



In the Anti-Dumping Review Panel

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

ABB Ltd. (of Vietnam)

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1 Applicant

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

The applicant is ABB Ltd. (of Vietnam) (hereinafter “ABB Vietnam”).

The address of the applicant is Km 9, National Road 1A, Hoang Liet, Hoang Mai, Hanoi, Vietnam.

ABB Vietnam is a limited liability company registered in Vietnam.

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 Vietnam is Bradley Havlin, Distribution Transformer Product Group Manager.

His contact details are:

- telephone +84 4 3861 1010
- fax +84 4 3861 1009
- email bradley.havlin@vn.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 Vietnam is represented in this matter by Alistair Bridges, Senior Lawyer, 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 alistair.bridges@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 Vietnam. 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 Vietnam, 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

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

² <http://www.adcommission.gov.au/cases/documents/194-FinalReport219recommendingpublicationofadumpingdutynotice.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 Vietnam seeks review of this decision by the ADRP under Sections 269ZZA(1)(a) and 269ZZC of the Act.

Specifically, ABB Vietnam 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 Vietnam’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 Vietnam’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 Vietnam negotiated or contracted with for the purposes of establishing its export price and did not pay ABB Vietnam the export price.
- Finding 2** The finding that ABB Vietnam’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 Vietnam’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 3.8% 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

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 Vietnam 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 claimed basis that ABB Vietnam's exports had been found to be dumped and to have dumping margins under Section 269TACB(6).

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 Vietnam.

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 in respect of exports of the goods by ABB Vietnam 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 Vietnam'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 Vietnam'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 Vietnam's exports.

The grounds supporting ABB Vietnam's request for a review of each of Findings 1 to 5 are discussed separately as follows.

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

The finding that ABB Vietnam'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 Vietnam negotiated or contracted with for the purposes of establishing its export price and did not pay ABB Vietnam 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*

⁶ Section 269TACB(3)(a) refers.

(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 Vietnam's exports to Australia, the Commission decided that ABB Vietnam'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 Vietnam 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 Vietnam.⁷ This aspect is dealt with as Finding 1.
- The second aspect, is that as a factual matter ABB Vietnam'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.

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. In the *ABB Limited, Vietnam Exporter Visit Report* the Commission comes to the following conclusions with regard to the export prices:

We verified that overall, transactions between ABB Vietnam and ABB Australia were profitable during the investigation period. Transactions between ABB Vietnam and ABB Hong Kong were also profitable. We reviewed how prices between the two companies were negotiated and are satisfied the price is not influenced by the relationship between the companies. We consider that transactions between ABB Vietnam and both ABB Australia and ABB Hong Kong are at arms-length, subject to review of the ABB Australia visit report.⁸

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.

⁸ ABB Limited, Vietnam Exporter Visit Report, page 18.

As a result, the majority of ABB Vietnam's export prices to Australia – those created through transactions with ABB Australia - were determined under Section 269TAB(1)(a) and the remainder – those created through transactions with ABB Limited (of Hong Kong) (“ABB Hong Kong”) were determined under Section 269TAB(3)).⁹ .

Section 269TAB(1)(a) 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 then, the export price referred to, and the export price that was determined in the case of ABB Vietnam, 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(1)(a), 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 Vietnam'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 Vietnam that constituted the export price. The purchaser and importer in the case of ABB Vietnam was ABB Australia, not, as the Report suggests, the final customers of ABB Australia. .

In the case of ABB Hong Kong, it had been contracted to provide transformers to a third-party, as part of an international project. A number of these transformers were purchased from ABB Vietnam and were destined for importation into Australia. However, because the Australian-based importer for those particular transformers did not participate in the investigation, Section 269TAB(1)(a) could not be used to determine the export prices for those transformers, instead, those export prices were determined under Section 269TAB(3). Section 269TAB(3) allows the Parliamentary Secretary to determine an export price “*having regard to all relevant information*”. With regard to these sales, this Parliamentary Secretary determined that the export price for each transaction was the actual FOB invoice price for that

⁹ Report No 219, page 72 - 73.

transaction.

As is made clear in the above extract from the *ABB Limited, Vietnam Exporter Visit Report*, the Commission was satisfied that sales made by ABB Vietnam to ABB Hong Kong were “*profitable*” and that the prices charged by ABB Vietnam “*were not influenced by the relationship between the companies*”. In the *ABB Limited, Vietnam Exporter Visit Report* the Commission also is satisfied that sales between ABB Vietnam and ABB Hong Kong were “arm’s length”.¹⁰ Therefore, in the case of the sales to ABB Hong Kong, the export price determined by the Parliamentary Secretary is the profitable, arm’s length price determined via negotiation between ABB Vietnam and ABB Hong Kong. For the purposes of Section 269TACB(3), ABB Hong Kong is the relevant purchaser, because it is the entity that has both purchased the transformer from ABB Vietnam and paid the export price.

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. The only substantive justification in the Report (or, indeed, in any policy or guidance document published by the Commission) is extracted below:

*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.*¹¹

The reading of Section 269TACB that we have advanced above is the only reading of that Section that is available. The “purchaser” is the entity that procures ownership of the transformer via the transaction from which the export price is derived. We do not accept that it is “*narrow and inappropriate*”. The report itself does not explain why such a reading would be “*narrow and inappropriate*”.

¹⁰ At page 73, Report 219 suggests that there was insufficient information to determine whether sales between ABB Hong Kong and its Australian customer were arm’s length. This does not detract from the finding in *ABB Limited, Vietnam Exporter Visit Report* that sales between ABB Vietnam and ABB Hong Kong were arm’s length. Moreover, despite the fact the investigation extended well over 500 days, and the fact ABB Vietnam was subject to a week-long verification, the Commission never requested further information about the ABB Hong Kong sales. ABB Vietnam was at all times cooperative with the Commission, however, ABB Vietnam cannot, and should not – be expected to provide information that the Commission has not requested.

¹¹ Report No 219, page 58.

Report No 219 makes the same finding for ABB Ltd (of Thailand) (“ABB Thailand”). In doing so, it refers to unremarkable facts to try to pierce the corporate veil and “connect” ABB Thailand to the customers of ABB Australia. As the same position has been adopted with respect to ABB Vietnam, we assume that the Report has relied upon the same references to satisfy itself that there is a link between ABB Vietnam and ABB Australia’s customers. We refer to those references as follows:

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

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 Vietnam 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 Vietnam 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 Vietnam 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).

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 Vietnam to know the technical specifications of a power transformer in order to provide a quotation to ABB Australia;
- that ABB Vietnam 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 Vietnam’s export prices were to be determined solely from the purchases made by ABB Australia or ABB Hong Kong in the arm’s length transactions that took place between those parties, we believe that it is that purchaser that can be the only purchaser under Section 269TACB(3).¹²

During the investigation, we drew to the attention of the Commission¹³ that the practice of another anti-dumping user jurisdiction correctly recognises that the application of a provision like Section 269TACB(3)¹⁴ 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

¹² We have considered whether export prices to ABB Australia and ABB Hong Kong could be said to “differ significantly” using the same form of analysis adopted in the Report. If the same criteria as those adopted for the purposes of the Report are followed, then export prices applicable to ABB Australia and ABB Hong Kong cannot be said to differ significantly.

¹³ 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.

¹⁴ 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”).

- (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.*¹⁵ [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 “*different purchasers*” in that context are the first independent purchasers.

The points that we wish to make here are these:

- in ABB Vietnam’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;
- similarly, ABB Vietnam’s sales to ABB Hong Kong were found to be arm’s length¹⁶ and, pursuant to Section 269TAB(3) were determined to be the FOB invoice price paid by ABB Hong Kong; and
- the “*export prices... among different purchasers*” were those which, under Section 269TAB,

¹⁵ 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>

¹⁶ ABB Limited, Vietnam Exporter Visit Report, page 18.

applied to the purchases made by ABB Australia or ABB Hong Kong.

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 Vietnam and ABB Australia and ABB Hong Kong 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, only the prices to ABB Hong Kong were constructed, and not by reason of the fact that the sales were proven not to be arm’s length.

Accordingly, we submit:

- that all of ABB Vietnam’s exports to Australia were arm’s length transactions, as found by the Commission;
- that ABB Australia was the importer and purchaser of the majority of ABB Vietnam’s exports to Australia, and was the party that paid the export price, as found by the Commission;
- that ABB Hong Kong was the purchaser of the remainder of ABB Vietnam’s 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 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, and that export prices did not differ significantly between such purchasers, within the meaning of that term in Section 269TACB(3). 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 Vietnam had 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 7.9%.¹⁷

Thus, the Commission would have been bound to terminate the investigation as against ABB Vietnam on the basis that there was a less than *de minimis* dumping margin worked out in respect of exports of the goods by ABB Vietnam. On the basis that it should have been terminated, any recommendation from the Commission to impose dumping duties on ABB Vietnam'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 Vietnam, 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 Vietnam'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 Federal Court in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* ("Panasia"):¹⁸

¹⁷ Please note that the Report incorrectly identifies this margin as negative 5.1% at page 73. When reference is had to Confidential Attachment 11 of the Report, which sets out the calculations of the dumping margin, Cell AG126 indicates that the correct dumping margin worked out on a transaction-transaction methodology is a negative (no dumping) margin of 7.9%.

¹⁸ [2013] FCA 870 (30 August 2013).

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 Vietnam’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 Vietnam’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 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 Vietnam'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 Vietnam's exports, and how it was applied, that ABB Vietnam 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 Vietnam'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 Vietnam 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:¹⁹

**[CONFIDENTIAL TEXT DELETED – chart showing Commission’s ratios
of ABB Vietnam’s export prices]**

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

**[CONFIDENTIAL TEXT DELETED – confidential information withheld from the public record
by the Anti-Dumping Commission].²⁰**

ABB Vietnam 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 Vietnam’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,²¹ then the chart shows that ABB Vietnam’s prices (“ratios”, as explained above) for units supplied by ABB Australia to **[CONFIDENTIAL TEXT DELETED – ABB Australia’s customers]** were sold at prices that were more and less than the prices of power transformers sold to other purchasers.

The prices are not the “lowest prices”, nor are they particularly unique. There are a number of other sales that had similar ratios, yet were not considered to be “significantly different”. If reference is had to above graph extracted from Confidential Attachment 11, it is clear that there were a number of exports prices similar to the ones identified. This can be shown if we rearrange that graph so that it shows the “ratios” in order from largest to smallest:

**[CONFIDENTIAL TEXT DELETED – chart showing Commission’s ratios
of ABB Vietnam’s export prices]**

In this graph, the “brown” columns relate to those export prices that Report 219 identifies as “differing significantly” from export prices to other “purchasers”. When the export prices are considered on this

¹⁹ Report No 219, Confidential Attachment 10, page 3.

²⁰ *Ibid.*

²¹ The bar lines do not represent absolute or actual prices. They are a ratio of the export price of each unit to ABB Vietnam’s costs to make and sell the same unit (those costs stopping at the FOB point).

basis, it is not apparent at all how they differ from the export prices that ABB Australia paid for the transformers that it would on sell to its [CONFIDENTIAL TEXT DELETED – number] other customers. Even if the point of differentiation for sales to [CONFIDENTIAL TEXT DELETED – ABB Australia's customer names] was that the ratio for these sales is less than [CONFIDENTIAL TEXT DELETED – number], there are still another [CONFIDENTIAL TEXT DELETED – number] customers of ABB Australia (specifically – [CONFIDENTIAL TEXT DELETED – ABB Australia's customer names]) who can be linked to a similar ABB Australia export price.

In these circumstances it cannot be validly said, as a factual matter, that the “export prices” related to ABB Australia's sales [CONFIDENTIAL TEXT DELETED – ABB Australia's customer names] are significantly different to its export prices related to ABB Australia's sales to other customers. Prices (ratios) for some of the units supplied to these customers of ABB Australia were higher than prices (ratios) for other customers of ABB Australia.

Accordingly, ABB Vietnam offered prices to ABB Australia for units that were supplied by ABB Australia to [CONFIDENTIAL TEXT DELETED – ABB Australia's customer names] which (based on the Commission's “ratio” approach towards measuring prices) did not differ significantly to the prices for units supplied to other customers of ABB Australia, including [CONFIDENTIAL TEXT DELETED – ABB Australia's customer names]. 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 Vietnam) 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.²²

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 Anti-Dumping Commission]

²² An explanation of the methodology used in the case of ABB Vietnam's exports, and ABB Vietnam's objection to it, is the subject of our submissions in relation to Finding 5, below. The methodology changed the 7.9% no-dumping margin that would have been worked out for ABB Vietnam based on the methodology used for other exporters (ie the exporters to which Section 269TACB(3) was not applied) into a 3.8% dumping margin.

[CONFIDENTIAL TEXT DELETED – disclosure of confidential information withheld from the public record by the Anti-Dumping Commission]

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 Vietnam 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. As per the above extract from Confidential Attachment 10, the Report attempts to by-pass this issue by stating that it has “[CONFIDENTIAL TEXT DELETED – disclosure of confidential information withheld from the public record by the Anti-Dumping Commission]”²³, rather than export prices that differ significantly between different purchases. The latter is a valid consideration under Section 269TACB(3), the former is not.

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’s customer names] were exported by ABB Vietnam at prices both above and below the prices for units ultimately sold by ABB Australia to the remaining [CONFIDENTIAL TEXT DELETED – number] customers. 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 Vietnam) 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 Vietnam submits that the correct and preferable decision with regard to this Finding 2 is that in ABB Vietnam’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

²³ Report No 219, Confidential Attachment 10, page 3.

ABB Vietnam as were applied to all other exporters.²⁴

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 Vietnam, 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 Vietnam on the basis that there was a less than *de minimis* dumping margin worked out in respect of exports of the goods by ABB Vietnam, 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 Vietnam's exports was unlawful and could not have been acted upon by the Minister.

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 Vietnam'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 sales agreements between ABB Vietnam and ABB Australia that were the subject of the Commission's "*differ significantly*" finding were entered into between **[CONFIDENTIAL TEXT DELETED – discrete period of the total investigation period]**.²⁵

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.

²⁴ Excepting Siemens Guangzhou, Siemens Jinan and Siemens Wuhan, against whom a Section 269TACB(6) method was also applied (Report No 219, page 63 refers).

²⁵ **[CONFIDENTIAL TEXT DELETED – commercially sensitive details regarding a transaction between ABB Vietnam and ABB Australia]**.

In the case of ABB Vietnam, the Commission considered the period of inappropriateness to be the entire period of investigation. The period of investigation was three years, from 1 July 2010 to 30 June 2013.

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 Vietnam 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 Vietnam export sales to Australia in the investigation period.²⁶

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 **[CONFIDENTIAL TEXT DELETED – discrete period of the total investigation period]**:

- 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 Vietnam’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 Vietnam’s exports it would have had a larger negative (no dumping) margin than that of any of the seven exporters in respect of whom the investigation was terminated;²⁷

²⁶ Report No 219, page 73.

²⁷ 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.

- (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 Vietnam 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.

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 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 Vietnam. 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 Vietnam. On the basis that it should have been terminated, any recommendation from the Commission to impose dumping duties on ABB Vietnam'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 there was dumping and that the level of the dumping was positive 3.8% 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 Section 269TACB 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 Vietnam’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.*²⁸

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.

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 Vietnam’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

²⁸ Report No 219, page 60.

“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.²⁹

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

²⁹ *Pilkington (Australia) Ltd v Minister for Justice and Customs* [2002] FCA 770 (18 June 2002).

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 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.³⁰

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.

A close consideration of the particular circumstances of ABB Vietnam renders the Commission's position all the more illogical. We recall that the purpose of Section 269TACB(3) is firstly to identify whether there was a period within the period of investigation in which, because export prices differ significantly between purchasers, regions or periods, it is inappropriate to use the traditional methods (W-W and T-T) to determine whether dumping occurred, and secondly, to provide an alternative methodology where the circumstances require it (W-T). In order to determine whether it was appropriate to apply Section 269TABC(3) in the case of ABB Vietnam, the Commission "[CONFIDENTIAL TEXT DELETED –

³⁰ There is a typographical error here, in that the law requires the use of *"the weighted average of corresponding normal values"* - the omission of *"of"* gives the requirement a very different meaning.

disclosure of information which the Commission considers to be confidential]”.³¹

Secondly, as we have discussed in this section, if the finding that “export prices differed significantly... amongst different purchases” was not made, it was the Commission’s intention to undertake the dumping determination via the T-T methodology in Section 269TAC(2)(b).³² The Section 269TACB(2)(b) methodology requires that each export price be compared to a corresponding normal value. In our discussion regarding Finding 1, we have addressed how the export prices were determined. According to the Report, the corresponding normal values were established under Section 269TAC(2)(c) of the Act.³³ If reference is had to Confidential Attachment 11, **[CONFIDENTIAL TEXT DELETED – details of calculation of normal value]**. Thus if the Section 269TACB(2)(b) dumping determination methodology was used, that determination would have been achieved by comparing the FOB export price for a transformer to its FOB CTMS.

[CONFIDENTIAL TEXT DELETED – details of relationship between dumping determination and the Commission’s “ratio”]. So, the Commission has essentially determined that it was inappropriate to use the T-T methodology to determine whether dumping has occurred by applying a Section 269TACB(2)(b) T-T methodology. Having determined on this basis that it would be inappropriate to use the T-T methodology under Section 269TACB(2)(b) for ABB Vietnam, the Commission has then used what amounts to the T-T methodology under Section 269TACB(3). The only reason why this has led to a different margin then would have been the case had the Section 269TACB(2)(b) methodology been used, is because the Commission believes it has the power to “zero” under Section 269TACB(6).

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 Vietnam 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 Vietnam, any recommendation from the Commission to impose dumping duties on ABB Vietnam’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

³¹ Report No 219, Confidential Attachment 10, page 1.

³² Report No 219, page 73.

³³ *Ibid.*

respect of the goods exported to Australia by ABB Vietnam 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 claimed basis that ABB Vietnam'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 Vietnam’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 Vietnam, although ABB Vietnam does not concede that it was justified. ABB Vietnam’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 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 Vietnam’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.³⁴

We will explain our view that the notices could not have been published against ABB Vietnam in the

³⁴ 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.

following way:

- a summary of how the Commission arrived at the finding that ABB Vietnam'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.

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

A dumping margin of 3.8% was achieved by the Commission under Section 269TACB(6) as follows:³⁵

- (a) ABB Vietnam 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") method³⁶ 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 Vietnam's export sales to ABB Australia "*differ[ed] significantly*" in respect of units purchased from ABB Australia which were then sold **[CONFIDENTIAL TEXT DELETED – number of customers]**.
- (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's calculations, using the T-T method to work out the dumping margin for ABB Vietnam's exports over the entire period of investigation under Section 269TACB(2)(b) would have resulted in a negative dumping margin (no dumping) of 7.9%.

³⁵ Please refer to Report No 219, Confidential Attachment 8.

³⁶ This method is explained under 2 below.

- (e) Instead, the Commission used the “transaction to weighted average” (“T-W”) method¹ under Section 269TACB(3) to work out the dumping margin for ABB Vietnam’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 doing so, to adopt by 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 values.*³⁷

- (g) As a result of the method referred to in (f), with “zeroing”, a dumping margin of 3.8% was determined for ABB Vietnam’s exports to Australia. The calculation method was to calculate the amount of the differences between the normal values³⁸ 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*,³⁹ 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]

³⁷ Report No 219, page 61. For the purposes of clarity, we note that the word “zeroing” is not used in Report No 219.

³⁸ 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.

³⁹ [2013] FCA 870 (30 August 2013).

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;*

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;⁴⁰ 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.⁴¹

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

Working out whether dumping has occurred and levels of dumping

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 the 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.*

⁴⁰ See our submissions in relation to Finding 2.

⁴¹ *Ibid.*

- (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 Vietnam’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 Vietnam’s normal values were used in that comparison. ABB Vietnam 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 minimis 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 Vietnam’s exports to Australia? ABB Vietnam submits that he has not.

The normal value ascertained under Section 269TAC for ABB Vietnam's exports to Australia during the period of investigation, being those goods to which the Australian industry's application under Section 269TB, was **[CONFIDENTIAL TEXT DELETED – number]**.⁴² On a per unit basis, this amounts to **[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 **[CONFIDENTIAL TEXT DELETED – number]**:

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

Accordingly, the Commission did not correctly inform the Minister of the normal value of ABB Vietnam'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 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 3.8%, 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 5.1%,⁴³ means that the normal values were overstated. Indeed, our review of the calculations provided to us by the Commission⁴⁴ 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 10 to the notice signed by the Parliamentary Secretary, the ascertained normal value was not the normal value

⁴² See Report No 219, Confidential Attachment 11, cell AE126.

⁴³ Report No 219, page 71. Again, noting that this figure is incorrect according to Confidential Attachment 11, which calculates the difference between the export prices and normal values.

⁴⁴ Report No 219, Confidential Attachment 8.

to 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 10, shows that the normal value is the export price plus the Commission’s “*alternative dumping margin*” arrived at by applying its interpretation of Section 269TACB(6).

ABB Vietnam 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 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 Vietnam, 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 Vietnam'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 Vietnam 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 Vietnam’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 Vietnam, and that the notice should be revoked as against ABB Vietnam or varied to that effect.

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 Vietnam seeks to have reviewed.

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

ABB Vietnam’s application is in the approved form and has otherwise been lodged as required by the Act.⁴⁵

⁴⁵ As appears to have become available on the ADRP’s website only today (today being the last day for lodgement of this application) and which is stated by the Commission as “*approved for use from 9 January 2015*” for the purposes of Section 269ZZE(1)(b) – Australian Dumping Notice No. 2015/03 refers.

We submit that the ABB Vietnam's application is a sufficient statement setting out ABB Vietnam'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 Vietnam 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 Vietnam, 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:
 - (a) the variation of the relevant notices by way of the exclusion of any references to exports from ABB Vietnam 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 Vietnam.

Lodged for and on behalf of ABB Limited of Vietnam

**Alistair Bridges
Senior Lawyer**

Moulis Legal