry.

Anti-circumvention inquiries:

- to alter a dumping duty notice following an anti-circumvention inquiry;
- to alter a countervailing duty notice following an anti-circumvention inquiry;
- not to alter a dumping duty notice following an anti-circumvention inquiry; and
- not to alter a countervailing duty notice following an anti-circumvention inquiry.

Before making a recommendation to the Minister, the ADRP may require the Commissioner to:

- reinvestigate a specific finding or findings that formed the basis of the reviewable decision; and
- report the result of the reinvestigation to the ADRP within a specified time period.

The ADRP only has the power to make **recommendations to** the Minister to affirm the reviewable decision or to revoke the reviewable decision and substitute with a new decision. The ADRP has no power to revoke the Minister's decision or substitute another decision for the Minister's decision.

WHICH APPLICATION FORM SHOULD BE USED?

It is essential that applications for review be lodged in accordance with the requirements of the *Customs Act 1901* (the Act). The ADRP does not have any discretion to accept an invalidly made application or an application that was lodged late.

Division 9 of Part XVB of the Act deals with reviews by the ADRP. Intending applicants should familiarise themselves with the relevant sections of the Act, and should also examine the explanatory brochure (available at www.adreviewpanel.gov.au).

There are separate application forms for each category of reviewable decision made by the Commissioner, and for decisions made by the Minister. It is important for intending applicants to ensure that they use the correct form.

This is the form to be used when applying for ADRP review of a decision of the Minister whether to publish a dumping duty notice or countervailing duty notice (or both). It is approved by the Commissioner pursuant to s 269ZY of the Act.

WHO MAY APPLY FOR REVIEW OF A MINISTERIAL DECISION?

Any interested party may lodge an application for review to the ADRP of a review of a ministerial decision. An "interested party" may be:

- if an application was made which led to the reviewable decision, the applicant
- a person representing the industry, or a portion of the industry, which produces the goods which are the subject of the reviewable decision
- a person directly concerned with the importation or exportation to Australia of the goods
- a person directly concerned with the production or manufacture of the goods
- a trade association, the majority of whose members are directly concerned with the production or manufacture, or the import or export of the goods to Australia, or
- the government of the country of origin or of export of the subject goods.

Intending applicants should refer to the definition of "interested party" in s 269ZX of the Act to establish whether they are eligible to apply.

WHEN MUST AN APPLICATION BE LODGED?

An application for a review must be received within 30 days after a public notice of the reviewable decision was first published in a national Australian newspaper (s 269ZZD).

The application is taken as being made on the date upon which it is received by the ADRP after it has been properly made in accordance with the instructions under 'Where and how should the application be made?' (below).

WHAT INFORMATION MUST AN APPLICATION CONTAIN?

An application should clearly and comprehensively set out the grounds on which the review is sought, and provide sufficient particulars to satisfy the ADRP that the Minister's decision should be reviewed. It is not sufficient simply to request that a decision be reviewed.

The application should include a statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application. There may be more than one such correct or preferable decision that should be identified, depending on the grounds that have been raised.

The application must contain a full description of the goods to which the application relates and a statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision (s 269ZZE).

If an application contains information which is confidential, or if publication of information contained in the application would adversely affect a person's business or commercial interest, the application will be rejected by the ADRP unless an appropriate summary statement has been prepared and accompanies the application.

If the applicant seeks to bring confidential information to the ADRP's attention (either in their application or subsequently), the applicant must prepare a summary statement which contains sufficient detail to allow the ADRP to reasonably understand the substance of the information, but the summary must not breach the confidentiality or adversely affect a person's business or commercial interest (s 269ZZY).

While both the confidential information and the summary statement must be provided to the ADRP, only the summary statement will be lodged on the public record maintained by the ADRP (s 269ZZX). The ADRP is obliged to maintain a public record for review of decisions made by the Minister, and for termination decisions of the Commissioner. The public record contains a copy of any application for review of a termination decision made to the ADRP, as well as any information given to the ADRP after an application has been made. Information contained in the public record is accessible to interested parties upon request.

Documents containing confidential information should be clearly marked "Confidential" and documents containing the summary statement of that confidential information should be clearly marked "Non-confidential public record version", or similar.

The ADRP does not have any investigative function, and **must** take account only of information which was before the Minister when the Minister made the reviewable decision (s269ZZ). The ADRP will disregard any information in applications and submissions that was not available to the Minister.

HOW LONG WILL THE REVIEW TAKE?

The timeframes for a review by the ADRP will be dependent on whether the ADRP requests the Commissioner to reinvestigate specific findings or findings that formed the basis of the reviewable decision.

If reinvestigation is not required

Unless the ADRP requests the Commissioner to reinvestigate a specific finding or findings, the ADRP must make a report to the Minister:

- at least 30 days after the public notification of the review;
- but no later than 60 days after that notification.

In special circumstances the Minister may allow the Review Panel a longer period for completion of the review (s 269ZZK(3)).

If reinvestigation is required

If the ADRP requests the Commissioner to reinvestigate a specific findings or findings, the Commissioner must report the results of the reinvestigation to the ADRP within a specified period.

Upon receipt of the Commissioner's reinvestigation report, the ADRP must make a report to the Minister within 30 days.

WHAT WILL BE THE OUTCOME OF THE REVIEW?

At the conclusion of a review, the ADRP must make a report to the Minister, recommending that the:

- - Minister affirm the reviewable decision (s 269ZZK(1)(a)), or
- - Minister revoke the reviewable decision and substitute a specified new decision (s 269ZZK(1)(b)).

After receiving the report from the ADRP the Minister must:

- - affirm his/her original decision; or
- - revoke his/her original decision and substitute a new decision.

The Minister has 30 days to make a decision after receiving the ADRP's report, unless there are special circumstances which prevent the decision being made within that period. The Minister must publish a notice if a longer period for making a decision is required (s 269ZZM).

WHERE AND HOW SHOULD THE APPLICATION BE MADE?

Applications must be EITHER:

- - lodged with, or mailed by prepaid post to:

Anti-Dumping Review Panel
c/o Legal Services Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601
AUSTRALIA

- - OR emailed to:

ADRP_support@industry.gov.au

- - OR sent by facsimile to:

Anti-Dumping Review Panel
c/o Legal Services Branch
+61 2 6213 6821

WHERE CAN FURTHER INFORMATION BE OBTAINED?

Further information about **reviews by the ADRP** can be obtained at the ADRP website (www.adreviewpanel.gov.au) or from:

Anti-Dumping Review Panel
c/o Legal Services Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601
AUSTRALIA

Telephone: +61 2 6276 1781
Facsimile: +61 2 6213 6821

Inquiries and requests for **general information about dumping matters** should be directed to:

Anti-Dumping Commission
Department of Industry and Science
Ground Floor Customs House
1010 Latrobe Street
MELBOURNE 3008

Telephone: 1300 884 159
Facsimile: 1300 882 506
Email: clientsupport@adcommission.gov.au

FALSE OR MISLEADING INFORMATION

It is an offence for a person to give the ADRP written information that the person knows to be false or misleading in a material particular.

(Penalty: 20 penalty units – this equates to $3400).

PRIVACY STATEMENT

The collection of this information is authorised under section 269ZZE of the *Customs Act 1901*. The information is collected to enable the ADRP to assess your application for the review of a decision to publish a dumping duty notice or countervailing duty notice.

APPLICATION FOR REVIEW OF DECISION OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR COUNTERVAILING DUTY NOTICE

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

to publish : ☒ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

OR

not to publish : ☐ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application;
- provides reasonable grounds for the decision not being the correct or preferable decision; and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

☒ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

☒ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

☒ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

☒ Full description of the imported goods to which the application relates.

☒ The tariff classification/statistical code of the imported goods.

☒ A copy of the reviewable decision.

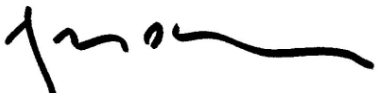
☒ Date of notification of the reviewable decision and the method of the notification.

☒ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.

☒ a statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application. There may be more than one such correct or preferable decision that should be identified, depending on the grounds that have been raised.

☒ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Please refer to the Attachments to this application

Signature: 

Name: Daniel Moulis

Position: Principal, Moulis Legal

Applicant Company/Entity: ABB Limited (of Thailand)

Date: 9 January 2015

Power and productivity
for a better world™

8 January 2015

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

Dear Review Panel

Application for review
Alleged dumping of power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam

We confirm that we retained the law firm of Moulis Legal to represent the interests of ABB Limited ("ABB") in the investigation concerning this matter, and that we continue to retain Moulis Legal for the purposes of our application to the Review Panel.

Please give Moulis Legal the same assistance and consideration in relation to the provision of information and cooperation in this matter as you would ABB.

The lead contact person at Moulis Legal is Daniel Moulis. His email address is daniel.moulis@moulislegal.com, and he can be contacted by telephone on +61 2 6163 1000.

Please contact him directly with any inquiries.

Yours faithfully,

ABB LIMITED
บริษัท เอบีบี จำกัด

Mr.Chaiyot Piyawannarat
Director

Mr.Kritskorn Hongprapat
Director

ABB LIMITED
Head Office
161/1 SG Tower, 1st – 4th Floor
Soi Mahadlekluang 3,
Rajdamri Road, Lumpini,

บริษัท เอบีบี จำกัด
สำนักงานใหญ่
161/1 อาคารเอสจีทาวเวอร์ ชั้น 1-4
ซอยมหาดเล็กหลวง 3 ถนนราชดำริ
แขวงลุมพินี เขตปทุมวัน

Plants
322 Moo 4,
Bangpoo Industrial Estate,
Soi 6, Sukhumvit Road,

โรงงาน
322 หมู่ 4 นิคมอุตสาหกรรมบางปู
ซอย 6 ถนนสุขุมวิท

Australian Government

Anti-Dumping Commission

Customs Act 1901 – Part XVB

POWER TRANSFORMERS EXPORTED FROM THE REPUBLIC OF INDONESIA, TAIWAN, THAILAND AND THE SOCIALIST REPUBLIC OF VIETNAM

Findings in relation to a dumping investigation

Public notice under subsections 269TG(1) and (2) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of power transformers (the goods), exported to Australia from the People's Republic of China (China), the Republic of Indonesia (Indonesia), the Republic of Korea (Korea), Taiwan, Thailand and the Socialist Republic of Vietnam (Vietnam).

The goods are classified to tariff subheadings 8504.22.00 (statistical code 40) and 8504.23.00 (statistical codes 26 and 41) of Schedule 3 to the *Customs Tariff Act 1995*. The various potential combinations of incomplete power transformers are not all classifiable to these classifications.

A full description of the goods is available in Anti-Dumping Notice (ADN) No. 2013/64 which is available at **http://www.adcommission.gov.au**.

On 1 December 2014, the Commissioner terminated the investigation so far as it related to goods exported by certain exporters in China, Indonesia and Korea and in so far as it related to all exporters in China and Korea. Termination Report No. 219 sets out the reasons for these terminations. This report is available at **http://www.adcommission.gov.au**.

The Commissioner reported the findings and recommendations to the Parliamentary Secretary to the Minister for Industry (the Parliamentary Secretary) in Anti-Dumping Commission Report No. 219 (Report No. 219) which outlined the investigation carried out by the Commission and recommended the publication of a dumping duty notice in respect of the goods.

Particulars of the dumping margin established and an explanation of the method used to compare export prices and normal values to establish each dumping margin are set out in the following table:

Country	Manufacturer / exporter	Dumping margin and effective rate of duty	Method to establish dumping margin
Indonesia	PT CG Power Systems Indonesia	8.7%	Individual export prices were compared with corresponding normal values over the investigation period in accordance with subsection 269TACB(2)(b) of the *Customs Act 1901* (the Act).
	All other Indonesian exporters except PT. Unelec Indonesia	8.7%	
Taiwan	Fortune Electric Co. Ltd	15.2%	
	Shihlin Electric & Engineering Corp	21.0%	
	Tatung Company	37.2%	
	All other Taiwanese exporters	37.2%	
Thailand	ABB Limited, Thailand	3.6%	Individual export prices were compared with weighted average corresponding normal values over the investigation period in accordance with subsection 269TACB(3) of the Act.
	Tirathai Public Company Limited	39.1%	Individual export prices were compared with corresponding normal values over the investigation period in accordance with subsection 269TACB(2)(b) of the Act.
	All other Thai exporters	39.1%	
Vietnam	ABB Limited, Vietnam	3.8%	Individual export prices were compared with weighted average corresponding normal values over the investigation period in accordance with subsection 269TACB(3) of the Act.
	All other Vietnamese exporters	3.8%	

I, ROBERT CHARLES BALDWIN, Parliamentary Secretary to the Minister for Industry, have considered, and accepted, the recommendations of the Commission, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in Report No. 219.

I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those goods and because of that, material injury to the Australian industry producing like goods might have been caused if securities had not been taken. Therefore under subsection 269TG(1) of the Act, I DECLARE that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

(i) the goods; and

(ii) like goods that were exported to Australia after 27 November 2013 (being the date that the Commissioner made a Preliminary Affirmative Determination under paragraph 269TD(4)(a) of the Act that there appeared to be sufficient grounds for the publication of a dumping duty notice) but before publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been caused, is being caused, or may be caused in the future. Therefore under subsection 269TG(2) of the Act, I DECLARE that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from Indonesia (excluding goods exported by PT Unelec Indonesia), Taiwan, Thailand and Vietnam.

The dumping duties will be calculated using the ad valorem duty method in accordance with Regulation 5(7) of the *Customs Tariff (Anti-Dumping) Regulations 2013;* that is as a proportion of the export price.

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports on prices in the Australian market in the form of price undercutting and price suppression and the consequent impact on the Australian industry including loss of sales volume, reduced market share, reduced revenue, reduced profits and profitability, reduced capacity utilisation, reduced employment and reduced return on investment.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export prices, non-injurious prices, and normal values of the goods (as ascertained in the

confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how measures are applied to 'goods on the water' is available in Australian Customs Dumping Notice No. 2012/34, available at **www.adcommission.gov.au**

Report No. 219 and other documents included in the public record are available at **www.adcommission.gov.au**. Alternatively, the public record may be examined at the Anti-Dumping Commission's office by contacting the case manager on the details provided below.

Enquiries about this notice may be directed to the case manager on telephone number +61 2 6275 6729, fax number 1300 882 506 or +61 3 9244 8902 (outside Australia) or **operations1@adcommission.gov.au**.

Dated this 4th day of December 2014

ROBERT CHARLES BALDWIN
Parliamentary Secretary to the Minister for Industry

GT12867

ATTACHMENT D

9 January 2015

In the Anti-Dumping Review Panel

Application for review
Power transformers exported from China, Indonesia, Korea, Taiwan, Thailand and Vietnam

ABB Limited (of Thailand)

NON-CONFIDENTIAL

1 Applicant

Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

The applicant is ABB Limited (of Thailand) (hereinafter "ABB Thailand").

The address of the applicant is 161/1 SG Tower, 1st-4th Floor, Soi Mahadlekluang 3, Rajdamri Road, Lumpini, Pathumwan, Bangkok 10330 Thailand.

ABB Thailand is a limited liability company registered in Thailand.

2 Applicant's contact details

Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation

The contact person at ABB Thailand is Jutharat Sutheewasinnon, Local Business Controller - Transformer.

Her contact details are:

- telephone +66 2 762 2003
- fax +66 2 709 3764
- email jutharat.sutheewasinnon@th.abb.com

3 Applicant's representative

Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

ABB Thailand is represented in this matter by Daniel Moulis, Principal, Moulis Legal.

The contact details of Moulis Legal are:

- address 6/2 Brindabella Circuit, Brindabella Business Park, Canberra International Airport ACT 2609 Australia
- telephone +61 2 6163 1000
- fax +61 2 6162 0606
- email daniel.moulis@moulislegal.com

A copy of the authorisation of Moulis Legal is at **Attachment B**.

Please address all communications relating to this application to Moulis Legal.

4 Description of imported goods

Full description of the imported goods to which the application relates.

This Application relates to power transformers imported from Thailand. The goods were described by the Anti-Dumping Commission ("the ADC") in Anti-Dumping Notice No. 2013/64 as follows:

> *The goods the subject of the application are power transformers. The applicant provided further details as follows:*
>
> > *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*
>
> *Incomplete power transformers are subassemblies consisting of the active part and any other parts attached to, imported with or invoiced with the active parts of power transformers. The active part of a power transformer consists of one or more of the following when attached to or otherwise assembled with one other:*
>
> - *the steel core;*
> - *the windings;*
> - *electrical insulation between the windings; and*
> - *the mechanical frame.*
>
> *Distribution transformers are not the subject of this application. Distribution transformers are smaller transformers that have design and manufacturing technology which is different from power transformers.*

5 Tariff classification of imported goods

The tariff classification/statistical code of the imported goods.

The imported goods are classified to the tariff subheading 8504.22.00 (statistical code 40) and 8504.23.00 (statistical codes 26 and 41) under Schedule 3 to the *Customs Tariff Act* 1995 ("the Tariff Act").

If a power transformer is imported as part of a power system then subheading 8537.20.90 may be applicable.

Parts for power transformers are classified to tariff subheading 8504.90.90 and, in the case of windings, to subheadings of 8544.1.

6 Reviewable decision

Copy of the reviewable decision, date of notification of the reviewable decision and the method of the notification

A copy of the decision is at **Attachment C**.

The reviewable decision was notified on 10 December 2014. It was published in *The Australian* newspaper on that day.

On that day the ADC also caused to be published:

- Australian Dumping Notice ADN 2014/132 – *Power transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam - Findings in Relation to a Dumping Investigation* ("ADN 2014/132");[1] and
- *Report to the Minister No. 219 – Power transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* ("Report No 219").[2]

7 Applicant's reasons

A statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision

A Introduction

Wilson Transformer Company Pty Ltd ("WTC") applied for a dumping investigation into imports of power transformers from the subject countries, including from Thailand, by way of an application to that effect dated 4 July 2013. The investigation was initiated on 29 July 2013.

As a result of this investigation, the Parliamentary Secretary to the Minister for Industry ("the Parliamentary Secretary") decided on 4 December 2014 to impose dumping duties on power

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1 http://www.adcommission.gov.au/cases/documents/195-ADN214-132-ParliamentarySecretaryhasacceptedtheCommissionsreccommendations.pdf

2 http://www.adcommission.gov.au/cases/documents/194-FinalReport219recommedingpublicationofadumpingdutynotice.pdf

transformers exported to Australia from Indonesia, Taiwan, Thailand and Vietnam. Specifically, the Parliamentary Secretary decided to publish notices in relation to power transformers exported from those countries under Sections 269TG(1) and (2) of the *Customs Act 1901* ("the Act").[3]

ABB Thailand seeks review of this decision by the ADRP under Sections 269ZZA(1)(a) and 269ZZC of the Act.

Specifically, ABB Thailand seeks review of a number of findings and conclusions which led to the decisions by the Parliamentary Secretary to publish those notices in respect of ABB Thailand's exports to Australia. The findings and conclusions concerned, as set out in Report No 219, are the following:

Finding 1 The finding that ABB Thailand's export prices *"differ[ed] significantly among different purchasers"*[4] for the purposes of Section 269TACB(3)(a) when the different purchasers considered by the ADC for that purpose were not the parties with whom ABB Thailand negotiated or contracted with for the purposes of establishing its export price and did not pay ABB Thailand the export price.

Finding 2 The finding that ABB Thailand's export prices *"differ[ed] significantly among different purchasers"*,[5] for the purposes of Section 269TACB(3)(a) when, on a factual basis, they did not *"differ significantly"*.

Finding 3 The finding that, in working out whether dumping has occurred and levels of dumping in circumstances where ABB Thailand's export prices were said to have *"differ[ed] significantly among different purchasers"*, the inappropriateness for the purposes of Section 269TACB(3) constituted the whole of the investigation period.

Finding 4 The finding that that there was dumping and that the level of the dumping was positive 3.6% using the transaction to weighted average method under Section 269TACB(3), when in truth the Commission did not use that method.

Finding 5 The finding that it was open to the Commission to recommend to the Minister that the

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[3] A reference to a "Section", "Subsection" or "Subparagraph" in this Application is a reference to a Section, Subsection or Subparagraph of the Act, unless otherwise specified.

[4] Section 269TACB(3)(a) refers.

[5] Section 269TACB(3)(a) refers.

export price in respect of the goods exported to Australia by ABB Thailand was less than the normal value of those goods, and for the Minister to publish notices under Sections 269TG(1) and (2) of the Act in respect of those goods, on the clamed basis that ABB Thailand's exports had been found to be dumped and to have dumping margins under Section 269TACB(6).

Finding 6 The finding that the total volume of the goods exported over the period of investigation that were dumped from Thailand was not negligible for the purposes of Section 269TDA(3), on the claimed basis that *"volume"* of goods for the purposes of Section 269TDA(4) could be adjudged based on the power rating capacity of power transformers and not on units of power transformers, when in terms of units the total volume of the goods exported over the period of investigation that were dumped from Thailand was negligible.

These findings and the conclusions to which they led formed the basis for the recommendations made by the Commission to the Parliamentary Secretary, being recommendations that were evidently accepted by the Parliamentary Secretary in making the reviewable decision to impose dumping duty against the goods under consideration ("the goods") when imported into Australia from ABB Thailand.

In relation to **Findings 1 to 4**, had the correct and preferable decision been made in respect of any of those matters then a level of dumping greater than *de minimis* would not have been worked out it in respect of exports of the goods by ABB Thailand and the investigation should have been terminated. On the basis that it should have been terminated, any recommendation from the Commission to impose dumping .duties on ABB Thailand's exports was unlawful and could not have been acted upon by the Minister.

In relation to **Finding 5**, the correct and preferable decision was that the export price in the case of ABB Thailand's exports to Australia was not less than the corresponding normal values, and therefore notices under Section 269TG(1) and (2) could not be published against ABB Thailand's exports.

In relation to **Finding 6**, the correct and preferable decision in respect of that matter was that the volume of the goods exported over the period of investigation that were dumped from Thailand was negligible for the purposes of Section 269TDA(3), and the investigation should have been terminated. On the basis that it should have been terminated, any recommendation from the Commission to impose dumping duties on ABB Thailand's exports was unlawful and could not have been acted upon by the Minister.

The grounds supporting ABB Thailand's request for a review of each of Findings 1 to 6 are discussed separately as follows.

B Finding 1 – different purchasers were not the purchasers from ABB Thailand

The finding that ABB Thailand's export prices "differ[ed] significantly among different purchasers",[6] for the purposes of Section 269TACB(3)(a) when the different purchasers considered by the ADC for that purpose were not the parties with whom ABB Thailand negotiated or contracted with for the purposes of establishing its export price and did not pay ABB Thailand the export price.

Section 269TACB(3) provides as follows:

> *If the Minister is satisfied:*
>
> *(a) that the export prices differ significantly among different purchasers, regions or periods; and*
>
> *(b) that those differences make the methods referred to in subsection (2) inappropriate for use in respect of a period constituting the whole or a part of the investigation period;*
>
> *the Minister may, for that period, compare the respective export prices determined in relation to individual transactions during that period with the weighted average of corresponding normal values over that period.*

In the case of ABB Thailand's exports to Australia, the Commission decided that ABB Thailand's export prices did differ significantly among different purchasers; that this rendered the methods for working out dumping and the dumping margins under Section 269TACB(2) inappropriate; and that the period of this inappropriateness extended for the whole of the period of investigation. There are four aspects of the Commission's conclusions under this Section that ABB Thailand contests.

- The first is that as a matter of legal interpretation the different purchasers amongst whom the export price was said to have differed significantly must be the purchasers from ABB Thailand.[7] This aspect is dealt with as Finding 1.
- The second aspect, is that as a factual matter ABB Thailand's export prices did not differ significantly among different purchasers. This aspect is dealt with as Finding 2.
- The third aspect, is that that it was not inappropriate to use the methods of working out whether there was dumping and the level of dumping under Section 269TACB(2). This aspect is dealt with as Finding 3.
- The fourth aspect is that, in any event, the Commission did not use the comparison method referred to in Section 269TACB(3). This aspect is dealt with as Finding 4.

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[6] Section 269TACB(3)(a) refers.

[7] For the assistance of the ADRP, the explanations offered by the Commission in this regard are contained in Report No 219 at pages 58 and 59.

Section 269TACB(3) has as its focus the exporter's export prices. Those export prices are referred to in Section 269TACB(1) as the export prices established in accordance with Section 269TAB. ABB Thailand's export prices to Australia were determined under Section 269TAB(1)(a).[8] That Section provides as follows:

> *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 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 an arms length transaction;*
>
> *the price paid or payable for the goods by the importer, other than any part of that 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…* [underlining supplied]

Plainly, the export price referred to, and the export price that was determined in the case of ABB Thailand, was the price in the transactions by which the importer purchased the goods. For the purposes of Sections 269TACB(1) and (3), by way of the literal, textual connection between those Sections and Section 269TAB, the purchaser in the arm's length transactions to which Section 269TAB(1)(a) applies is the importer who paid the export price, or the price from which the export price is derived. In ABB Thailand's case it was the importer who was the purchaser. It was the price paid by the importer as purchaser of the goods in its transaction with ABB Thailand that constituted the export price. The purchaser and importer in the case of ABB Thailand was ABB Australia, and Section 269TACB(3) can have no application. Despite the clear legislative resonance between the operation of Section 269TAB and of Section 269TACB(3), the Report has chosen to look at ABB Australia's customers when considering whether there are significant differences in the export prices to different purchasers.

We note the following extract from the Report:

> *The Commission notes claims by ABB Thailand that there are not and cannot be different export prices amongst different purchasers in its case because ABB Thailand does not have different purchasers. The Commission considers it would be a narrow and inappropriate reading of the provision of 269TACB(3) that would restrict the definition of purchasers to only those entities involved in the purchase of the goods directly from the exporter, especially when that entity is related to the exporter.*[9]

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[8] Report No 219, page 70.

[9] Report No 219, page 58.

The reading of Section 269TACB that we have advanced above is the only reading of that Section that is available. We do not accept that it is *"narrow and inappropriate"*. The "purchaser" is the entity that procures ownership of the transformer via the transaction from which the export price is derived. There is a statutory impediment to the application of the Section because ABB Thailand's export prices have not been among the purchaser/s of the goods from ABB Thailand.

Further, lest our client's position on this be mistaken, we do wish to clarify one aspect of the above extract.[10] We are not aware of having used the word *"directly"* in any of our client's submissions on this point. If that reference is intended to suggest that there can be direct and indirect purchasers, and that they are all purchasers for Section 269TACB(3) purposes, then that is not a connection that we have encouraged nor do we support it.

Our client's consistent position has been that it is the *"export prices"* of ABB Thailand *"among different purchasers"* that are amenable to the considerations referred to in Section 269TACB(3), The word *"among"* relates export prices to one purchaser with export prices to other purchasers. It is a relationship of one thing to other things. The Commission's approach does not reflect that relationship. There are no direct or indirect purchasers contemplated by the Section. All that is contemplated is a consideration of *"export prices…. among different purchasers"* and whether they *"differ significantly"*.

Report No 219 refers to unremarkable facts to try to pierce the corporate veil and "connect" ABB Thailand to the customers of ABB Australia. We refer to those references as follows:

1 The Report states that each Australian sale could be traced to specific Australian tenders:

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[10] There is another material misrepresentation of ABB's position in this respect that we would like to correct. In Confidential Attachment 7, at page 2, the Commission reports:

> *In its submission of 27 August 2014, ABB Thailand submitted a time series chart showing its export prices over the investigation period, which was said to show that the prices to* **[CONFIDENTIAL TEXT DELETED – ABB Australia customer details]** *were "…not different from other prices when shown in normal price context…".*

That is false. ABB Thailand did not refer to the prices to **[CONFIDENTIAL TEXT DELETED – ABB Australia customer details]** because it did not have prices to those parties. The true extract from that submission of 27 August 2014 proceeded as follows:

> *Here is a time sequence graph showing all of ABB TH's export prices. It can be observed that the transformers that the Commission has marked in orange and brown on its "Chart 2" worksheet are not different from other prices when shown in a normal price context– not exceptionally, consistently or otherwise.*

With respect, it was a distortion of ABB Thailand's submission to refer to the prices *"to"* **[CONFIDENTIAL TEXT DELETED – ABB Australia customer details]** and to state that ABB Thailand submitted that they were *"its"* prices.

> *In summary, we were satisfied that each Australian sale could be traced to specific Australian tenders and associated supply contracts which in turn could be linked directly to specific importations by ABB Australia.* [footnote omitted]

This statement was taken from the report of the visit of the Commission to ABB Australia for the purposes of verifying the financial data of that company. Its relevance for the purposes of supplanting ABB Australia as the purchaser for the purposes of Section 269TACB(3) is not apparent. Power transformers are not stock items, to be purchased off the shelf from a local warehouse. The statement was made by the Commission in the course of establishing that ABB Australia's sales to its domestic customers were profitable, such that the prices in the transactions between ABB Thailand and ABB Australia could be used as the export prices for the purposes of Section 269TAB(1)(a). It was that Section that the Commission used to identify that ABB Australia was the purchaser of the goods. There were no *"export prices… among different purchasers"* because there was only one purchaser.

2 The Report also suggests that price negotiation between ABB Australia and ABB Thailand is somehow supportive of the proposition that ABB Australia's customers were relevantly the *"different purchasers"* under Section 269TACB(3):

> *If the quote is not acceptable to ABB Australia, the supplier may be requested to re-quote. The supplier may then re-quote subject to suitable profitability considerations being satisfied.* [footnote omitted]

Again, this statement was made by the Commission in the ABB Australia visit report. It was made in the context of finding that ABB Australia was the purchaser of the goods from ABB Thailand pursuant to an arm's length transaction that was negotiated between the two parties and from which the export price for the goods could be derived. It was not made for, and has nothing to do with, the *"export prices… among different purchasers"* under Section 269TACB(3).

3 The Report states that:

> *…evidence relating to the negotiation process and information exchange that occurs between ABB Thailand and ABB Australia with respect to sales and supply of power transformers to Australian purchasers. This confidential information (discussed in Confidential Attachment 7) has been taken into account when determining which parties have been treated by the Commission as the purchasers for the purpose of s. 269TACB(3)(a).*

We presume that this is a reference to a number of dot-points set out in that Confidential Attachment 7 at page 6. We ask the ADRP to have reference to those dot points, and in relation to them, we note the following:

(a) power transformers are purchased by tender, therefore it is hardly surprising that a

tender party or a project name will be used in referring to a quotation requested by ABB Australia, or that matters such as the need for a number of units to satisfy the tender requirements and the technical specifications, options and logistical requirements relevant to ABB Thailand would be conveyed to ABB Thailand for quotation purposes; and

(b) *"the need for ABB Australia to achieve an acceptable profit margin"* as referenced in Confidential Attachment 7, bears out the fact that ABB Thailand and ABB Australia are independent seller and purchaser respectively - no finding of non-commercial behaviour between the ABB companies was made, indeed the Commission's conclusions were diametrically opposed to any such finding.

The claimed justifications in Report No 219 for considering that ABB Australia can be "looked through" in the comparison of prices to *"different purchasers"* are nothing more than a restatement of these factual realities:

- that it is necessary for ABB Thailand to know the technical specifications of a power transformer in order to provide a quotation to ABB Australia;
- that ABB Thailand and ABB Australia negotiate the export price between each other on an arm's length basis; and
- that ABB Australia is not an end user of the goods.

We do not see how these could be facts that impact upon the interpretation of the words *"export prices… among different purchasers"*. In the circumstances of its finding that ABB Thailand's export prices were to be determined solely from the purchases made by ABB Australia in the arm's length transactions that took place between those two ABB parties, we believe that it is that purchaser that can be the only purchaser under Section 269TACB(3).

During the investigation, we drew to the attention of the Commission[11] that the practice of another anti-

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[11] Please refer to footnote 9 of our letter to the Commission dated 11 November 2014 which states the following:

> *At our meeting with the Commission on 30 October 2014 we drew attention to statutory provisions in another anti-dumping user jurisdiction which appear to permit a wider application of so-called "targeted dumping" concepts where a constructed export price ("CEP") is used. In Australia this would be known as a work-back export price. That practice is not facilitated by Section 269TACB(3), and in any event no work-back export price was applied to the sales by ABB Thailand and ABB Vietnam to ABB Australia.*

dumping user jurisdiction correctly recognises that the application of a provision like Section 269TACB(3)[12] could be frustrated, in a policy sense, in circumstances where a chain of sales took place, and that its laws and regulations had been drafted to overcome that impediment in some circumstances. Section 777A(d)(1)(B) of the United States *Tariff Act (1930)* regarding determination of dumping (also referred to as "less than fair value") provides as follows:

> *Exception. The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if*
>
> *(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and*
>
> *(ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).*

We recognise that an explication of US law is not determinative of the position under Australian law. However we do wish to point out that under the US system, it is the reference to *"constructed export prices"* in Section 777A(d)(1)(B) that enables the US investigating authority to consider purchasers from an affiliated importer (affiliated to the producer/exporter) to be the *"purchasers"* for the purposes of Section 777A(d)(1)(B)(i). In the US, *"constructed export price"* is described as:

> *…the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.*[13] [underlining supplied]

We understand that under US law, if the exporter sells to only one purchaser (the importer), and the export sale is arm's length, the investigating authority could not find grounds for the application of Section 777A(d)(1)(B) (the *"differ significantly among purchasers"* ground). This is because the only *"export price"* transactions would be those from the exporter to the importer. However, if *"constructed export price"* is used, the relevant transactions to which the Section can be applied are those which represent the first independent resale, namely, the *"constructed export price"* transactions. The

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[12] Section 269TACB(3) and provisions like it in an other jurisdictions are claimed to be implementations of Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the Anti-Dumping Agreement").

[13] Import Administration Antidumping Manual, Chapter 07 Export Price and Constructed Export Price, at Section III (page 7), available at http://enforcement.trade.gov/admanual/index.html

"different purchasers" in that context are the first independent purchasers.

The points that we wish to make here are these:

- in ABB Thailand's case, its export prices to ABB Australia were found to be at arm's length and were determined under Section 269TAB(1)(a), pursuant to which the export price is *"the price paid or payable for the goods by the importer"* less any deductions to the FOB point; and
- the *"export prices… among different purchasers"* were those which, under Section 269TAB, applied to the purchases made by ABB Australia.

It should be noted that under US law, *"constructed export prices"* are always used in cases where the exporter and importer are *"affiliates"* of each other. ABB Thailand and ABB Australia would be considered to be *"affiliates"* of each other for the purposes of US law. However the specific reference in the US equivalent of Section 269TACB(3) to *"constructed export prices… that differ significantly among different purchasers"* allows that differential analysis to be undertaken amongst the first independent purchasers. That is not the case under Australian law, and as already stated the sales were considered by the Commission to be arm's length transactions. And, if it is thought that the non-mention of "constructed export price" in Section 269TACB(3) under Australian law is a matter of no consequence, and that purchasers in the transaction from which a constructed export price was derived are the relevant purchasers for the purposes of the analysis, none of ABB Thailand's transactions were found to be non arm's length, and none of them were constructed.

Accordingly, we submit:

- that all of ABB Thailand's exports to Australia were arm's length transactions, as found by the Commission;
- that ABB Australia was the importer and purchaser of ABB Thailand exports to Australia, and was the party that paid the export price, as found by the Commission;
- that the analysis of differential pricing amongst purchasers under Section 269TACB(3) applies to the purchases that take place in transactions that are used to establish the export prices; and
- as a result of the above, the application of Section 269TACB(3) in Report No 219 was unlawful, because the basis for that application - that export prices differed significantly among different purchasers – incorrectly identified ABB Australia's final customers as the "purchasers" relevant to the determination of the export price..

The correct decision in relation to the interpretation of Section 269TACB(3) is that the *"different purchasers"* are the purchasers that pay the export price that is the subject of the inquiry under that Section. A recommendation by the ADRP to that effect would obviate the Commission's adoption, and

manner of adoption, of Section 269TACB(6) for the purposes of working out whether dumping by ABB Thailand occurred, and the level of any such dumping. Instead, the dumping margin, using the same "transaction to transaction" methodology that was applied to other exporters to which Section 269TACB(3) was not applied, would be a negative (no dumping) margin of 10.0%. This is spelt out in the following extract from the Report:

> *If the dumping margin was determined under s. 269TACB(2)(b) using the transaction to transaction method and subsequently each separate margin for this exporter is amalgamated, the result is a dumping margin of negative 10.0%.*[14]

Thus, the Commission would have been bound to terminate the investigation as against ABB Thailand on the basis that there was a less than *de minimis* dumping margin worked out it in respect of exports of the goods by ABB Thailand. On the basis that it should have been terminated, any recommendation from the Commission to impose dumping duties on ABB Thailand's exports was unlawful and could not have been acted upon by the Minister. Therefore, the ADRP's recommendation to the Minister should be that the notice should not apply to exports from ABB Thailand, and that it should be varied or revoked to that effect.

Lastly, we recall the Commission's statement that *"it would be a narrow and inappropriate reading of the provision of 269TACB(3) that would restrict the definition of purchasers to only those entities involved in the purchase of the goods directly from the exporter, especially when that entity is related to the exporter"*. The nature of the *"inappropriateness"* is not spelt out. The Commission could be meaning to suggest that low *"export prices [that] "differ significantly among different purchasers"* are potentially causative of material injury to the Australian industry, and that this is the policy underpinning interpretation of who those purchasers are. If so, then we wish it to be noted that the point of contestability with WTC in the Australian market is at the point of tendering with end users. ABB Australia provides many services and additions in its resale prices to end users, seeks its own profits on such sales, and negotiates its own price for those sales. Whether there are differences in ABB Australia's prices to end users, what those differences are, and whether or not it achieves profits, are not things that can be divined from ABB Thailand's export prices.

In relation to any suggestion that there is a policy to protect Australian industry underpinning this work-around approach to the question of whether there were *"export prices that differ[ed] significantly among different purchasers"*, we note the consideration and rejection of this suggestion by Nicholas J of the

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[14] Report No 219, page 71.

Federal Court in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* ("Panasia"):[15]

> *Further, I do not agree with Capral that the purpose of Part XVB of the Act is "to protect Australian industry". The purpose of Part XVB is far more complicated. It is apparent from the scheme of Part XVB that the legislature has sought to strike a balance, as the relevant international agreements no doubt seek to do, between various interests including not only those of Australian industries but also other WTO members and their own domestic industries, Australian consumers (in the broadest sense of that word) who may have an interest in acquiring imported goods at the lowest available prices and Australian exporters that supply their goods to other countries that are also members of the WTO.*

Applying Section 269TACB(3) to ABB Thailand's export prices is not an indicia of ABB Australia's price to an end user in Australia, and therefore does not address the question of whether it was the differences in ABB Thailand's export prices that were materially injurious to the Australian industry. ABB Australia seeks profitability on all of its sales, but it cannot be assumed that there is some steady linear relationship between the export price at which ABB Australia purchases the goods and the prices at which it resells to its customers.

In a submission on this point to the Commission during the investigation, we advised the following:

> *End users do not pay "export prices". End users do not buy power transformers simpliciter. ABB Australia is not a trader of documents of title relating to power transformers and is not a distributor of power transformers. ABB Australia is a sophisticated provider of power systems. In terms of major capital equipment in the form of power transformers, this involves everything from their supply, installation and commissioning within existing networks, to the design, construction and operation of entire power networks supporting sites for mining, for industry, and for communities.*
>
> *It is simply not possible to equate an export price of ABB Thailand or ABB Vietnam to the price an end user pays, nor is the scope of supply under the contract that ABB Australia has with those exporters the same as that with its end user customers. ABB Australia supplies the products, further materials to complete the products, and elaborate services to complete and install the goods under contract with its customer. There supply and installation services cover the period from* ***[CONFIDENTIAL TEXT DELETED – trading terms]*** *to final customer acceptance. In a simpler example, these include:*
>
> - *off-loading and customs clearance including all quarantine inspections;*
> - *loading at port for transportation to installation site;*
> - *road transport of main tank and accessories from port to installation site (typically by way of two or three prime movers for the main tank, two or more separate semi-trailers or B-double*

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15 [2013] FCA 870 (30 August 2013)

vehicles for accessories);

- *unloading by crane and positioning main tank on foundations;*
- *assembly of complete transformer with all working parts/accessories including, but not limited to,* ***[CONFIDENTIAL TEXT DELETED –details of transformer assembly by ABB Australia]****;*
- *connection of all secondary wiring;*
- *supply transformer oil;*
- *vacuum fill and process;*
- *site acceptance testing;*
- *restoration of paint finish following transport and assembly; and*
- *on-going warranty and whole of life maintenance programmes if required under terms of tender.*

The price the customer pays is not the export price. The customer pays ABB Australia's price for the procurement of the subject power transformer/s and of assembling and installing them on site, with all attendant interconnections, commissioning and testing.

We continue to maintain that the Commission's attempt to look through ABB Australia as if it were not there, and its conflation of the concept of different purchasers to include ABB Australia's customers, involves an error of law.

Accordingly, the policy that the Commission may have used to inform its interpretation of the words *"export prices differ significantly among different purchasers"* is not served by the outcome of that interpretation, because the prices that were considered for the purposes of Section 269TACB(3) are not the prices that the end users pay for those goods.

C Finding 2 – export prices among different purchasers did not differ significantly

The finding that ABB Thailand's export prices "differ[ed] significantly among different purchasers", for the purposes of Section 269TACB(3)(a) when, on a factual basis, they did not "differ significantly".

In 7B above we indicated that there were a number of aspects of the Commission's finding that Section 269TACB(3) could be applied to ABB Thailand's exports, and how it was applied, that ABB Thailand contested. The first aspect has been dealt with as Finding 1, above. The next aspect, which is put in the alternative to our submissions in relation to Finding 1, is that as a factual matter ABB Thailand's export prices did not differ significantly among different purchasers. We now deal with this matter as Finding 2.

We wish to reiterate that our submissions in this regard are put in the alternative, and do not detract from our client's primary position that the Commission's consideration of the differences in export prices for the goods purchased by ABB Australia from ABB Thailand as if ABB Australia's customers were the different purchasers of those goods is incorrect.

Section 269TACB(3) requires export prices to differ significantly among different purchasers for it to be

utilised in working out whether dumping has occurred and the levels of any such dumping. The differences that the Commission identified were illustrated in the following chart that the Commission used for the purposes of its analysis:[16]

[CONFIDENTIAL TEXT DELETED –chart showing Commission's ratios of ABB's Thailand's export prices]

The Commission's conclusion that export prices *"differ[ed] significantly"* is stated in the following extract from Report No 219:

> *After considering the evidence available and the ABB Thailand submissions, the Commission is of the view that ABB Thailand export prices to ABB Australia for supply to* ***[CONFIDENTIAL TEXT DELETED – ABB Australia customer name]*** *in the investigation period are significantly different to its export prices to other Australian purchasers in that period (s. 269TACB(3)(a)).*[17]

ABB Thailand does not agree with the Commission and believes that its rebuttal of this conclusion is simple and compelling.

The underlying methodology of the Commission's price comparison was to work out a ratio of the export price of each unit to ABB Thailand's costs to make and sell ("CTMS") the same unit (those costs stopping at the FOB point). This means that the bar lines do not represent absolute or actual prices. However, assuming, for the purposes of argument, that the underlying methodology used by the Commission for measuring whether there were different export prices is acceptable,[18] then the chart shows that ABB Thailand's prices ("ratios", as explained above) for units supplied by ABB Australia to **[CONFIDENTIAL TEXT DELETED – ABB Australia customer name]** were **[CONFIDENTIAL TEXT DELETED – price "ratios"]**. To another customer, **[CONFIDENTIAL TEXT DELETED – ABB Australia customer name]**, they were **[CONFIDENTIAL TEXT DELETED – price "ratios"]**. This means that **[CONFIDENTIAL TEXT DELETED – number]** of the **[CONFIDENTIAL TEXT DELETED – number]** export prices for sales of units supplied by ABB Australia to **[CONFIDENTIAL TEXT DELETED – ABB Australia customer name]** were higher than the lowest priced unit supplied to **[CONFIDENTIAL TEXT DELETED – ABB Australia customer name]**. In these circumstances it cannot be validly said, as a factual matter, that the *"export prices to ABB Australia for supply to* **[CONFIDENTIAL TEXT DELETED – ABB Australia customer name]** *in the investigation period are significantly different to its export prices*

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16 Report No 219, Confidential Attachment 7, page 7.

17 *Ibid.*

18 The bar lines do not represent absolute or actual prices. They are a ratio of the export price of each unit to ABB Thailand's costs to make and sell the same unit (those costs stopping at the FOB point).

to other Australian purchasers in that period". Prices (ratios) for some of the units supplied to [CONFIDENTIAL TEXT DELETED – ABB Australia customer name] were higher than prices (ratios) for some of the units supplied to [CONFIDENTIAL TEXT DELETED – ABB Australia customer name] as is more conveniently shown by this version of the Commission's chart:

[CONFIDENTIAL TEXT DELETED –chart showing Commission's ratios of ABB's Thailand's export prices]

Taking the analysis further, it can also be seen from the chart that the prices (ratios) for [CONFIDENTIAL TEXT DELETED – number] of the units supplied to [CONFIDENTIAL TEXT DELETED – ABB Australia customer name] were higher than prices (ratios) for some of the units supplied to [CONFIDENTIAL TEXT DELETED – ABB Australia customer/project names].

Accordingly, ABB Thailand offered prices to ABB Australia for units that were supplied by ABB Australia to [CONFIDENTIAL TEXT DELETED – ABB Australia customer name] which (based on the Commission's "ratio" approach towards measuring prices) did not differ significantly to the prices for units supplied to [CONFIDENTIAL TEXT DELETED – ABB Australia customer name]. Sometimes the prices were higher, and sometimes they were lower.

The Commission's approach towards the application of the statutorily-defined test for determining whether export prices differed significantly among different purchasers (being the purchasers from ABB Australia, not ABB Thailand) was to work out which exports to ABB Australia (being exports that were supplied by ABB Australia to a particular customer) were collectively the most likely to be *"dumped"* (being the ratio of export price to CTMS). Having done that, it only used the positive margin of dumping on those exports as the numerator in the fraction used to calculate the dumping margin.[19]

We submit that this is a misconstruction of the statutory test. This can be made apparent from this explanation of how the Commission arrived at its finding:

> [CONFIDENTIAL TEXT DELETED – confidential information withheld from the public record by the Commission]

The first part of this test was directed towards working out whether there was a *group* of sales to ABB Australia, defined by the fact that they were supplied by ABB Australia to the one end user customer,

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[19] An explanation of the methodology used in the case of ABB Thailand's exports, and ABB Thailand's objection to it, is the subject of our submissions in relation to Finding 5, below. The methodology changed the 10% no-dumping margin that would have been worked out for ABB Thailand based on the methodology used for other exporters (ie the exporters to which Section 269TACB(3) was not applied) into a 3.6% dumping margin.

that had the greatest potential to have been sold at a loss. Once that was done, the Commission compared that group with the group of sales supplied by ABB Australia to another customer which had the closest similar potential. Then the Commission said that the overall characteristic of the first mentioned group differed significantly to the overall characteristic of the second mentioned group.

That test failed to consider the export prices (using the Commission's ratio-based comparison) themselves. It did not identify that each of those customers were supplied with power transformer units by ABB Australia that ABB Thailand had sold to ABB Australia at export prices which had interchangeably higher and lower prices. On that basis the export prices did not differ significantly, in that there were examples of sales to the first mentioned customer that were higher priced than sales to the second mentioned customer.

The proper approach for the Commission would have been to ask itself – as directed by Section 269TACB(3) - whether export prices were significantly different among different purchasers. If the Commission had done so it would have identified that units ultimately sold by ABB Australia to **[CONFIDENTIAL TEXT DELETED – ABB Australia customer name]** were exported to ABB Australia at prices both above and below the prices for units ultimately sold by ABB Australia to **[CONFIDENTIAL TEXT DELETED – ABB Australia customer name]**. In that the levels of prices (ratios) were mixed as between the different purchasers, we do not believe they can be said to have been significantly different. Prices will always vary. One purchaser (noting again that the purchasers considered by the Commission were not the purchasers from ABB Thailand) within a group of purchasers will always get an *overall* higher price, and one other will always get an *overall* lower price. All the Commission has done is to choose units supplied to a customer that were *overall* the lowest priced and to label them as *"differ[ing] significantly"* when the truth of the matter is that some of the prices to another customer were lower than some of those prices. If this is how Section 269TACB(3) is to be applied, then in all likelihood there would be no case in which it could not be applied.

ABB Thailand submits that the correct and preferable decision with regard to this Finding 2 is that in ABB Thailand's case the relevant export prices did not differ significantly among different purchasers, and that there was accordingly no basis to apply Section 269TACB(6) as the method of working out whether dumping had occurred, and the levels of dumping. The same methods should have been applied to ABB Thailand as were applied to all other exporters.[20].

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[20] Excepting Siemens Guangzhou, Siemens Jinan and Siemens Wuhan, against whom a Section 269TACB(6) method was also applied (Report No 219, page 63 refers).

Thus, we refer back to the same request for a recommendation by the ADRP to the Minister as under 7B above, which is that the notice should not apply to exports from ABB Thailand, and that it should be varied or revoked to that effect. This is because if the Commission had not made the Section 269TACB(3) finding, it would have been bound to terminate the investigation as against ABB Thailand on the basis that there was a less than *de minimis* dumping margin worked out it in respect of exports of the goods by ABB Thailand, as it did for exporters in respect of which that Section was not applied and against which the investigation was terminated. On the basis that it should have been terminated, any recommendation from the Commission to impose dumping duties on ABB Thailand's exports was unlawful and could not have been acted upon by the Minister.

In making this submission we again draw the ADRP's attention to the intellectual difficulties caused by the Commission's opinion that the export prices for the goods purchased by ABB Australia were amenable to consideration under Section 269TACB(3) on the basis that ABB Australia's customers were the "*different purchasers"*, and to our client's rejection of that opinion (Finding 1).

Relatedly, we wish to draw the ADRP's attention to one particular aspect of the Commission's explanation of its Section 269TACB(3) finding with which our client also takes issue. In Report No 219, it is said that:

> *The Commission calculated the ratios of actual export price to actual full cost to make and sell the power transformers for ABB Thailand sales to ABB Australia for the supply to Australian purchasers. The Commission noted that those ratios for one purchaser,* **[CONFIDENTIAL TEXT DELETED – ABB Australia customer details]** *ranged from* **[CONFIDENTIAL TEXT DELETED – number]***% to* **[CONFIDENTIAL TEXT DELETED – number]***%, with a weighted average of* **[CONFIDENTIAL TEXT DELETED – number]***%. Of the* **[CONFIDENTIAL TEXT DELETED – number]** *units sold to* **[CONFIDENTIAL TEXT DELETED – ABB Australia customer details]** *only* **[CONFIDENTIAL TEXT DELETED – number]** *achieved a profit,* **[CONFIDENTIAL TEXT DELETED – number]** *break-even, and* **[CONFIDENTIAL TEXT DELETED – number]** *were sales at a loss. ABB Thailand has not contested these facts.*[21]

It is evident, from the positioning and expression of this passage, that it contains information that the Commission felt was important to its conclusions. We have rebutted those conclusions above. Nonetheless, for the ADRP's further benefit we do need to clarify specific aspects of what is said in this passage.

The references to *"actual export price"* and *"actual full cost"* are misleading. ABB Thailand's actual *prices* to ABB Australia were not the *export prices* for those goods. The export price is an outcome of the

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[21] Report No 219, Confidential Attachment 7, page 6.

legislation, and of the Commission's administration of that legislation, because it is the exporter's price adjusted back to the FOB point. [CONFIDENTIAL TEXT DELETED – trading terms] Therefore it was not the actual price, and associating the word *"actual"* to an export price where that price is a price that is worked out under a legislative provision is not an appropriate use of the word.

The same applies to the use of the words *"actual"* and *"full"* in that passage in association with the cost to make and sell the goods. The costs that the Commission used were again limited to those costs that applied to the FOB point.

As a result, the following statement in the passage is not a proper explanation of the outcomes of ABB Thailand's ABB Thailand's pricing and costs:

> *[o]f the* [CONFIDENTIAL TEXT DELETED – number] *units sold to* [CONFIDENTIAL TEXT DELETED – ABB Australia customer name] *only* [CONFIDENTIAL TEXT DELETED – number] *achieved a profit,* [CONFIDENTIAL TEXT DELETED – number] *was at break-even, and* [CONFIDENTIAL TEXT DELETED – number] *were sales at a loss*

The words *"profit"*, *"break-even"* and *"loss"* would suggest to any reasonable reader that ABB Thailand experienced those things in the sales to which the Commission refers. However that is not the case. On 9 October 2014, we provided a chart to the Commission which we explained as follows:

> *Using the spread sheet referred to as "CA2 Australian CTMS" from the Commission's email dated 15 July 2014, we have prepared a chart which tracks the ratio of* [CONFIDENTIAL TEXT DELETED – confidential spread sheet information] *against* [CONFIDENTIAL TEXT DELETED – confidential spread sheet information] *of each of those transformers. This comparison does not arbitrarily exclude price and cost factors past the FOB point. Even if the Commission's analysis was a valid one, we believe that the exclusion of these factors is a distortion of that analysis because it does not take into account all of the costs and all of the revenue for the sale concerned from the exporter's perspective. In other words, our substitute comparison for that constructed by the Commission compares ABB Thailand's full-up revenue against its full up cost for each individual transformer concerned.*[22]

Indeed, the Commission refers to this in Report No 219, and replicates the chart that we provided on 9 October 2014:

> [CONFIDENTIAL TEXT DELETED – confidential information withheld from the public record by the Commission][23]

The Commission has not contested these facts, and given that they are derived from the verified data that the Commission provided to ABB Thailand and has used for all of its calculations it could not contest

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22 Letter from Moulis Legal to the Commission dated 9 October 2014, page 5.

23 Report No 219, Confidential Attachment 7, pages 6 and 7.

them.

Thus, in a commercial sense ABB Thailand really, actually, was *profitable* in respect of [CONFIDENTIAL TEXT DELETED – number] of its [CONFIDENTIAL TEXT DELETED – number] sales to ABB Australia that ABB Australia supplied to its customer [CONFIDENTIAL TEXT DELETED – ABB Australia customer name], and the sales as a group were overall profitable.

D Finding 3 – incorrect finding that inappropriateness extended over whole period

The finding that, in working out whether dumping has occurred and levels of dumping in circumstances where ABB Thailand's export prices were said to have "differ[ed] significantly among different purchasers", the inappropriateness for the purposes of Section 269TACB(3) constituted the whole of the investigation period.

Under Section 269TACB(3), the period during which the transaction to weighted average ("T-W") method may be used is the period in which it is inappropriate to use either the weighted average to weighted average ("W-W") method or the transaction to transaction ("T-T") method.

The [CONFIDENTIAL TEXT DELETED – ABB Australia customer name] sales that were the subject of the Commission's *"differ significantly"* finding took place within [CONFIDENTIAL TEXT DELETED – discrete period of total investigation period]. The contract dates were [CONFIDENTIAL TEXT DELETED – dates of contracts].

Section 269TACB(3) only operates where there are different export prices between purchasers, regions or periods, and those differences make the use of the normal dumping margin calculation methodologies inappropriate for a period. Where this is found to have occurred the Commission may use the T-W methodology *"for that period"* in which the inappropriateness arises and in respect of goods in the transactions to which Section 269TACB(6) is applied.

In the case of ABB Thailand, the Commission considered the period of inappropriateness to be the entire period of investigation. The period of investigation was three years.

The Commission reported its conclusion in this regard as follows:

> *The Commission considers that the observed differences make the methods for comparison of export price and normal value under s. 269TACB(2) inappropriate for use in respect of the whole investigation period. That is, in undertaking the aggregation of each transaction-to-transaction dumping margin the differential pricing is effectively masked. The Commission considers that export prices that 'differ significantly' for certain ABB Thailand transactions are masked and not taken into account appropriately when the weighted average to weighted average or transaction to transaction methods for determining dumping are applied. The Commission also considers that the margin of dumping particular to those sales, and the volume of those sales at dumped prices, has caused injury to the Australian power transformer industry.*

> *In these circumstances, the Commission considers that injurious dumping would have been masked by the weighted average to weighted average or the transaction to transaction approaches to calculating dumping margins. Therefore, the Commission considers it is inappropriate to use s. 269TACB(2) for working out whether dumping has occurred in relation to ABB Thailand export sales to Australia in the investigation period.*[24]

As Section 269TACB(3) notes, the period may be a *"period constituting the whole or a part of the investigation period"*. We discern that two justifications are offered for the Commission's choice of a three year period, when the sales only took place over two months:

1 That *"the margin of dumping particular to those sales, and the volume of those sales at dumped prices, has caused injury to the Australian power transformer industry"* – in response to this we ask the ADRP to consider these matters:

(a) it is also the case that ABB Thailand's other sales represented **[CONFIDENTIAL TEXT DELETED – number]**% of its sales to Australia, and that if the transaction to transaction method had been applied to ABB Thailand's exports it would have had the highest negative (no dumping) margin of any of the seven exporters in respect of whom the investigation was terminated;[25]

(b) that Nicholas J in Panasia, as quoted above, disagreed that the policy of the Act was solely to protect Australian industry, and instead observed that the legislature had sought to strike a balance between competing interests;

(c) that the loss of a sale by the Australian industry can come about just as easily as a result of a 5% dumping margin as a 10% one, therefore the concept that ABB Thailand would be treated differently than others just because its lower prices (ie the Commission's ratios) were not spread more evenly amongst other purchasers is entirely unreasonable.

2 That *"in undertaking the aggregation of each transaction-to-transaction dumping margin the differential pricing is effectively masked"* - if the requisite inappropriateness is that the usual methods mask dumping (i.e. that the normal margin calculation methodologies do not deliver a dumping margin), then there would be no need to specify that the period could be anything other than the whole investigation period, because in all cases the application of the normal margin calculation methodologies would mask the dumping.

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[24] Report No 219, page 71.

[25] In respect of one such exporter, the negative margin was expressed as greater than 5%, therefore we cannot be sure about its precise dumping margin.

We submit that the conclusion that the "different" export prices affected the entire three year period of investigation when they only took place in a discrete **[CONFIDENTIAL TEXT DELETED – discrete period of total investigation period]** period is unfair and unreasonable.

If the ADRP agrees with our submissions, then the question that might be posed (subject to the impact of agreement on the ADRP's part with any of our other submissions, and the ADRP's recommendations that would arise therefrom) is what would be the period of inappropriateness. We would leave that matter, and its implications, in the hands of the ADRP.

Ultimately, we would hope that the ADRP would recommend to the Minister that the notice should not apply to exports from ABB Thailand. This would arise if the application of whichever methodology the ADRP uses or substitutes as part of its determination that a shorter period should apply leads to the conclusion that a less than *de minimis* margin should have been worked out. In that case the Commission would have been bound to terminate the investigation as against ABB Thailand. On the basis that it should have been terminated, any recommendation from the Commission to impose dumping duties on ABB Thailand's exports was unlawful and could not have been acted upon by the Minister.

E Finding 4 – failure to apply the method that was claimed to have been applied

The finding that that there was dumping and that the level of the dumping was positive 3.6% using the "transaction to weighted average" method under Section 269TACB(3), when in truth the Commission did not use that method.

Throughout this application references have been made to the three methods for dumping margin calculation under Section 269TACB. They are the weighted average to weighted average method ("W-W"), the transaction to transaction method ("T-T"), and the transaction to weighted average ("T-W") method.

A "*weighted average"* value means exactly that – that all transactions in relation to which the *"weighted average of export prices"* or *"weighted average of corresponding normal values"* are to be worked out in a TACB comparison in respect of a period must be a *"weighted average"* amount of each of those sets of prices/values.

We submit that there can be only one weighted average of export prices and one weighted average of normal values in any given period in which such a comparison is carried out, both as a matter of the plain meaning of the words and the language of the Act.

The multiple references to these concepts in Section 269TACB are clear and consistent. They read as follows:

- *"weighted average of export prices"*;
- *"weighted average of corresponding normal values".*

The law does not read as:

- *"weighted averages of export prices"*;
- *"weighted average export prices"*; or
- *"corresponding weighted average normal values"*.

How a weighted average is to be calculated is set out in Section 269T(5A) of the Act. Again, we note that the formula is aimed at working out one value from a number of values as being the weighted average of them.

In purporting to apply a T-W method to ABB Thailand's exports, the Commission did not work out one weighted average of corresponding normal values. It explained itself as follows:

> *Subsection 269TACB(3) requires export prices to be compared with the weighted average of corresponding normal values. As stated elsewhere in this report the Commission considers that the normal value for each export transaction can only be determined by reference to the constructed cost to make and sell the power transformer in that transaction. Each and every normal value was therefore constructed specifically to correspond to an individual export transaction. In these circumstances, the Commission considers the weighted average of corresponding normal values may, in relation to each individual export transaction, be based on a single observation of corresponding normal value. That is, in 'weighting', the Commission has properly taken account of the importance of each relevant and corresponding normal value by applying a weighting factor of 1.*
>
> *To establish the weighted average of corresponding normal values, the Commission used the same constructed normal values that had been determined to compare to the export price in the transaction to transaction method. The resulting weighted average corresponding normal value (based on a weighting factor of 1) is therefore the same as the corresponding normal value used in the transaction to transaction method.*[26]

The key statements in this explanation are, first, that there was not one weighted average worked out, instead there was something called a weighted average normal value for each individual export transaction (a thing called *"a single observation"*) and, second, that the *"single observations"* were in each case exactly the same as the constructed normal values based on the T-T method.

With respect to the Commission, we find this to be outlandish.

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[26] Report No 219, page 60.

If a T-W method is to be used, then each *transactional* export price of each particular transaction is supposed to be compared with the same amount of normal value being the *weighted average of corresponding normal values* in the period that such method is applied. It is only in this way that the T-W method can be applied. The T-W method as provided for under Section 269TACB(3) cannot be said to have been applied when the transactional export prices have simply been compared to the corresponding transactional normal values for each transaction, and claiming that the transactional normal value is really a "weighted average" with a weighting of "1".

With respect, the method used by the Commission can only be described as a T-T comparison as envisaged by Section 269TACB(2)(b), which is artificially labelled as a T-W method. The normal values used in this way do not have the single value meant by the expression *"weighted average of corresponding normal values"*. They are, at best, and if a weighting of "1" is a weighting at all, which we reject, the "weighted average normal values of each corresponding export transaction". They are not examples of the W contemplated by the T-W test.

The Commission admits that the normal values that were used in applying the T-W method to ABB Thailand's exports were the transactional normal values. These are the normal values for each and every transaction – being the corresponding normal values to each export transaction, as prescribed under Section 269TACB(2), not (3). It is clear that the Commission has not compared the export price for each transaction to the *"weighted average of corresponding normal values*.

Even if, for some reason, it is accepted that this conversion of a transactional value to a weighted average value can be done by a change of linguistic description, then the fact that the "two methods" appear to be exactly the same highlights the lack of logic in calling one method – the T-T method - "inappropriate" and the other method – the "T-W" method - more "appropriate". How can the "inappropriateness" be cured when they are factually and mathematically exactly the same things?

Further, we take note of the comment that

> *As stated elsewhere in this report the Commission considers that the normal value for each export transaction can only be determined by reference to the constructed cost to make and sell the power transformer in that transaction.*

We expect that the following is the statement "elsewhere" in the Report to which the Commission refers:

> *The Commission considers that the transaction to transaction method provided for in s. 269TACB(2)(b) best suits those circumstances where there are not a large number of transactions, such as capital equipment made to specific requirements where the normal value may vary from transaction to transaction with significant technical variation between each sale. This method produces as many dumping margins as there are export transactions and these are amalgamated using a weighted average in order to calculate a single dumping margin for each exporter over the investigation period. The transaction to transaction method is provided for at s. 269TACB(2)(b) and requires that each export transaction price be compared to each*

comparable normal value.

Further:

> *…while electrical steel and copper conductor are the most significant cost components of power transformers, many other variables affect price. For example, depending on whether the power transformer is single or three phase, the design costs, lead times and ancillary options (such as tap changers) can significantly affect price. The Commission considers that because of these many variables it is unable to meaningfully adjust relevant domestic prices of power transformers to make them comparable with export prices. Subsection 269TAC(2)(c) allows for the constructed method when there is an absence of relevant sales or because of the situation in the market the sales are not suitable. The Commission has constructed normal values because of the lack of relevant domestic sales.*
>
> *…*
>
> *The ordinary course of trade provisions at s. 269TAAD are an important element of those provisions is determining whether the cost of goods sold at a loss are recoverable within a reasonable period. The recovery test is at s. 269TAAD(3). In the case of power transformers, each unit is uniquely constructed and the costs and prices can differ significantly from one unit to another. It is the inability to make reasonable adjustments to prices of models sold domestically, to ensure fair comparison with export prices, that explains why the Commission has not established normal values on the basis of domestic selling prices using s. 269TAC(1). Furthermore, the Commission considers that a "weighted average cost" of goods contemplated in s. 269TAAD(3) is not meaningful for power transformers.*

In summary, the Commission considered that a transaction based normal value should be constructed, because of the uniqueness of each power transformer. Further, and importantly, the Commission acknowledges that a weighted average cost of goods (noting that this was for the purpose of comparison but in a different context to Section 269TACB(3)) cannot be meaningfully calculated. The Commission was aware of the confusion that this contrast in views could generate, and therefore also stated in Report No 219:

> *This approach [the approach towards working out what was claimed to be a "weighted average" under Section 269TACB(3)] is not at odds with the view expressed earlier in relation to the use of weighted averages in the context of assessing ordinary course of trade. At Section 6.5.3 of this report the Commission stated that "…each power transformer is unique and the weighted average cost of goods contemplated in s. 269TAAD(3) cannot be meaningfully calculated." The legislative requirements in that subsection are prescriptive, requiring the weighted average cost of certain goods to be established over the investigation period. In the case of normal values, the weighted average required is for corresponding normal values. The weighted average corresponding normal values used in the weighted average to transaction method are meaningful for the purposes of dumping margin calculations in relation to power transformers.*
>
> *The Commission considers its approach is a reasonable and practical application of the legislative provisions. If the provisions were interpreted otherwise it means that if an investigation involves products that are unique in each transaction it would render the weighted average to transaction methodology in s. 269TACB(3) without purpose when it is clear that exporters can, in relation to any type of goods, have practices which result in export prices that differ significantly among different purchasers, regions or periods.*

We do not agree with the portrayal of the transaction-based normal values to be used for one method as individual weighted average normal values to be used for a different method. The explanation – that Section 269TAAD(3) is prescriptive – does not in our opinion justify the approach towards the weighted average of corresponding normal values under Section 269TACB(3). Section 269TACB is equally prescriptive:

> *The language of s 269TACB suggests that the Minister is obliged to approach the task of answering the question in the specified way.*
>
> *…*
>
> *It is difficult to discern the purpose of s 269TACB if it is not intended to identify, prescriptively, the means by which the Minister is to determine whether dumping of the goods the subject of the application has occurred.*[27]

The legislative requirements in Section 269TACB prescriptively require the weighted average of the corresponding normal values of the goods to be established over part or the whole of the investigation period. There is nothing in Section 269TACB that allows the Commission to move outside those requirements, such as to develop a new concept of multiple weighted average normal values (that are the same as the transactional values). It is not clear to us why there should be a difference with Section 269TAAD(3) simply because *"the weighted average required is for corresponding normal values".*

The rationale for deciding that the *weighted average cost* cannot be meaningfully worked out for the power transformers sold in an exporter's domestic market is equally applicable in the context of comparing export price and the *weighted average of normal values*. This is particularly the case when, each of the normal values constructed by the Commission is indeed the cost to make and sell of each transaction, with a fixed percentage amount of profit added. The fact that one value is called weighted average "cost", the other is called weighted average "normal value" (which is based entirely on cost), does not solve the lack of "meaningfulness" in either value when it comes to comparison with the prices of each transaction.

The Commission clearly considers that the transaction to transaction method, using the export prices of each transaction and the corresponding normal values, is a meaningful and available comparison for it to use. Where the normal value of each transaction is worked out using the cost of that exact transaction, then the transaction to transaction method would appear to provide the most reflective and accurate way of working out whether there is or is not a dumping margin for each transaction. Using that method

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[27] *Pilkington (Australia) Ltd v Minister for Justice and Customs* [2002] FCA 770 (18 June 2002).

dumping cannot be masked or, for that matter, unrealistically created, as it might under a weighted average normal value method.

The Commission states:

> *The Commission considers that the weighted average corresponding normal values that it is proposing to use in the weighted average to transaction method are meaningful for the purposes of dumping margin calculations.*[28]

Whether it is "meaningful" or not through the Commission's frame of reference is not the point. The exercise must be conducted according to law. The *"weighted average of corresponding normal values"* is no such thing. If the method cannot appropriately be used, then it should not be used, and it certainly should not be used in a different way to the way in which it was intended to be used.

We request the ADRP to recommend to the Minister that the Commission should have decided that the T-W methodology was not available to be applied, and that therefore ABB Thailand should have been treated in the same way as all other exporters under the T-T method. On the basis that this would have led to the termination of the investigation as against ABB Thailand, any recommendation from the Commission to impose dumping duties on ABB Thailand's exports was unlawful and could not have been acted upon by the Minister.

F Finding 5 – incorrect determination of "normal value" and "export price"

The finding that it was open to the Commission to recommend to the Minister that the export price in respect of the goods exported to Australia by ABB Thailand was less than the normal value of those goods, and for the Minister to publish notices under Sections 269TG(1) and (2) of the Act in respect of those goods, on the clamed basis that ABB Thailand's had been found to be dumped and to have dumping margins under Section 269TACB(6).

The Commission has adopted a practice known as *"zeroing"* as part of the exercise of working out whether ABB Thailand's exports to Australia were dumped and the level of dumping. The meaning of this will be explained hereunder.

Whether or not that practice was justified as part of the investigative exercise required under Part XVB is not entirely relevant to ABB Thailand, although ABB Thailand does not concede that it was justified. ABB Thailand's concern, and the basis of this ground of review, is that the legislation prescribes quite carefully what it is that the Minister (in this case, the Parliamentary Secretary) is entitled to do at the

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[28] There is a typographical error here, in that the law requires the use of *"the weighted average <u>of</u> corresponding normal values*" - the omission of *"of*" gives the requirement a very different meaning.

conclusion of an investigation such as this – and it was not done. Nothing in the legislation entitled the Commission to recommend to the Parliamentary Secretary that he should publish notices against ABB Thailand's exports under Sections 269TG(1) and (2). Those Sections rely on the proposition that the export price was less than the normal value. Those amounts are determined under Sections 269TAB and Sections 269TAC respectively. The normal value determined under Section 269TAC was not the normal value considered by the Parliamentary Secretary and is not the normal value in the notice he signed.

Under Australian law and under WTO law there is no written (statutory or Anti-Dumping Agreement) authority for zeroing and no judicial authority for zeroing. Under all published Australian policy, up until the policy indications now contained in Report No 219, there has been no support for zeroing. Under Australia's most recent free trade agreements, the policy of not adopting zeroing is clearly and unambiguously stated.[29]

We will explain our view that the notices could not have been published against ABB Thailand in the following way:

- a summary of how the Commission arrived at the finding that ABB Thailand's exports were dumped and the level at which they were dumped;
- an analysis of the Section that must be used to work out margins of dumping, namely Section 269TACB; and
- an analysis of the Section that must be used to publish notices against a particular exporter at the conclusion of an investigation, namely Section 269TG.

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[29] Policy statements to this effect include:

- Commission's Dumping Manual, page 167 - http://www.adcommission.gov.au/reference-material/manual/documents/DumpingandSubsidyManual-December2013_001.pdf;
- advice on the Commission's website says, starting from 2004, there will be no zeroing - http://www.adcommission.gov.au/reference-material/documents/PolicyAdvice2004-02.pdf and http://www.adcommission.gov.au/reference-material/policy-advice.asp;
- the Productivity Commission has recommended and the legislature itself confirmed that zeroing practice has no place in Australia – see *Explanatory Memorandum for Customs Act (Anti-Dumping Improvements) Amendment (No.2) 2011*, pages 33, 36, 37, 45, 66, 69 and 73; and
- the point was again made clear in the course of considering Amendment No.3, 2012 http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd019

1 The Commission's finding of dumped exports and the dumping margin

A dumping margin of 3.6% was achieved by the Commission under Section 269TACB(6) as follows:[30]

(a) ABB Thailand exported [CONFIDENTIAL TEXT DELETED – number] units to Australia during the three year period of investigation, which was from 1 July 2010 to 30 June 2013. The Commission's calculations indicated that, on the basis of applying the "transaction to transaction" ("T-T") method[31] under Section 269TACB(2)(b) to work out dumping margins, [CONFIDENTIAL TEXT DELETED – number] of those units were sold for export at export prices that were less than their respective normal values.

(b) As explained above, the Commission decided, under Section 269TACB(3)(a), that ABB Thailand's export sales to ABB Australia *"differ[ed] significantly"* in respect of units purchased from ABB Australia by [CONFIDENTIAL TEXT DELETED – ABB Australia customer details].

(c) As also explained above, the Commission decided, under Section 269TACB(3)(b), that there was a period in which it was inappropriate for it to use the T-T method and that that period was the entire period of investigation.

(d) According to the Commission, using the T-T method to work out the dumping margin for ABB Thailand's exports over the entire period of investigation under Section 269TACB(2)(b) would have resulted in a negative dumping margin (no dumping) of 10%.

(e) Instead, the Commission used the "transaction to weighted average" ("T-W") method[1] under Section 269TACB(3) to work out the dumping margin for ABB Thailand's exports over the entire period of investigation.

(f) In the Commission's opinion, it was open for it to use the T-W method under Section 269TACB(6), and in so doing to adopt the practice known as "zeroing", which it explained involved:

> *not tak[ing] into account offsets for negative dumping margins arising from transactions where the export price was higher than the weighted average of corresponding normal*

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30 Please refer to Report No 219, Confidential Attachment 8.

31 This method is explained under 2 below.

values.[32]

(g) As a result of the method referred to in (f), with "zeroing", a dumping margin of 3.6% was determined for ABB Thailand's exports to Australia. The calculation method was to calculate the amount of the differences between the normal values[33] and the (lower) export prices of the **[CONFIDENTIAL TEXT DELETED – number]** units referred to in (a) above as a percentage of the total amount of the **[CONFIDENTIAL TEXT DELETED – number]** export prices. The amount of the differences between the normal values and the (higher) export prices for the other **[CONFIDENTIAL TEXT DELETED – number]** units was not offset against the amount of the differences in respect of the **[CONFIDENTIAL TEXT DELETED – number]** units.

2 An analysis of Section 269TACB

Section 269TACB provides how the Minister should determine *"whether dumping has occurred and the levels of dumping"*. In *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth*,[34] Nicholas J referred to Section 269TACB as follows:

> *Section 269TACB is a central provision which establishes how the variable factors, once ascertained in accordance with other relevant provisions of the Act, are to be used in determining whether dumping has occurred.* [underlining supplied]

Section 269TACB comes into effect once (ie after) the export price and normal values have been established. Section 269TACB(1) provides as follows:

> *If:*
>
> *(a) application is made for a dumping duty notice; and*
>
> *(b) export prices in respect of goods the subject of the application exported to Australia during the investigation period have been established in accordance with section 269TAB; and*
>
> *(c) corresponding normal values in respect of like goods during that period have been established in accordance with section 269TAC;*

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[32] Report No 219, page 61. For the purposes of clarity, we note that the word "zeroing" is not used in Report No 219.

[33] Noting that, as per our submissions in relation to Finding 4, this involves a plurality of normal values, and was not the single weighted average that was required. Ignoring the amounts by which the export prices were more than the normal values for some transactions was the relevant "zeroing", and had the effect of not using those normal values.

[34] [2013] FCA 870 (30 August 2013)

> *the Minister must determine, by comparison of those export prices with those normal values, whether dumping has occurred.*

Therefore, Section 269TACB is focussed on the *comparison* of export prices with normal values. Section TACB(1) indicates that all export prices in respect of the goods which are the subject of the Australian industry's application that were exported to Australia during the period of investigation (*"those export prices"*) and all corresponding normal values (*"those normal values"*) are to be compared, in order to work out whether dumping has occurred. The export prices and the corresponding normal values are those under the Sections mentioned by Section 269TACB(1), being Section 269TAB in the case of export prices, and Section 269TAC in the case of normal values. It is these export prices and normal values that are to be compared by the Minister.

The methods through which the Minister may discharge this obligation to compare the export prices for the goods with their normal values are provided for in Section 269TACB(2), which we now set out for the ADRP's benefit as follows:

> *In order to compare those export prices with those normal values, the Minister may, subject to subsection (3):*
>
> *(a) compare the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period; or*
>
> *(aa) use the method of comparison referred to in paragraph (a) in respect of parts of the investigation period as if each of these parts were the whole of the investigation period; or*
>
> *(b) compare the export prices determined in respect of individual transactions over the whole of the investigation period with the corresponding normal values determined over the whole of that period; or*
>
> *(c) use:*
>
> *(i) the method of comparison referred to in paragraph (a) in respect of a part or parts of the investigation period as if the part or each of these parts were the whole of the investigation period; and*
>
> *(ii) the method of comparison referred to in paragraph (b) in respect of another part or other parts of the investigation period as if that other part or each of these other parts were the whole of the investigation period.*

Essentially, Section 269TACB(2) prescribes two methods of comparison, and states that their use may be applied to different parts of the one investigation period. The first method mentioned, under Section 269TACB(2)(a), is the weighted average export price to weighted average normal value method. This can be referred to as the "W-W" method. The second method mentioned, under Section 269TACB(2)(b), is the transaction to transaction methodology. This can be referred to as the "T-T" method.

Section 269TACB(2A) is a limitation on the breaking-up of the period of investigation into parts – for the purposes of applying either the W-W method or the T-T method to the different parts - into periods of no less than two months.

The operation of the methods referred to in Section 269TACB(2) is said to be subject to Section 269TACB(3). That Section has been the subject of previous discussion in this application. It provides as follows:

> *If the Minister is satisfied:*
>
> *(a) that the export prices differ significantly among different purchasers, regions or periods; and*
>
> *(b) that those differences make the methods referred to in subsection (2) inappropriate for use in respect of a period constituting the whole or a part of the investigation period;*
>
> *the Minister may, for that period, compare the respective export prices determined in relation to individual transactions during that period with the weighted average of corresponding normal values over that period.*

Thus, Section 269TACB(3) allows, if the prescribed conditions are satisfied, for a third method of comparison. That third method is a comparison under Section 269TACB(6) of particular transactions by comparing their respective export prices with the weighted average of corresponding normal values over that period. This can be referred to as the "T-W" method.

As has already been pointed out, subparagraphs 269TACB(3)(a) and (b) establish two prerequisites to the use of such a methodology:

- export prices must differ significantly among different purchasers, regions or periods;[35] and
- those differences must make the Section 269TACB(2) methodologies inappropriate for use in respect of a period constituting the whole or part of the investigation period.[36]

The heading of Section 269TACB states its object, namely:

> *Working out whether dumping has occurred and levels of dumping*

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35 See our submissions in relation to Finding 2.

36 *Ibid.*

Sections 269TACB(1) provides an overarching rule for the Minister's consideration of the export prices and normal values, in that it is those export prices and normal values that are to be compared. Sections 269TACB(2), (3) and (4) talk about methods of comparing those export prices and normal values.

None of those Subsections work out whether dumping has occurred and levels of dumping - those things are left to the following Subsections, namely Subsections 269TACB(4), (4A), (5) and (6). They provide as follows:

> *(4) If, in a comparison under subsection (2), the Minister is satisfied that the weighted average of export prices over a period is less than the weighted average of corresponding normal values over that period:*
>
> *(a) the goods exported to Australia during that period are taken to have been dumped; and*
>
> *(b) the dumping margin for the exporter concerned in respect of those goods and that period is the difference between those weighted averages.*
>
> *(4A) To avoid doubt, a reference to a period in subsection (4) includes a reference to a part of the investigation period.*
>
> *(5) If, in a comparison under subsection (2), the Minister is satisfied that an export price in respect of an individual transaction during the investigation period is less than the corresponding normal value:*
>
> *(a) the goods exported to Australia in that transaction are taken to have been dumped; and*
>
> *(b) the dumping margin for the exporter concerned in respect of those goods and that transaction is the difference between that export price and that normal value.*
>
> *(6) If, in a comparison under subsection (3), the Minister is satisfied that the export prices in respect of particular transactions during the investigation period are less than the weighted average of corresponding normal values during that period:*
>
> *(a) the goods exported to Australia in each such transaction are taken to have been dumped; and*
>
> *(b) the dumping margin for the exporter concerned in respect of those goods is the difference between each relevant export price and the weighted average of corresponding normal values.* [underlining supplied]

The Commission's view is that it could adopt an interpretation of Section 269TACB(3) and (6) which allowed it to "zero" dumping margins. That zeroing was achieved in a "round about" way. As we have pointed out this arose because of an approach towards the *"weighted average of corresponding normal values"*. All of ABB Thailand's export prices were used in the comparison, but because only the dumping margin on the dumped exports was used as the numerator in the margin calculation, not all of ABB

Thailand's normal values were used in that comparison. ABB Thailand rejects any interpretation that the Commission believes could have generated such an outcome, and reserves all its rights in relation thereto. Below we explain how Section 269TG was misapplied.

If the ADRP believes that the Commission's interpretation of Section 269TACB was correct, then the ADRP might also be concerned to know how the two Sections – Section 269TACB and Section 269TG – could be read together. To give effect to the legislation they can be read together - they can and do operate independently.

The words we have underlined in Sections 269TACB(4), (5) and (6) – *"dumped"* and *"dumping margin"* – are important. They are used consistently and repeatedly in Section 269TACB. The words have relevance to those provisions of the Act that have a need to consider those things. The following table sets out what those provisions are:

Section	**Purpose of Section**
269T	Defines "dumped goods" as goods determined under Section 269TACB as having been dumped
269TAC(14)	Low volume of domestic sales can still be used to work out dumping margin if large enough for a proper comparison.
269TACAB(3)	Weighted averages of export prices and normal values that are not dumped or have margins less than 2% not to be included in residual exporter margin calculation.
269TACB	To work out whether dumping has occurred and levels of dumping.
269TAE	The Minister is to have regard to the size of the dumping margin, in determining whether material injury has been caused. The Minister is to consider goods that are not dumped. The Minister is to consider the cumulative effect of dumped goods that are not in negligible volumes.
269TDA	If the goods found to be dumped have de minims dumping margins or are in negligible volumes, the investigation against them is to be terminated. Rules for aggregation of negligible volumes such as will prevent termination. Negligible dumping margins to count in determining whether volume negligible.
269ZDI	Particulars of dumping margins to be stated in public notice regarding securities

Thus, it can be seen that the product of the Commission's consideration of the matters set out in Section 269TACB – whether goods are *dumped* and the *dumping margin* for the goods – is available for its consideration of those other provisions of the Act that rely upon those concepts for their own purposes.

As will be demonstrated below, Section 269TG is not one of those provisions, and the power under that Section has not been exercised correctly.

3 An analysis of Section 269TG

Section 269TG provides as follows:

> *(1) Subject to section 269TN, where the Minister is satisfied, as to any goods that have been exported to Australia, that:*
>
> *(a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and*
>
> *(b) because of that:*
>
> *(i) material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered; or*
>
> *(ii) in a case where security has been taken under section 42 in respect of any interim duty that may become payable on the goods under section 8 of the Dumping Duty Act—material injury to an Australian industry producing like goods would or might have been caused if the security had not been taken;*
>
> *the Minister may, by public notice, declare that section 8 of that Act applies:*
>
> *(c) to the goods in respect of which the Minister is so satisfied; and*
>
> *(d) to like goods that were exported to Australia after the Commissioner made a preliminary affirmative determination under section 269TD in respect of the goods referred to in paragraph (c) but before the publication of that notice.*
>
> *(2) Where the Minister is satisfied, as to goods of any kind, that:*
>
> *(a) the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods; and*
>
> *(b) because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered;*
>
> *the Minister may, by public notice (whether or not he or she has made, or proposes to make, a declaration under subsection (1) in respect of like goods that have been exported to Australia), declare that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of the notice or such later date as is specified in the notice.*

The power to impose dumping duties on goods exported before the publication of a notice under Section 269TG(1) is predicated on a satisfaction on the part of the Minister that:

> *the amount of the export price of the goods is less than the normal value of those goods* [underlining supplied]

In the case of the imposition of dumping duties on goods exported after the publication of a notice, pursuant to Section 269TG(2), the prescription is the same. The Minister must be satisfied that:

> *the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods* [underlining supplied]

Section 269TG does not use the words *"dumped"* or *"dumping margin"*, nor does it refer to Section 269TACB.

A notice can only be published under Section 269TG(1) or (2), and dumping duties can only be imposed on an exporter, pursuant to the terms of the Section. Plainly, the Sections refer to the "export price" of the goods and the "normal value" of those goods. Export price is defined under Section 269TAB. Normal value is defined under Section 269TAC. The Minister must be satisfied that the *"the amount of export price of like goods"*, being the like goods to those which were the subject of the application, is less than *"the amount of the normal value of those goods"*.

Has the Minister, in this case, received a proper recommendation from the Commission as to the export price and the normal value for ABB Thailand's exports to Australia? ABB Thailand submits that he has not.

The normal value ascertained under Section 269TAC for ABB Thailand's exports to Australia during the period of investigation, being those goods to which the Australian industry's application under Section 269TB, was THB**[CONFIDENTIAL TEXT DELETED – number]**.[37] On a per unit basis, this amounts to THB**[CONFIDENTIAL TEXT DELETED – number]**. However, the notice signed by the Parliamentary Secretary, which is required to include the amount ascertained to be the normal value, states that it is THB**[CONFIDENTIAL TEXT DELETED – number]**:

[CONFIDENTIAL TEXT DELETED – confidential information contained in Section 269TG notice signed by Parliamentary Secretary]

Accordingly, the Commission did not correctly inform the Minister of the normal value of ABB Thailand's exports to Australia. Section 269TG(3)(c) requires the notice to include a statement of the respective amounts that *"was or would be the normal value of the goods to which the application relates"* (the one

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[37] Report No 219, Confidential Attachment 8, cell AP435.

normal value, with *"was"* allowing it to be applied to past exports to which the notice is to apply, and *"would be"* to future imports).

The Commission's methodology for working out whether the goods were dumped and of the level of the dumping – putting to one side the legitimacy of how that was done under Section 269TACB - is relevant to the matters referred to in the table in E.2 above. It does not define what the export price or the normal values were for the purposes of Section 269TG.

Recalling E.1(g) above, the method of working out the dumping margin did not take into account the normal value of the goods to which the export prices corresponded. To work out a difference between the normal value and a (lower) export price of positive 3.6%, where the Commission is on record as saying that the comparison of all export prices with their corresponding normal values using the T-T method was negative 10.0%,[38] means that the normal values were overstated. Indeed, our review of the calculations provided to us by the Commission[39] indicates that the Commission worked out the ascertained export price based on the sum of all export transactions, and then divided that by **[CONFIDENTIAL TEXT DELETED – number]** (the number of units exported). As shown by Table 7 to the notice signed by the Parliamentary Secretary, the ascertained normal value was not the normal value of the export transactions at all. It was the sum of all the export transactions plus the value of the dumping margin, where the dumping margin was worked out using the "W-T method" (i.e, zeroed), all divided by **[CONFIDENTIAL TEXT DELETED – number]**.

The ascertained normal value – the amount that was supposed to be the normal value worked out under Section 269TAC(2)(c) – was not the normal value nor was it based on that normal value. The formula in Report No 219, and the clear evidence of Table 7, shows that the normal value is actually the export price plus the Commission's *"alternative dumping margin"* arrived at by applying its interpretation of Section 269TACB(6).

ABB Thailand exported **[CONFIDENTIAL TEXT DELETED – number]** power transformer units to Australia during the period of investigation. The Commission ascertained the export prices and the corresponding normal values for each of them. We see no power in Section 269TG to disregard

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38 Report No 219, page 71.

39 Report No 219, Confidential Attachment 8.

ascertained export prices or the corresponding ascertained normal values of those transformers under Section 269TG.

The provisions of the Act and of the *Customs Tariff (Anti-Dumping) Act* 1975 ("the Dumping Duty Act") and their associated regulations make no reference to Section 269TACB. The proposition put by the Commission - that a dumping margin can be determined in relation to certain transactions but not others - is technically unrelated to the declaration that can be made against an exporter and to the imposition of duty that such a declaration leads to, such that the Sections can be read together *even if* the ADRP holds the view that *"zeroing"* is permitted under Section 269TACB. There is no necessary conflict between them which might impact on the ADRP's consideration of the power under Section 269TG.

Section 8(2) of the Dumping Duty Act states as follows:

> *There is imposed, and there must be collected and paid, on goods:*
>
> *(a) to which this section applies by virtue of a notice under subsection 269TG(1) or (2) of the Customs Act; and*
>
> *(b) in relation to which the amount of the export price is less than the amount of the normal value;*
>
> *a special duty of Customs, to be known as dumping duty, calculated in accordance with subsection (6).*

In relation to ABB Thailand, Section 8(2)(b) was not satisfied. Therefore Section 8(2) could not have been enlivened.

Further, we do not see how interim dumping duty can be collected in the case of ABB Thailand's exports. Again, referring to the Dumping Duty Act, we find that that the next Subsections include these provisions:

> *(3) Pending final assessment of the dumping duty payable on goods the subject of a notice under subsection 269TG(1) or (2) of the Customs Act, an interim dumping duty is payable on those goods.*
>
> *Calculation of interim dumping duty*
>
> *(5) The Minister must, by signed notice, determine that the interim dumping duty payable on goods the subject of a notice under subsection 269TG(1) or (2) of the Customs Act is an amount worked out in accordance with a method specified in that signed notice. That method must be one of the methods referred to in subsection (5BB).*
>
> *…*

Methods available for calculating interim dumping duty

(5BB) The regulations must prescribe the methods for working out the amount of interim dumping duty payable on goods the subject of notices under subsection 269TG(1) or (2) of the Customs Act.

(5BC) Those methods must refer to one or more of the following matters:

(a) the export price of the goods the subject of the notice under subsection 269TG(1) or (2) of the Customs Act;

(b) the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice;

(c) the normal value of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice;

(d) the non-injurious price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice.

The *Customs Tariff (Anti-Dumping) Regulation 2013* provides that the interim dumping duty is to be collected in accordance with prescribed methods, of which there are four available. Each of these require the ascertained export price and the ascertained normal value to be used for the purposes of duty collection.

The *"dumping margin"* used as the basis to recommend that the Minister impose and collect dumping duty in respect of ABB Thailand has been worked out by referring to *"particular transactions"* under the method of comparison under Section 269TACB(6). Whether that has been done correctly or incorrectly ultimately is not relevant to Section 269TG, which simply calls for the Minister to be satisfied that the export price is less than the normal value.

4 Correct and preferable decision

In Report No 219, the Commission went to great lengths to explain and to attempt to justify its implementation of Sections 269TACB(3) and (6), in order that interested parties could have an understanding of what was proposed and what was ultimately done. That effort is to be respected. The matters that were under consideration by the Commission are highly controversial.

We do not intend to address the issue of *"zeroing"* under Section 269TACB(6) in detail. The point that we do make, and that we make forcefully, is that the basis put forward to the Parliamentary Secretary for the publication of the Section 269TG notice, and the notice itself, are invalid. Further, there is no necessary connection between what was done under Section 269TACB(6), and the purposes for which that was done, with what needed to be done under Section 269TG. The Minister was able to publish a notice in respect of ABB Thailand's exports if – and only if – their export price was less than their normal value.

The normal value that was reported to the Minister was not their normal value, and their export price was not less than their correct normal value.

In this regard we request that the ADRP recommend to the Minister that he had no power to publish a notice in respect of ABB Thailand, and that the notice should be revoked as against ABB Thailand or varied to that effect.

G Finding 6 – termination as against Thailand on basis of negligible volume

The finding that the total volume of the goods exported over the period of investigation that were dumped from Thailand was not negligible for the purposes of Section 269TDA(3), on the claimed basis that "volume" of goods for the purposes of Section 269TDA(4) could be adjudged based on the power rating capacity of power transformers and not on units of power transformer, when in terms of units the total volume of the goods exported over the period of investigation that were dumped from Thailand was negligible.

Section 269TDA is headed "*Termination of investigations*". Relevantly for the purposes of ABB Thailand's complaint concerning Finding 1, Sections 269TDA(3), (4) and (5) provide as follows:

> *Commissioner must terminate if negligible volumes of dumping are found*
>
> *(3) If:*
>
> *(a) application is made for a dumping duty notice; and*
>
> *(b) in an investigation for the purposes of the application the Commissioner is satisfied that the total volume of goods the subject of the application:*
>
> *(i) that have been, or may be, exported to Australia over a reasonable examination period from a particular country of export; and*
>
> *(ii) that have been, or may be, dumped;*
>
> *is negligible;*
>
> *the Commissioner must terminate the investigation so far as it relates to that country.*
>
> *What is a negligible volume of dumped goods?*
>
> *(4) For the purpose of subsection (3), the total volume of goods the subject of the application that have been, or may be, exported to Australia over a reasonable examination period from the particular country of export and dumped is taken to be a negligible volume if:*
>
> *(a) when expressed as a percentage of the total Australian import volume, it is less than 3%; and*
>
> *(b) subsection (5) does not apply in relation to those first-mentioned goods.*
>
> *Aggregation of volumes of dumped goods*
>
> *(5) For the purposes of subsection (4), this subsection applies in relation to goods the subject of the application that have been, or may be, exported to Australia over a reasonable examination period from the particular country of export and dumped if:*

(a) *the volume of such goods that have been, or may be, so exported from that country and dumped, when expressed as a percentage of the total Australian import volume, is less than 3%; and*

(b) *the volume of goods the subject of the application that have been, or may be, exported to Australia over that period from another country of export and dumped, when expressed as a percentage of the total Australian import volume, is also less than 3%; and*

(c) *the total volume of goods the subject of the application that have been, or may be, exported to Australia over that period from the country to which paragraph (a) applies, and from all countries to which paragraph (b) applies, and dumped, when expressed as a percentage of the total Australian import volume, is more than 7%.*

A more simple explanation of these subsections proceeds as follows:

- If the total volume of goods that are dumped from country A in the period of investigation is found to be less than 3% of the total volume of goods imported (whether dumped or not dumped) from all other countries in the period of investigation, then the investigation must be terminated as against country A.
- However, there can be no such termination against a country if more than two countries are eligible to have the investigation terminated as against them, because the volumes of dumped goods that they exported to Australia were each less than 3% of the total volume of goods imported, but when their respective volumes are added together the total volume of dumped goods is more than 7% of the total volume of goods imported.

In Report No 219, the Commission decided that the volume of dumped goods from Thailand was not less than 3% of the total import volume from all countries. However, to do so the Commission did not use power transformer units as the measure of their volume. Instead, the Commission claims to have used power capacity rating as the measure of their volume.[40] Further, in the absence of information about the power capacity rating of power transformers *"from other countries"*,[41] it appears that the Commission has used "value" as the measure of power capacity rating, which it used in turn as the measure of "volume".

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[40] The expression *"claims to have used"* is used respectfully. It is based on the contradiction between the Commission's statement that *"capacity (measured using the power rating) rather than number of units is the most appropriate measure of volume"* and the "y" axis of Figure 8 in Report No 219 which states *"Estimate of capacity (value)"*. The ADRP may be assisted in understanding the way the Commission went about doing this by referring to a letter in the record of this investigation from the Commission to ourselves dated 2 October 2014 (public record no 159).

[41] Report No 219, page 74. It is unclear to us why this statement refers only to an absence of information about power transformers from *"other countries"* and does not refer more widely to exports

The Commission stated its position as follows:

> *As noted in Section 5.5, the Commission decided that capacity (measured using the power rating) rather than number of units is the most appropriate measure of volume. The Commission does not have power ratings for exports from the nominated countries outside the investigation period or for exports from other countries. The Commission has relied on value as the best available measure of volume and the size of the Australian market.*

This passage from Section 5.5 of Report No 219 further elucidates the Commission's approach (in the context of its consideration of the size of the Australian market):

> *The Commission notes that power transformers vary in size. A power transformer may be 10 MVA and weigh 20 to 25 tonnes or 500 MVA and weigh over 200 tonnes. The problem of how best to measure volume is illustrated in the following example. If a producer has an annual capacity of 10,000 MVA, it could manufacture 20 500 MVA power transformers or 400 25 MVA power transformers using similar production time frames and factory resources.*
>
> *The Commission reviewed the websites of a number of exporters visited during the investigation and noted that they referred to the power rating and voltage rating of power transformers that they can manufacture. Further, some producers, such as ABB Chongqing, CG Power, Hyundai and WTC, referred to annual capacity or output in terms of MVA and not the number of power transformers manufactured.*
>
> *The Commission decided that capacity (measured using the power rating) rather than number of units is the most appropriate measure of volume. ACBPS' import database only records value and quantity. The quantity figures that are recorded are not meaningful for a number of reasons. For example, a single power transformer may be imported in different shipments or brokers may enter the number of packages rather than the number of power transformers.*
>
> *The Commission does not have power ratings for exports from the nominated countries outside the investigation period, for exports from other countries or for sales by other Australian producers. The Commission has relied on value as the best available measure of volume and the size of the Australian market.*

ABB Thailand maintains that the Commission's approach towards the interpretation and application of Section 269TDA(3) was incorrect.

We submit that, in truth, the Commission's consideration of whether to terminate the investigation as against ABB Thailand under Section 269TDA(3) has not been based on a comparison of the volume of goods said to have been dumped by ABB Thailand with the total import volume at all. Instead, it has been based on value, with the Commission saying that the value allows an estimate to be made of power capacity rating which the Commission claims is a measure of volume of the imported goods. This is circular reasoning. Ultimately, this is not a consideration of volume. It is a consideration of value.

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from non-cooperative exporters from the countries under investigation. We would assume that there was an absence of information in that regard as well.

"Volume" is a term that can be applied to working out the dimension or contents of a three dimensional object. In Section 269TDA(3) the word "volume" is not used in that way. It is used in the context of measuring the volume, of specific goods that are imported into Australia, in terms of their quantity. One would expect this to the number of the goods (eg how many bicycles) or a unit of their volume such as tonnage (eg, how much steel) or litres (eg, how much biodiesel).

Power rating capacity is not a measure of the volume of power transformers imported into Australia. It is simply a technical specification of the goods. No electricity is imported in a power transformer, and electricity is not the goods under consideration. To better illustrate this point, in the case of imports of bottled water, it would be correct to say that a certain number of litres of water were imported in the bottles from one or other country. However, if the goods under consideration were plastic jugs, would the volume of the imported jugs be determined by how much water the jugs might contain if they were filled up?

In a scientific or engineering sense, power capacity rating is not a measure of volume. In fact an analysis of the value of similarly rated power transformers exported by ABB Thailand demonstrates that using value and power capacity rating is not a safe proxy to measure the number of power transformers exported to Australia:[42]

ABB Australia customer	Power rating	Maximum voltage rating	Gross invoice value
[CONFIDENTIAL TEXT DELETED – details of ABB Australia customer and of goods and prices]			

Power transformers with the same power rating are shown to have quite different values. This can arise from many variables.

In case it is needed, contextual support from within Part XVB of the Act to the effect that the expression "volume" is a measure of the quantity of goods under consideration is provided by Section 269TAAD(2):

> *For the purposes of this section, sales of goods at a price that is less than the cost of such goods are taken to have occurred in substantial quantities during an extended period if the volume of sales of such goods at a price below the cost of such goods over that period is not less than 20% of the total volume of sales over that period.* [underlining supplied]

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42 Report No 219, Confidential Attachment 8, information extracted from rows 212 and 213.

As indicated by the underlining, the volume referred to is the quantity of the goods under consideration, and not of their technical specifications.

ABB Thailand makes these submissions without knowing the precise details of the methodology used by the Commission, nor of the details extending to all other exporters upon which the Commission relied. The explanation of the Commission's methodology is opaque and the details of other parties' exports are, of course, confidential. Axiomatically, ABB Thailand does not know whether the goods found by the Commission to have been dumped from Thailand were less than 3% of the total import volume as per Section 269TDA(3) nor whether, if they were, Section 269TDA(6) would then prevent termination of the investigation in the case of ABB Thailand and require a reversal of termination decisions made in respect of China and Korea. What ABB Thailand does know is that there were only **[CONFIDENTIAL TEXT DELETED – number]** power transformers found to have been dumped by it over the three year period of investigation, and that exports by the other exporter from Thailand can only have been very minimal. If there had been one power transformer exported by the other Thai exporter, then a total import volume of **[CONFIDENTIAL TEXT DELETED – number]** units or more would render ABB Thailand's exports as "negligible".

ABB Thailand asks the ADRP, as a reviewer of the Parliamentary Secretary's decision on its merits, to please investigate the number of power transformers imported during the period of investigation so as to properly and adequately review the finding that ABB Thailand challenges. Many exporters openly participated in the investigation, and will have provided clear details of their exports to the Commission. We appreciate that in so far as there may be some residual number of power transformers that were not accounted for in the information provided to the Commission, and the number of units was not apparent, then it would be open to the ADRP to arrive at his own estimation of those numbers. However the use of the value/power capacity rating methodology for all exports, of the type the Report suggests was adopted for market analysis purposes, is not a correct approach for the purposes of Section 269TDA(3). We believe that the Commission will have in its records actual unit numbers for most of the exports, and should have used those numbers for the purposes of applying that Section.

If the ADRP determines that the volume of ABB Thailand's imports that were found to be dumped was a *de minimis* volume, such that the Commission should have terminated the investigation as against ABB Thailand, any recommendation from the Commission to impose dumping duties on ABB Thailand's exports was unlawful and could not have been acted upon by the Minister.

8 Conclusion and request

A statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application

The decisions to which this application refers are reviewable decisions under Section 269ZZA of the Act. Where references are made to the ADC and its recommendations, it is those recommendations which were accepted by the Minister/Parliamentary Secretary and form part of the reviewable decision that ABB Thailand seeks to have reviewed.

ABB Thailand is an interested party in relation to the reviewable decision.

ABB Thailand's application is in the approved form[43] and has otherwise been lodged as required by the Act.

We submit that the ABB Thailand's application is a sufficient statement setting out ABB Thailand's reasons for believing that the reviewable decisions are not the correct or preferable decisions, and that there are reasonable grounds for that belief for the purposes of acceptance of its application for review.

This application contains confidential and commercially sensitive information. An additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information is at Attachment D.

The correct or preferable decision/s that may result from the grounds ABB Thailand has raised in the application are dealt with in the foregoing, and lead to the correct or preferable decision that is referred to in 2 below.

On behalf of ABB Thailand, we respectfully request that the ADRP:

1 Undertake the review of the reviewable decision as requested by this application under Section 269ZZK of the Act.

2 Recommend that the Minister revoke the reviewable decision and substitute a new decision to be specified by the ADRP, being either:

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[43] As appears to have become available on the ADRP's website only today (today being the last day for the lodgement of this application) and which is stated by the Commission as being *"approved for use from 9 January 2015"* for the purposes of Section 269ZZE(1)(b) – Australian Dumping Notice No 2015/03 refers.

(a) the variation of the relevant notices by way of the exclusion of any references to exports from ABB Thailand from those notices; or

(b) the revocation of the relevant notices and substitution of them by notices that do not refer to exports from ABB Thailand.

Lodged for and on behalf of ABB Limited of Thailand

Daniel Moulis
Principal

Moulis Legal