Australian Government
Anti-Dumping Review Panel

ADRP Conference Summary

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

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

Purpose

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

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

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

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

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

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

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

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

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

- The recording of the conference; and

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

Background

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

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

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

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

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

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

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

Further Information:

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

Wilson's representative Richard Scheelings provided the following information:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appendix A

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

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

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

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

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

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

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

> **269TAA Arms length transactions**

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

(a) there is any consideration payable for or in respect of the goods other than their price; or

(b) the price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or

(c) in the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

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

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

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

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

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

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

269TAA Arms length transactions

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

…

(b) the price **is** influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; …

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

Item 6 – Paragraph 269TAA(1)(b)

…

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

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

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

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

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

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

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

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

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

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

Ms Smit opined:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Provided above

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

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

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

Provided above

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

Provided above

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

Provided above

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

Provided above

Appendix B

frontier economics

Arms length prices

Prepared for Wilson Transformer Company | 18 May 2022

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

Contents

1 Introduction

1.1 The author

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

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

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

4. I have attached my CV as Appendix A.

1.2 Background and instructions

1.2.1 Relevant background

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

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

7. I have attached my instructions as Appendix B.

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

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

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

2 Response to questions

2.1 Supplied scenario

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

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

2.2 Question 1

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

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

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

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

    (ii) the choice of markup percentage, or

    (iii) both.

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

2.3 Question 2

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

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

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

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

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

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

Profit maximisation between related group entities in a vertical chain

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

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

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

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

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

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

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

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

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

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

Other market factors that distort internal pricing

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

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

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

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

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

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

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

11 OECD Transfer Pricing Guidelines, 2010, at 1.4.

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

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

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

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

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

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

Methods for reasonable estimation of arms length prices

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

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

14 OECD Transfer Pricing Guidelines, 2010, at 1.5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A CV

Warwick Davis

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

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

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

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

Warwick Davis

RELEVANT EXPERIENCE

Competition and public policy

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

Warwick Davis

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

Regulatory analysis

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

Career

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

Education

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

Publications

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

B Letter of instructions

[Attached]

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May 2022

Warwick Davies,
Frontier Economics
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Melbourne,
3000

Expert Opinion: Arms Length Transactions

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

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

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

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

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

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

Yours sincerely,

Michèle Williams

Michèle Williams

General Counsel

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