

**PUBLIC RECORD**



Australian Government  
Department of Industry and Science

**Anti-Dumping Commission**

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**ANTI-DUMPING COMMISSION  
REPORT TO THE ANTI-DUMPING REVIEW PANEL**

**REINVESTIGATION OF CERTAIN FINDINGS  
REPORT 286**

**POWER TRANSFORMERS EXPORTED TO AUSTRALIA  
FROM THE PEOPLE'S REPUBLIC OF CHINA, THE  
REPUBLIC OF INDONESIA, THE REPUBLIC OF KOREA,  
TAIWAN, THE KINGDOM OF THAILAND AND THE  
SOCIALIST REPUBLIC OF VIETNAM**

**31 August 2015**

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### 1 SUMMARY OF FINDINGS

This report provides the results of the reinvestigation by the Commissioner of the Anti-Dumping Commission (Commissioner) of certain findings in Report No. 219 (REP 219), relating to the dumping of power transformers exported to Australia from the People's Republic of China (China), the Republic of Indonesia (Indonesia), the Republic of Korea (Korea), Taiwan, the Kingdom of Thailand (Thailand) and the Socialist Republic of Vietnam (Vietnam).

#### 1.1 Findings

Having regard to evidence submitted to the Anti-Dumping Commission (Commission) during the original investigation, the Commissioner affirms the following findings in respect of REP 219:

- for the purposes of determining a deductive export price<sup>1</sup> for Shihlin Electric & Engineering Corporation (SEEC), a deduction for profit based on profits achieved by other importers using information from the respective importer visit reports is consistent with subsection 269TAB(2)(c) of the *Customs Act 1901*<sup>2</sup> (the Act); and
- in relation to goods exported by ABB Ltd (of Thailand) (ABB Thailand) and ABB Ltd (of Vietnam) (ABB Vietnam), the export prices differed significantly among purchasers and these differences made the methods referred to subsection 269TACB(2) inappropriate.

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<sup>1</sup> Subsection 269TAB(1)(b) of the Act

<sup>2</sup> A reference to a division, section or subsection in this report is a reference to a provision of the *Customs Act 1901*, unless otherwise specified

## **2 BACKGROUND**

### **2.1 Original investigation**

On 29 July 2013, the Commissioner initiated an investigation regarding the alleged dumping of power transformers exported from China, Indonesia, Korea, Taiwan, Thailand and Vietnam.

The then Parliamentary Secretary to the Minister for Industry (the then Parliamentary Secretary)<sup>3</sup> accepted the findings and recommendations in REP 219. REP 219 and a dumping duty notice imposing dumping duties on power transformers exported to Australia from Indonesia, Taiwan, Thailand and Vietnam were published on 10 December 2014.

### **2.2 Legislative framework for review**

Division 9 of Part XVB of the Act sets out procedures for review by the Anti-Dumping Review Panel (ADRP) of certain decisions made by the relevant Minister or Parliamentary Secretary or the Commissioner.

Interested parties<sup>4</sup> can apply to the ADRP to review certain decisions of the relevant Minister or Parliamentary Secretary in relation to dumping and countervailing matters (reviewable decision).<sup>5</sup> If an application for review is not rejected, the ADRP must make a report to the Parliamentary Secretary to the Minister for Industry and Science (the Parliamentary Secretary)<sup>6</sup> on the application recommending:

- that the Parliamentary Secretary affirm the reviewable decision; or
- that the Parliamentary Secretary revoke the reviewable decision and substitute a specified new decision.

If the ADRP has not rejected an application for review, before making a recommendation under subsection 269ZZK(1), the ADRP may, by written notice, require the Commissioner to:<sup>7</sup>

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

### **2.3 Review by the ADRP**

On 5 January 2015, an application for review of a decision by the ADRP was lodged on behalf an Indonesian company, PT CG Power Systems Indonesia (CG Power). On 8 January 2015 an application for review was lodged on behalf of a Taiwanese

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<sup>3</sup> The then Minister for Industry delegated responsibility for anti-dumping matters to the then Parliamentary Secretary to the Minister for Industry

<sup>4</sup> As defined in section 269ZX

<sup>5</sup> Section 269ZZC

<sup>6</sup> The Minister for Industry and Science has delegated responsibility for anti-dumping matters to the Parliamentary Secretary to the Minister for Industry and Science.

<sup>7</sup> Subsection 269ZZL(1)



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company, Fortune Electric Co Ltd (Fortune). On 9 January 2015 an application for review was lodged on behalf of SEEC. Also on 9 January 2015 two further applications for review were lodged, one on behalf of ABB Thailand and the other on behalf of ABB Vietnam (ABB exporters).

On 19 March 2015, the ADRP asked the Commissioner under subsection 269ZZL(1) to reinvestigate certain findings that formed the basis of the reviewable decision. The ADRP requested that Commissioner reinvestigate the following:

- the finding, made for the purposes of section 269TAB, of the export price in relation to goods exported by SEEC and any consequential findings upon this finding; and
- the findings that, in relation to goods exported by the ABB exporters, the export prices differed significantly among purchasers and any findings consequential upon those findings.

The Commission's reinvestigation report was due by 18 May 2015.

The Commissioner requested and was granted an extension to 17 July 2015, and a further extension to 31 August 2015.

### 2.4 Specific findings to be considered in the reinvestigation

#### 2.4.1 Export price in relation to goods exported by SEEC

SEEC was the exporter of power transformers from Taiwan to Australia and an associated company incorporated in Australia, Shihlin Electric Australia Pty Ltd (SeA), was the importer.

The Commission was not satisfied that relevant export sales were arms length transactions and accordingly had recourse to subsection 269TAB(1)(b) for the purposes of determining an export price. In undertaking that determination, the Commission deducted from the price at which the goods were sold by SeA, an amount of profit based on profits achieved by other importers using information from the respective importer visit reports.

SEEC contended that in circumstances when SeA had actually not made any profit, the Commission should not have made a deduction for a notional profit.

The ADRP asked the Commission to re-examine the profit used for the purposes of determining a deductive export price for SEEC.

The ADRP noted that, in its opinion the expression "the profit, if any, on the sale by the importer", contained within subsection 269TAB(2)(c):

*requires consideration of the actual profit. You appear to have used s269TAB(2)(c) when determining export price but did not consider the actual*

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*profit. The calculations you did were based on profits achieved by other importers that were subsidiaries of, or related to, those exporters.*<sup>8</sup>

### **2.4.2 Export prices differed significantly among purchasers in relation to goods exported by ABB Thailand and by ABB Vietnam**

In determining whether dumping had occurred in relation to power transformers exported by the ABB exporters, the Commission applied subsection 269TACB(3).

Subsection 269TACB(3) requires the Parliamentary Secretary to be satisfied that:

- the export prices differ significantly among different purchasers, regions or periods; and
- those differences make the methods referred to in subsection 269TACB(2) inappropriate for use in respect of a period constituting the whole or a part of the investigation period.

The Commission determined that, in relation to the ABB exporters, export prices differed significantly among different purchasers and therefore considered that it was inappropriate to use subsection 269TACB(2) in determining dumping.

The ABB exporters advanced two key arguments as to why the necessary preconditions to use subsection 269TACB(3), rather than subsection 269TACB(2), were not met.

Firstly, the ABB exporters argued that the expression "export prices differ significantly" calls for a comparison between export prices as a monetary amount and nothing more. The methodology used by the Commission to evaluate whether export prices differed significantly was to calculate the ratio between the export price and the full cost to make and sell for each power transformer exported to Australia and sold domestically in the investigation period. The ratios were then compared to ascertain whether there were material or significant differences between those ratios. The Commission concluded that there were significant differences.

Secondly, the ABB exporters argued that the expression "different purchasers" could not be interpreted so as to include Australian customers who had purchased from ABB Australia. The Commission took approach that the word "purchasers" is capable of being read more broadly to include the final Australian customers and need not be confined to direct importers.

In relation to subsection 269TACB(3), the ADRP noted that:

*the expression "...the export prices differ significantly among different purchasers..." is ambiguous in two respects. Firstly it does not identify with clarity the nature of the difference upon which the operation of the provision depends and secondly it does not identify with clarity the class or group which constitutes "purchasers". You have acted on the basis described earlier, namely the difference may not simply be a manifestation of price differences as a monetary amount and that the purchasers can be those*

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<sup>8</sup> ADRP letter to the Commission requesting reinvestigation of certain findings, page 2



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*corporations to whom ABB Australia sold power transformers in the Australian market. I do not agree with either conclusion...*<sup>9</sup>

In relation to "export prices", the ADRP noted that:

*It is, in my opinion, difficult to avoid the conclusion that the difference s269TACB(3)(a) is concerned with is the monetary amount of export prices which may differ significantly. Elsewhere in s269TACB, there are repeated references to export prices and how they should be considered. Each instance, involves consideration of the export price as a monetary amount. It would be curious if, in s269TACB(3)(a), the identification of differences involved some other comparison such as the comparison undertaken by you comparing the ratios of export prices to the full cost to make and sell.*<sup>10</sup>

In relation to "purchasers", the ADRP noted that:

*The word "purchasers" does not, in a case where export prices have been established under s269TAB(1)(a) comprehend purchases from the importer.*<sup>11</sup>

The ADRP asked the Commission to reinvestigate the findings that, in relation to goods exported by the ABB exporters, the export prices differed significantly among purchasers and any findings consequential upon those findings.

### 2.5 Approach to the reinvestigation

In conducting a reinvestigation, the Commissioner must only have regard to the information before the ADRP. In conducting a review, the ADRP must (subject to subsections 269ZZK(4A) and (5)) have regard to relevant information and any conclusions based on relevant information that are contained in the application for the review or in any submissions received under section 269ZZ.<sup>12</sup> Relevant information relates to information from the original investigation and comprises the application, submissions concerning the publication of that notice which the Commissioner had regard to for the purposes of formulating the Statement of Essential Facts No. 219 (SEF 219), SEF 219, submissions in response to SEF 219, REP 219 and any other matters considered relevant by the Commissioner in the course of the investigation.<sup>13</sup>

If the ADRP gives the Commissioner notice under subsection 269ZZL(1), then, in making the recommendation, the ADRP must also have regard to this reinvestigation report in making a recommendation to the Parliamentary Secretary.<sup>14</sup>

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<sup>9</sup> Ibid page 3

<sup>10</sup> Ibid page 4

<sup>11</sup> Ibid page 4

<sup>12</sup> Subsection 269ZZK(4)

<sup>13</sup> Subsection 269ZZK(6)(a)

<sup>14</sup> Subsection 269ZZK(4A)

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### 3 EXPORT PRICE IN RELATION TO GOODS EXPORTED BY SEEC

#### 3.1 Summary of reinvestigation findings

The Commissioner's reinvestigation finds that, for the purposes of determining a deductive export price for SEEC, a deduction for profit based on profits achieved by other importers using information from the respective importer visit reports is consistent with subsection 269TAB(2)(c).

#### 3.2 Application by SEEC to ADRP

In its application to the ADRP, SEEC stated that:

*In circumstances when SeA has actually not made any profit, SEEC submits that the Commission should not have made a deduction for a notional profit... While the ADA allows an adjustment for accrued profits in calculating a deductive export price, it does not allow investigating authorities to construct a notional profit where the importer has actually not incurred a profit. This is particularly so in view of the specific requirement in Article 2.4 of the ADA that only "profits accruing" should be adjusted to the deductive export price. Accordingly, the Commission, in calculating a deductive export price, should only have deducted the actual profit made by SeA on transactions during the POI. Given that SeA did not make any profit during the POI, in our submission no such profit should have been deducted when calculating a deductive export price. SEEC respectfully submits that the Commission's approach appears to be inconsistent with the ADA.<sup>15</sup>*

#### 3.3 Findings to be reinvestigated

The ADRP asked the Commission to re-examine the profit used for the purposes of determining a deductive export price for SEEC.

The ADRP noted that, in its opinion the expression "the profit, if any, on the sale by the importer", contained within subsection 269TAB(2)(c):

*requires consideration of the actual profit. You appear to have used s269TAB(2)(c) when determining export price but did not consider the actual profit. The calculations you did were based on profits achieved by other importers that were subsidiaries of, or related to, those exporters.<sup>16</sup>*

#### 3.4 The original finding

The Commission considered SEEC's submission in preparing REP 219 and reached the following determination:

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<sup>15</sup> SEEC application for review of a decision by the Minister whether to publish a dumping duty notice or a countervailing duty notice Attachment 4 page 10

<sup>16</sup> ADRP letter to the Commission requesting reinvestigation of certain findings, page 2



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The Commission notes that s. 269TAB(2)(c) provides for the deduction for profit in calculating deductive export prices, as follows:

*'the profit, if any, on the sale by the importer or, where the Minister so directs, an amount calculated in accordance with such rate as the Minister specifies in the direction as the rate that, for the purposes of paragraph (1)(b), is to be regarded as the rate of profit on the sale by the importer.'*

The Commission's Dumping and Subsidy Manual also addresses the deduction for profit in calculating deductive export prices. The manual states the Commission may have regard to a number of factors, including

*'the profit achieved by other importers at the same level of trade for the goods during the investigation period.'*

The Commission has calculated a rate of profit based on profits achieved by other importers using information from the respective importer visit reports.<sup>17</sup>

### 3.5 The reinvestigation

#### 3.5.1 SEEC visit report

The Commission's SEEC visit report stated in the export price section:

*In respect of export sales to Australia during the investigation period, we found evidence that the importer, SeA, [REDACTED]*

[REDACTED]

*Further, we note that SEEC [REDACTED]*

[REDACTED]

*Given the relationship between the parties and the sales at a loss incurred by SeA, [REDACTED]*

[REDACTED]

*We therefore consider that the export price for these sales can be determined under section under subsection 269TAB(1)(b), being the selling price of the goods by SeA, less prescribed deductions. We have deducted a reasonable amount of profit of [REDACTED]% in deriving an arms length export price.<sup>18</sup>*

#### 3.5.2 Submissions by interested parties

SEEC made a submission in response to the Commission's visit report. SEEC stated that it:

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<sup>17</sup> REP 219 page 68

<sup>18</sup> Visit Report – SEEC page 21

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...disagrees with the Commission's decision to deduct a ■% profit margin from the price at which SeA sold power transformers to its Australian customers.

SEEC seeks to make two points about this.

First, SEEC submits that the Commission should not make a deduction for a notional profit.

Article 2.3 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA) allows investigating authorities to construct an export price based on the price at which an associated importer on-sold the goods under investigation. Article 2.4 of the ADA then provides that:

*"In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made" (emphasis added).*

While the ADA allows an adjustment for accrued profits in calculating a deductive export price, it does not allow investigating authorities to ■■■■■. This is particularly so in view of the specific requirement in Article 2.4 of the ADA that only "profits accruing" should be adjusted to the deductive export price.

Accordingly, the Commission, in calculating a deductive export price, should only deduct the actual profit made by SeA on transactions during the POI. SEEC respectfully submits that the Commission's approach appears to be inconsistent with the ADA.

Secondly, without prejudice to that argument, even if a deduction of a reasonable profit for SeA may be made when calculating a deductive export price for SEEC, for the reasons set out below the Commission's determination of a ■% profit margin for that purpose is arbitrary and unreasonable.

In the visit reports for SeA (page 13) and for SEEC (page 21), the Commission notes that the source of the ■% profit margin allocated to SeA by the Commission was advice from SeA and SEEC to the Commission that a ■% profit on Australian sales was "expected".

That is, it was the "intent" or "expectation" of SeA and SEEC that they would achieve a profit margin of ■% on sales in Australia.

It is SEEC's position that in calculating a deductive export price, the Commission should, and is obliged, to deduct actual profits obtained in sales by SeA in sales to its Australian customers, as opposed to notional profits.<sup>19</sup>

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<sup>19</sup> SEEC Submission on Visit Report and Revised Dumping Margin page 2



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### **3.5.3 The Commission's assessment**

The Commission has reviewed the information available before the Commissioner in the original investigation and available to the ADRP for its review.

The Commission established during the verification process that SeA had incurred significant sales at a loss on power transformers sold during the investigation period. On the basis of this finding and other evidence obtained, the Commission concluded that the relationship between SeA and SEEC was not arms length and, as such, the purchase of the goods by SeA from SEEC was not an arms length transaction. This finding is not disputed by SeA or SEEC.

On the basis that the purchase of the goods by SeA from SEEC was not an arms length transaction, the Commission is satisfied that the export price cannot be determined under subsection 269TAB(1)(a). The export price can be determined under subsection 269TAB(1)(b), being the selling price of the goods by SeA, less prescribed deductions.

The Commission considered the submission made by SEEC in preparing REP 219 and amended the amount deducted for profit from ■%, being an "expected" profit margin, to 2.9% being the profit achieved by verified importers.

The Commission is satisfied that the prescribed deduction for profit based on the verified profits of other importers is consistent with subsection 269TAB(2)(c), which provides for the Minister to direct an amount calculated in accordance with such rate as the Minister specifies in the direction as the rate that, for the purposes of paragraph (1)(b), is to be regarded as the rate of profit on the sale by the importer.

Concerning the claims of the review applicant that the ADA does not allow investigating authorities to construct a notional profit where the importer has actually not incurred a profit, the Commission is not aware of any WTO jurisprudence relating to this matter. The Commission notes investigating authorities elsewhere appear to routinely use a profit in working out an export price where the sales are between associated parties (i.e. not arms length sales).

### **3.5.4 Conclusion**

After conducting a further assessment of the profit used for the purposes of determining a deductive export price for SEEC, the Commission concludes the use of the rate of profit based on profits achieved by other importers using information from the respective importer visit reports is consistent with subsection 269TAB(2)(c). Where an importer is related to an exporter, and given the potential for compensatory arrangements, the existence of an actual positive profit or an actual negative profit is not likely to be very meaningful. The purpose of working out the deductive export price is to estimate a price that is likely to have occurred had the sales been made between parties dealing at arms length. Deducting an amount for what is considered to be a normal operating profit of the importer in these non arms length situations is an important part of the deductive export price calculation.

In this case, the then Parliamentary Secretary exercised his discretion and, by public notice under subsections 269TG(1) and (2) of the Act, accepted the

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recommendations in REP 219. One such recommendation was that the then Parliamentary Secretary direct, in accordance with subsection 269TAB(2)(c), that the rate of profit used to calculate the deductive export price for SEEC be based on profits achieved by other importers that are related to the exporter.<sup>20</sup> The then Parliamentary Secretary's direction has given effect to the recommendation by directing that a 2.9% profit be included as a deduction for the purposes of subsection 269TAB(1)(b). Such case specific direction is considered by the Commission to be consistent with the legislation.

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<sup>20</sup> REP 219 page 97



**4 EXPORT PRICES FOR GOODS EXPORTED BY ABB EXPORTERS**

**4.1 Summary of reinvestigation findings**

The Commission's reinvestigation finds that, in relation to goods exported by the ABB exporters, the export prices differed significantly among purchasers and these differences made the methods referred to subsection 269TACB(2) inappropriate in assessing dumping.

**4.2 Application by ABB exporters to ADRP**

In their respective applications and submissions to the ADRP, the ABB exporters submitted that the different purchasers compared by the Commission in reaching its findings were not the purchasers from the ABB exporters. The ABB exporters noted:

- *that all of ABB [exporter's] exports to Australia were arms length transactions, as found by the Commission;*
- *that ABB Australia was the importer and purchaser of ABB [exporter'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 No 219 was unlawful, because the basis for that application - that export prices differed significantly among different purchasers – incorrectly identified ABB Australia's final customers as the "purchasers" relevant to the determination of the export price.*

*The correct decision in relation to the interpretation of Section 269TACB(3) is that the "different purchasers" are the purchasers that pay the export price that is the subject of the inquiry under that Section.<sup>21</sup>*

The ABB exporters further submitted that, in the alternative to the above detailed submission, export prices among different purchasers did not differ significantly. The ABB exporters noted that:

- A *The export prices (by which we mean "export price-CTMS ratios") which the Commission determined to be significantly different were not significantly different, nor were they particularly unique.*
- B *The test used by the Commission to determine whether export prices differed significantly did not even consider export prices, but rather*

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<sup>21</sup> ABB Thailand application for review of a decision by the Minister whether to publish a dumping duty notice or a countervailing duty notice page 13

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*only considered the export price-CTMS ratios calculated by the Commission.*<sup>22</sup>

The ABB exporters submitted that, on the basis of these arguments, the Commission's decision to apply subsection 269TACB(3) was incorrect, as it had not established that export prices differed significantly between different purchasers, and the correct decision would have been for the Commission to determine whether dumping had occurred in accordance with subsection 269TACB(2)(b).

### 4.3 Findings to be reinvestigated

The ADRP asked the Commission to reinvestigate the findings that, in relation to goods exported by the ABB exporters, the export prices differed significantly among purchasers and any findings consequential upon those findings.

### 4.4 The original finding

REP 219 details the Commission's original finding that, in relation to goods exported by the ABB exporters, the export prices differed significantly among purchasers, that these differences made the methods referred to subsection 269TACB(2) inappropriate, and the consequent use of subsection 269TACB(3) to determine dumping margins for the ABB exporters.

In order to apply subsection 269TACB(3) the Minister must be satisfied:

- that the export prices differ significantly among different purchasers, regions or periods; and
- that those differences make the methods referred to in subsection 269TACB(2) inappropriate for use in respect of a period constituting the whole or a part of the investigation period.

In regards to the comparison of **export prices**, the Commission concluded that each power transformer is uniquely constructed, which makes it more difficult to compare export prices between purchasers, regions or periods for each transaction than if, for example, the goods were homogenous. The Commission considered a range of approaches for comparing export prices for each power transformer exported to Australia, and concluded that using the ratio of actual export price to the actual full cost to make and sell was the most meaningful method available for understanding the differences between export prices for power transformers.

The Commission stated that it considered that this approach was reasonable for analysing export price patterns because the estimated cost to make and sell the goods was clearly a consideration for producers when pricing the goods. The Commission further noted that its analysis of the ratios of export price to cost to make and sell would also reveal whether an exporter's export prices were different simply because of differences in the exporter's costs from one unit to another. If this was the

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<sup>22</sup> Review of Ministerial decision – power transformers - Interested party submission of ABB Limited (of Thailand) page 5



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case, it would be reflected in reasonably consistent ratios among different purchasers, regions or periods.

Having identified that export prices for the ABB exporters differed significantly among different purchasers, region or periods, the Commission then considered whether it was inappropriate to use the methods for working out whether dumping has occurred in terms of subsection 269TACB(2).

The Commission determined that the *weighted average to weighted average* methodology was not appropriate because of the nature of the products that have significantly variable export prices and normal values among different power transformers. The *transaction to transaction* methodology was not considered appropriate because the significantly different export prices, including export prices that differed significantly among different purchasers, regions or periods, are masked when the range of dumping margins are amalgamated into one product dumping margin for each exporter. The dumping margin of the goods found to be at export prices that differed significantly were significant, and the volume of those goods exported at dumped prices was material.

In regard the comparison of **purchasers**, the Commission considered it a narrow and inappropriate reading of subsection 269TACB(3) to 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 Commission undertook a verification visit to ABB Australia and satisfied itself 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. It was clear to the Commission that each power transformer was designed, produced and sold to the Australian end user in accordance with the specific requirements of that end user. The Commission also gathered evidence relating to the negotiation process and information exchange that occurred between ABB Thailand and ABB Australia with respect to sales and supply of power transformers to Australian purchasers.

On the basis of this accumulated evidence, the Commission considered it was reasonable to compare the export prices from ABB Thailand in groupings according to the final Australian purchasers of those goods, even though those entities purchased the goods from ABB Australia.

### 4.5 The reinvestigation

#### 4.5.1 Submission from Wilson Transformer Company Pty Ltd (WTC)

In a submission to the original investigation dated 10 June 2014, WTC raised the issue of 'targeted dumping' in respect of exporters from Thailand. The Commission treated the WTC submission as an allegation that certain exporters may have been selling power transformers to Australia during the investigation period at export prices that differed significantly among different purchasers, regions or periods in terms of subsection 269TACB(3).

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### **4.5.2 Exporter verifications**

The Commission's analysis of verified exporter data identified significant fluctuations in the dumping margins calculated using the transaction to transaction methodology. As the Commission neared completion of its exporter verification exercises, it considered that such observations were indicative of instances where export prices differed significantly among purchasers, regions or periods.

### **4.5.3 Commission file note – Potential for use of an alternative approach to dumping margin assessments in terms of subsection 269TACB(3)**

Given the Commission's observations arising from exporter verification exercises, the Commission examined whether it was inappropriate to use the weighted average to weighted average methodology and the transaction to transaction methodology to work out whether dumping had occurred.

On 15 August 2014, the Commission placed a file note on the public record that advised interested parties that the Commission would be revisiting exporter dumping margin assessments to determine whether there are grounds to work out dumping in accordance with subsection 269TACB(3) – that is, by using the weighted average to transaction method.

The Commission wrote to ABB Thailand on 20 and 29 August 2014 and to both ABB exporters on 17 September 2014 outlining the analysis undertaken and why it proposed to rely upon a dumping margin calculation using subsection 269TACB(3) instead of using subsection 269TACB(2).

### **4.5.4 ABB Thailand submissions in response to Commission's proposed approach**

In response to the Commission's letter, ABB Thailand made submissions on 27 August 2014 and 4 September 2014.

The relevant aspects of ABB Thailand's submissions were:

- there are not and cannot be different export prices amongst different purchasers because ABB Thailand does not have different purchasers;
- ABB Thailand's exports were negotiated and transacted directly with ABB Australia on an arms length basis;
- even if the Commission suggests it can compare ABB Thailand's export prices depending on who the ultimate end-user might have been, instead of the direct importers, the analysis shows that ABB Thailand's export prices are not significantly different; and
- the Commission's amended analysis does not safely identify the ultimate end-users to whom ABB Thailand sold the power transformers concerned; and
- the Commission's amended analysis does not present significantly different prices.



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### **4.5.5 SEF 219**

SEF 219 detailed the Commissioner's findings that for the ABB exporters export prices differed significantly among different purchasers, regions or periods.

SEF 219 also outlined the Commissioner's reasons for the findings that it was inappropriate to use subsection 269TACB(2) to determine dumping margins for those exporters.

Furthermore, SEF 219 outlined the Commissions approach to the calculation of dumping margins when using the weighted average to transaction methodology under subsection 269TACB(3).

The Commission explained in SEF 219 that in moving from a transaction to transaction approach to a weighted average to transaction approach to calculating dumping margins, the dumping margin assessments changed. The revised dumping margins and reasons for using the weighted average to transaction methodology were published in the SEF.

### **4.5.6 Submissions in response to SEF 219**

In joint submissions, the ABB exporters made the following points relevant to the reinvestigation issues:

- subsection 269TACB(3) can have no application to ABB Thailand because ABB Thailand only had one purchaser, namely ABB Australia;
- the end users were not the purchasers with whom ABB Thailand or ABB Vietnam negotiated export price, they are remote to those export prices and did not pay those export prices, and they are customers of ABB Australia under separate and distinct contracts;
- ABB Australia's sales were separate arms length transactions;
- end users buy power transformers, installation and services – not power transformers – and they have no beneficial ownership in the power transformers prior to the time at which legal title is transferred;
- export prices for ABB Thailand and ABB Vietnam do not differ significantly in a way that would render the methods of working out whether dumping has occurred under subsection 269TACB(2) inappropriate;
- the transaction to transaction methodology is appropriate for calculating dumping margins; and
- the Commission has not used a transaction to weighted average normal value methodology. It has used the transaction to transaction methodology, and has merely labelled it as a transaction to weighted average normal value methodology.

In separate and additional letters, ABB Thailand also submitted:

- the Commission's export price to cost to make and sell ratio is not an appropriate measure of price behaviour, and its approach ignores cost past the FOB point;
- the correct manner to compare export price and cost to make and sell would involve a comparison of estimated cost to contract pricing; and

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- a comparison of “ABB Thailand’s full up revenue against its full up cost for each individual transformer” shows the price behaviour of ABB Thailand [ABB Thailand’s “full up” costs and revenues included all costs and all revenue for the sale concerned from the exporter’s perspective, including those elements past the FOB point].

In a further separate letter, ABB Vietnam submitted:

- the Commission’s export price to cost to make and sell ratio does not represent ABB Vietnam’s appreciation of the cost to make and sell at the time the price is set; and
- the proper gauge of ABB Vietnam’s mindset when considering the price is the estimated cost to make and sell the goods, which is represented by its full cost modelling.

### 4.5.7 The Commission’s assessment

The Commission has reviewed the information available before the Commissioner in the original investigation and available to the ADRP for its review.

#### Legislative framework

Pursuant to subsection 269TACB(3), export prices determined for individual transactions may be compared to the weighted average of corresponding normal values where 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 269TACB(2) inappropriate for use in respect of a period constituting the whole or a part of the investigation period.

Subsection 269TACB(6) provides that, in a comparison under subsection 269TACB(3), if the Commission is satisfied that export prices in respect of particular transactions during the investigation period are less than the weighted average normal value:

- 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.

#### Export prices differ significantly

The Commission maintains its view that each power transformer is uniquely constructed and as such a comparison of export prices by monetary value for each power transformer unit is of limited value in the context of subsection 269TACB(3). This is because of the unique nature of each power transformer, in contrast to mass produced commodities that are more usually the subject of dumping investigations.



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The Commission maintains its view that in applying subsection 269TACB(3) it may be necessary, in the context of unique products, to undertake an alternative approach to comparing export prices (that is, an approach other than the comparison of export prices by monetary value). It is for this reason that the Commission adopted the ratio of export price to the full cost to make and sell as a mechanism for understanding the differences between export prices for power transformers.

The Commission maintains the view that the analysis of the ratios of export price to cost to make and sell provided an effective method by which to compare pricing patterns. Using this method, reasonably consistent ratios among different purchasers would be indicative of the fact that export prices were different simply due to differences in the exporter's costs to make and sell from one unit to the next. A discrepancy in the ratios when comparing purchasers would be indicative that certain purchasers had been subject to a different pattern of export pricing.

The Commission views the observance of a pattern as being integral to subsection 269TACB(3). The Commission notes the consideration provided in WTO Appellate Body Report DS322<sup>23</sup>:

*The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods." The prices of transactions that fall within this pattern must be found to differ significantly from other export prices.*

The Commission calculated the ratios of actual export price to actual full cost to make and sell the power transformers for ABB Thailand sales to ABB Australia for the supply to Australian purchasers. The Commission noted that those ratios for one purchaser, [REDACTED]

[REDACTED] ABB Thailand has not contested these facts.

The ratios of export price to costs to make and sell in relation to ABB Thailand export prices for supply to [REDACTED] was significantly different to the pattern for all other purchasers.

The Commission noted that the ratios of export price to full cost to make and sell for ABB Vietnam sales to ABB Australia for the supply of power transformers to certain Australian purchasers were significantly different to such ratios for other purchasers. In particular, the Commission is satisfied that it has identified a pattern of export prices (for the supply of [REDACTED] that differ significantly from export prices for supply to the other purchasers in the investigation period.

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<sup>23</sup> WTO Report of the Appellate Body, United States – Measures relating to zeroing and sunset reviews, WT/DS322/AB/R, 9 January 2007, paragraph 135, page 56.

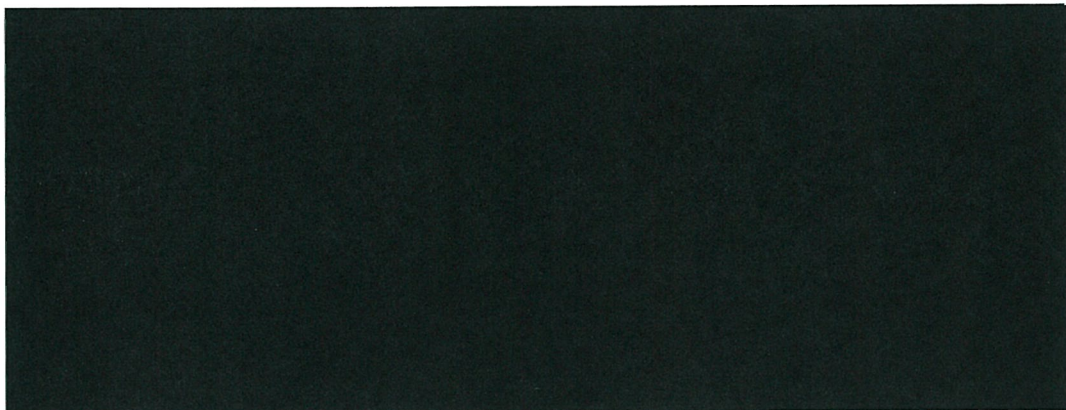
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The Commission remains satisfied following its review of the export pricing data for the ABB exporters that export prices for certain purchasers differed significantly from export prices for other purchasers.

### Different purchasers

The Commission maintains its view in applying subsection 269TACB(3) it may be necessary, especially in the case of the exporter and importer being related entities, to extend the definition of purchasers beyond those entities involved in the purchase of the goods directly from the exporter.

The Commission considers the Australian customer of ABB Australia is the relevant purchaser for the purpose of subsection 269TACB(3)(a). In relation to the confidential evidence gathered from ABB Thailand and ABB Australia in relation to ABB Thailand exports of power transformers to Australia, the Commission concludes that ABB Thailand is aware of:



Given the above detailed factors the Commission is satisfied that in relation to exports by ABB Thailand, the Australian customer of ABB Australia is the relevant purchaser for the purpose of subsection 269TACB(3)(a).

The Commission is similarly satisfied that ABB Vietnam and ABB Australia maintain a comparable relationship to that of ABB Thailand and ABB Australia and therefore is satisfied that in relation to exports by ABB Vietnam, the Australian customer of ABB Australia is the relevant purchaser for the purpose of subsection 269TACB(3)(a).

### Reasons subsection 269TACB(2) is inappropriate

The Commission has taken account of its export price analysis, and exporter comments on that analysis, and it considers it is inappropriate to use the methods for working out whether dumping has occurred in terms of subsection 269TACB(2).

The Commission considers that export prices that 'differ significantly', i.e. for ABB Thailand sales to ABB Australia to supply [REDACTED] and for ABB Vietnam sales to ABB Australia to supply [REDACTED], 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



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particular to those sales, and the volume of those sales at dumped prices, has caused material injury to the Australian power transformer industry. The Commission notes that the collective export value of those goods from ABB Thailand at FOB delivery terms was approximately AUD [REDACTED] and ABB Vietnam approximately AUD [REDACTED]

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 subsection 269TACB(2) for working out whether dumping has occurred in relation to ABB exporters' export sales to Australia in the investigation period.

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### **5 FINDINGS FROM THE REINVESTIGATION**

Having regard to evidence submitted to the Commission during the original investigation and the information available to the ADRP for its review, the Commissioner considers that:

- for the purposes of determining a deductive export price for SEEC, a deduction for profit based on profits achieved by other importers using information from the respective importer visit reports is consistent with subsection 269TAB(2)(c); and
- in relation to goods exported by the ABB exporters, the export prices differed significantly among purchasers and these differences made the methods referred to subsection 269TACB(2) inappropriate.