



Australian Government
Anti-Dumping Review Panel

ADRP Decision No. 122 and 123

Power Transformers exported from the People's
Republic of China

May 2020

<https://www.adreviewpanel.gov.au>

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Abbreviations

Term	Meaning
ABB Chongqing	ABB Chongqing Transformer Co., Ltd
ABB Zhongshan	ABB Zhongshan Transformer Co., Ltd
Act	<i>Customs Act 1901</i>
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
AUD	Australian Dollar
China	The People's Republic of China
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
FOB	Free on board
Goods	Liquid dielectric power transformers with power ratings of equal to or greater than 10 MVA (mega volt amperes) and a voltage rating of less than 500kV (kilo volts) whether assembled or unassembled, complete or incomplete.
Injury Period	From 1 January 2014.
Investigation period	1 January 2016 to 31 December 2018
Manual	Dumping and Subsidy Manual November 2018
Minister	Minister for Industry, Science and Technology
MVA	Megavolt ampere

NIP	Non-injurious price
Original application	The application for the imposition of dumping duties on the goods made on 24 January 2019 by the applicant
TER 507	The termination report published by the Commission in relation to Investigation 507 and dated 31 January 2020
Review applications	The applications for review of the decisions dated 28 February 2020
Review Panel	Anti-Dumping Review Panel
Reviewable Decisions	The decisions of the Commissioner made on 31 January 2020, the combined effect of which was to terminate the entire Investigation (ADN 2020/010)
SEF 507	Statement of Essential Facts
Siemens (Jinan)	Siemens Transformer (Jinan) Co., Ltd
Siemens (Wuhan)	Siemens Transformer (Wuhan) Co., Ltd
Attachment 2	Attachment 2 to the Review Applications.
TPS Report	The report of Transfer Pricing Solutions dated 20 January 2020.

Summary

1. This review concerns Investigation 507 into the dumping of certain power transformers exported from the People's Republic of China.
2. On 31 January 2020, the Commissioner made three decisions (decisions), the effect of which was to terminate the whole of that Investigation. The Commissioner:
 - Terminated the Investigation in respect of goods exported by ABB Chongqing Transformer Co., Ltd (ABB Chongqing) and Siemens Transformer (Jinan) Co., Ltd (Siemens (Jinan)) under s 269TDA(1)(b)(i) because those exporters did not export power transformers at dumped prices.
 - Terminated the Investigation in respect of goods exported by ABB Zhongshan Transformer Co., Ltd (ABB Zhongshan) and Siemens Transformer (Wuhan) Co., Ltd (Siemens (Wuhan)) under s 269TDA(1)(b)(ii) because the dumping margin was less than 2%.
 - Terminated the Investigation in respect of the goods exported from China by all other exporters under s 269TDA(13) because the injury caused to the Australian Industry was negligible.
3. The applicant, Wilson Transformer Company Pty Ltd (applicant), applied for review of the Decisions.¹
4. The applicant argued:
 - The Commissioner should have determined the export price of the goods by reference to s 269TAB(1)(b) or s 269TAB(1)(c). Instead, he misapplied s 269TAA(1)(b), failed to properly investigate whether transactions were arms length transactions within s 269TAA(1)(b), and disregarded evidence that the transactions were not arms length transactions; and
 - The Commissioner wrongly concluded that the injury caused to the Australian industry was negligible. He ought to have concluded that the injury, specifically the loss of the chance to be a successful tenderer in respect of a number of identified projects, was material injury.

¹ Under s 269ZZO, Item 3 of the Act

5. I consider that the export sales between related companies were arms length transactions.
6. I am not satisfied that the injury caused by the dumped goods was negligible.
7. I therefore affirm the decisions under s 269TDA(1) to terminate the Investigation in respect of particular exporters. I revoke the decision under s 269TDA(13) to terminate the Investigation in respect of all other exporters.

Background

8. The goods under consideration (goods) are:

liquid dielectric power transformers with power ratings of equal to or greater than 10 MVA (mega volt amperes) and a voltage rating of less than 500kV (kilo volts) whether assembled or unassembled, complete or incomplete.

Gas filled and dry type power transformers are not included. The goods are generally classified to the following tariff subheadings and statistical codes in Schedule 3 to the Customs Tariff Act 1995:

- 8504.22.00: 40; and
- 8504.23.00: 26 and 41.

9. An application for the imposition of dumping duties on the goods was made on 24 January 2019 by the applicant (original application).
10. The applicant carries on business manufacturing and selling like goods, that is to say, power transformers falling within the description of the goods. The Anti-Dumping Commission (ADC) was satisfied that the applicant accounts for most of the power transformers produced in Australia. The original application was, therefore, supported by a sufficient part of the Australian industry.²
11. The Commissioner initiated an investigation on 18 March 2019, Investigation 507.³ It did not, however, make a preliminary affirmative decision.⁴

² Section 269TB(4) and (6).

³ EPR 02.

⁴ EPR 03.

12. The investigation period for Investigation 507 was 1 January 2016 to 31 December 2018. The injury analysis period was from 1 January 2014.
13. The ADC identified and sought information from a number of exporters of the goods to Australia from China. The ADC also identified and sought information from importers of the goods into Australia. It made inquiries of, and obtained information from, local purchasers of the goods.
14. The ADC published a statement of essential facts on 17 October 2019 (SEF 507).
15. On 31 January 2020, the Commissioner published a termination report (TER 507) which set out the investigations and finding of facts underpinning the decisions.
16. The applications for review were lodged with the ADRP on 28 February 2020. Two applications were lodged. One related to the decisions under s 269TDA(1). The other related to the decision under s 269TDA(13) to terminate in respect of the rest of the exporters.
17. The Senior Member determined that the panel should be constituted by me.
18. I did not reject the grounds identified in the review applications under s 269ZZQA. The reviews were initiated on 18 March 2020.
19. I held a conference with representatives of the ADC on 8 May 2020 pursuant to s 269ZZRA for the purpose of obtaining further information in relation to the application for review. I may have regard to further information obtained at the conference to the extent that it relates to the information that was before the Commissioner, and to conclusions based on that information.⁵ The information provided at the conference largely reflected the information available from the documents previously provided by the ADC. Some details of profitability of projects were provided. A diagram showing the ownership structure of an exporter was provided after the conference.
20. In addition to information obtained through the conference, I may have regard to the applications and documents submitted with the applications insofar as they contained conclusions based on information before the Commissioner. I may also

⁵ Section 269ZZRB(2); ADRP Report No. 24.

have regard to the information that was before the Commissioner when the decisions were made.⁶

21. TER 507 included a list of the submissions to which the Commissioner had regard in making the decisions.⁷ That list did not include an expert opinion from a Ms Smit of Transfer Pricing Solutions dated 20 January 2020 (TPS Report) submitted by the applicant.⁸ The TPS Report, along with Attachment 2 from TIC and Siemens Australia,⁹ was provided more than 20 days after SEF 507 was placed on the public record. The Commissioner is not obliged to have regard to that submission if in his opinion, it would have delayed preparation of his report to the Minister.¹⁰ There is an argument that the TPS Report was 'before' the Commissioner for the purposes of s 269ZZT. I have considered the TPS Report below, although, for the reasons identified below, I do not consider that it assists the applicant. I have not, therefore, found it necessary to reach a final view about whether I can have regard to it.

The issues

22. Although there were two applications, one in respect of the decisions under s 269TDA(1) and the other in respect of the decision under s 269TDA(13), Attachment 2 to each application (Attachment 2) was the same and advanced the same arguments.
23. The four grounds identified in Attachment 2 may be summarised as follows:
- The Commissioner failed to correctly apply s 269TAA(1)(b) and wrongly applied a test of whether the export sales were arms length transactions in fact, when the Commission was required to consider whether the transactions 'appeared' to be influenced by the relationship between the parties.
 - The Commission failed to properly inquire whether the transactions appeared to be influenced by the relationship between the parties.

⁶ Section 269ZZT.

⁷ TER 507, pp 24 and 25.

⁸ EPR 73.

⁹ EPR74 and 75.

¹⁰ Section 269TEA(4).

- The Commission should have had regard to the evidence that transactions between related subsidiaries of multinational power transformer suppliers fell within s 269TAA(1)(b) of the Act and were not, therefore, arms length transactions.
- The Commission failed to properly assess injury suffered by the applicant and should not have concluded that the injury sustained by the Australian industry was negligible.¹¹

24. Under s 269ZZQA(5), the review is to be conducted on accepted grounds.

25. The first three grounds all go to the proposition that the export sales of goods between related companies were not arms length transactions within s 269TAA(1)(b). It is convenient to deal with them together.

Arms length transactions

Background

26. Except for ABB Zhongshan,¹² the Commissioner determined the export prices for the goods exported to Australia by reference to the FOB price paid or payable, as identified in sales of the goods between exporter and importer. The Commissioner treated the transactions as arm length transactions for the purposes of s 269TAB(1)(a) of the Act.

27. The applicant contended that the Commissioner did not determine the dumping margin correctly because he wrongly determined that sales between related companies were arms length transactions when he should have concluded that those sales were not 'arms length transactions' within s 269TAA(1)(b).

28. The exporters, the importers related to them and the dumping margins which the Commissioner calculated in respect of the exporters are set out in the table below:

¹¹ Attachment 2 at para 1.

¹² TER 507, p53. ABB Zhongshan in sold in China to an unrelated entity. The export price was assessed by reference to s 269TAB(1)(b). The arguments in relation to export price do not affect the decision of the Commissioner in relation to ABB Zhongshan.

Exporter	Related Importer	Dumping Margin (%)¹³
ABB Chongqing Transformer Co., Ltd	ABB Australia Pty Ltd	- 4.6
ABB Zhongshan Transformer Co., Ltd	ABB Australia Pty Ltd	- 1.0
Changzhou Toshiba Transformer Co., Ltd	Toshiba International Corporation Pty Ltd	16.1
GE High Voltage Equipment (Wuhan) Co., Ltd	GE Grid Australia Pty Ltd	42.4
Siemens Transformer (Jinan) Co., Ltd	Siemens Australia Pty Ltd	- 10.2%
Siemens Transformer (Wuhan) Co., Ltd	Siemens Australia Pty Ltd	- 3.7

29. The precise corporate structure of the ABB, Siemens, GE and Toshiba groups of companies differed, of course, so the relationship between the various exporters and their related importers also varied.

30. Section 269TAB deals with how the export price is to be ascertained. Whether an export sale is an arms length transaction determines the way in which the export price is calculated.

31. Section 269TAB(1)(a) applies where the sale from exporter to importer is an 'arms length' transaction. It provides that the export price of such transactions is to be the sale price paid or payable by the importer (excluding any transport charge after exportation). It does not apply where the transaction is not an arms length transaction. Where the export sale is not an arms length transaction then the export price is to be determined under s 269TAB(1)(b) or s 269TAB(1)(c).

32. Section 269TAB(1)(b) applies where the sale from exporter to importer is not an arms length transaction but the importer sells the goods to a third party who is not

¹³ TER 507, at p44. The dumping margin for uncooperative and all other exporters was 42.4%. The dumping margins are expressed as a percentage of the export price. Exporters which did not have associated importers were CHINT Electric Co., Ltd (dumping margin 20.6%) and Jiangsu Huapeng Transformer Co., Ltd (dumping margin 40.5%).

an associate of the importer and the goods are sold in the condition in which they were imported. In such circumstances the price at which the goods are sold to the third party (less prescribed deductions) is taken to be the export price. Section 269TAB(1)(c) enables the Minister to determine the price having regard to all the circumstances of the case. It is the default provision.

33. Section 269TAA(1) deals with the circumstances in which a transaction is not an arms length transaction. It provides:

(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.

34. Section 269TAA is also relevant to the determination of normal value under s 269TAC(1). Section 269TAC(1) provides that the normal value of goods is the price paid or payable for like goods sold in the country of export for home consumption. Sales which are not arms length transactions are excluded. This ground of review concerns s 269TAA(1)(b).

Consideration

35. The applicant advanced three grounds why the Commissioner was wrong to treat the related party sales as arms length transactions. They are outlined at paragraph 23.
36. The applicant's position is founded on the fact that the exporters from China and the importers into Australia were, in the cases identified above, related companies. The applicant said that this gave the 'appearance' that the price was influenced by the

relationship between them or within the group. The TPS Report dealt with the capacity for profit shifting within large multinational groups and the ability of 'head office' to influence price. It was said to provide evidence supporting the appearance of influence. The applicant contended that, despite this evidence, the Commissioner did not consider whether the transactions were arms length transactions. The applicant also argued that the Commissioner was concerned with whether the transactions were *in fact* influenced by the relationship of the parties, rather than whether they *appeared* to be influenced by the relationship as required by s 269TAA(1)(b).

37. There is some force to some of the applicant's arguments.

38. The Commissioner dealt with s 269TAA(1) at Part 6.3 of TER 507. The Report said:

The Commission considers that section 269TAA does not exhaustively set out the criteria for determining whether a transaction is, or is not, 'arms length'. Even if none of the circumstances in section 269TAA exist, the Commission may still examine the relevant information in order to determine whether there has been genuine bargain between buyer and seller.

In practical terms, the mere fact that parties are legally associated is not taken to automatically mean that they cannot be engaged in 'arms length' transactions. In assessing whether transactions between related parties comprise 'arms length' transactions, the Commission looks beyond the legal or functional relationship. It will determine whether the parties deal with each other as parties at 'arms length' would, and whether the outcomes are the result of real bargaining.

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

39. The Commissioner's discretion under s 269TAA(1)(b) is more limited than this passage contemplates. Section 269TAA provides criteria which, if established, lead to the conclusion that a transaction was not an arms length transaction. If the criterion set out in s 269TAA(1)(b) is satisfied, the transaction is not an arms length transaction. The Commissioner has no residual discretion to treat such a transaction as an arms length transaction.

40. The applicant pointed out that s 269TAA(1) uses the word 'appears'. That word was included by an amendment to s 269TAA(1) in 2013. The applicant referred to the Explanatory Memorandum for the *Customs Amendment (Anti-dumping Measures) Bill 2013* (Explanatory Memorandum). The passage from the Explanatory Memorandum dealing with s 269TAA(1) reads:

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

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

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

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

41. The applicant's argument is supported by passages from TER 507 which suggest that the Commissioner was required to be positively satisfied that the transaction was influenced by the relationship between the parties. For example, in the case of Siemens, TER 507 said that the Commissioner was satisfied that the export sales between Siemens Jinan and its Australian purchaser 'were the result of arms length transactions' 'having regard for the findings contained in the combined Siemens

Jinan verification report'.¹⁴ At page 13 of the Exporter Verification Report for Siemens Australia the Commissioner said:

In respect of Siemens Jinan's Australian sales of the goods 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 Siemens Jinan during the period were arms length transactions.

42. The approach in respect of the other exporters with related importers was the same.¹⁵
43. Section 269TAA(1)(b) does not require the Commissioner to be satisfied that, as a matter of fact, the export price was influenced by the relationship between the exporter and importer. A transaction may appear to be influenced by the relationship between the parties even if there is not enough evidence to satisfy the Commissioner, on the balance of probabilities, that the transaction was in fact influenced by the relationship. The reference to 'appears' in s 269TAA(1) imports a lower standard than would be necessary if the Commissioner was required to be satisfied that, in fact, price was not influenced by the parties' relationship. The Commissioner must treat a transaction as falling within s 269TAA(1)(b) if it merely 'appears' that the price is influenced by the relationship. Consequently, a statement that the Commissioner was not satisfied that the price was (in fact) influenced by the relationship between the parties would not address the statutory criterion.

¹⁴ At p 62.

¹⁵ TER 507 at pp 52, 53, 54, 56, 58 and 64.

44. However, the Commissioner must still act on all the information available to him. If there is some information which gives the appearance of influence and other evidence which establishes that, in fact, the prices were not influenced by the relationship between the parties, the Commissioner is entitled, and indeed obliged, to act on all the information available to him. This is consistent with paragraph 22 of the Explanatory Memorandum. The Minister or Commissioner is to reach a conclusion based on what (all) the available information suggests. Conversely, if there is no evidence from which it 'appears' that the price was influenced by the relationship, the Commissioner may treat the transaction as an arms length transaction.
45. In my opinion, the Commissioner does not fall into error by conducting the investigation with a view to ascertaining whether, in fact, the transaction was influenced by the relationship between the parties. It may be that the inquiries will not enable the Commissioner to reach a positive conclusion about the fact of influence. If, at the end of that inquiry, there was evidence which fell short of that standard, but gave the appearance of influence, the transaction would not be an arms length transaction.
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?*¹⁶

Ms Smit opined:

*...the price between related parties is invariably influenced by the commercial, structural and other relationships between the entities.*¹⁷

¹⁶ At p 2.

¹⁷ At p 7.

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.
50. I also note that s 269TAA(1) does not enable the Commissioner to reframe the nature of the commercial relationship between exporter and importer. In the present case, for example, importers did not purchase the goods on their own account, in the hope that customers would approach them for a power transformer. Power transformers are bespoke products. This background would inform the commercial relationship between exporters and importers who were not members of the same corporate group.
51. The Commissioner referred to the practice identified in the Dumping and Subsidy Manual to identify whether related party transactions are arms length.¹⁸ The practice is to compare the related party transaction to other similar transactions between

¹⁸ TER 507 at p49.

parties who are not relation. The Commissioner considered that this approach was not possible in this case because the exporters did not sell goods to unrelated parties.¹⁹

52. The applicant claimed that, in light of the TPS Report and the difficulties with the method of inquiry outlined in the Manual, the Commissioner failed to make inquiries into whether prices were influenced by the commercial and structural relationships between the related parties. This is not correct. The Commissioner did make inquiries. Documents were obtained from the related parties and the issue raised in verification visits. Information gathered during those inquiries is identified in the worksheets prepared in respect of the exporters and importers. The worksheets contained confidential information and were not disclosed to the applicant.

53. The information provided about the dealings between exporter and importer showed that the details of the arrangements between them varied. In broad terms, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED] (A

description of the relationship between exporters and importers - confidential to the importers and the exporters). The sales between exporter and importer were formalised. On occasions, the documentation attributed liability for defects and overruns. One set of documentation even allowed for determination of disputes by an independent arbitrator.

¹⁹ TER 507 at p49.

54. Although the conclusions in the various verification reports were expressed in terms of a lack of evidence to persuade the Commissioner that the export prices were in fact influenced by the relationship between the exporter and importer, the evidence also supports the conclusion that the prices did not *appear* to be influenced by the relationship of the parties.
55. For these reasons, I consider that the conclusion reached by the Commissioner in relation to whether the export sales were arms length transactions within s 269TAA(1) was correct. The applicant did not raise any other grounds in respect of the decisions under s 269TDA(1).

Conclusion in relation to arms length transaction

56. I affirm the decisions to terminate Investigation 507 in relation to:
- ABB Chongqing Transformer Co., Ltd and Siemens Transformer (Jinan) Co., Ltd under s 269TDA(1); and
 - ABB Zhongshan Transformer Co., Ltd and Siemens Transformer (Wuhan) Co., Ltd under s 269TDA(1).

Injury

Introduction

57. The Commissioner terminated the investigation in respect of the balance of the exporters under s 269TDA(13).
58. Although the Commissioner accepted that the Australian Industry had suffered injury of one form or another during the investigation period, and although the Commissioner found that goods had been dumped in Australia, he concluded that 'injury suffered to the Australian industry as a result of dumped goods from China was negligible.'²⁰
59. The Commissioner said:

This conclusion is based on the following findings:

²⁰ TER 507, page 80.

- *WTC's largest competitors in terms of tenders lost were Siemens Jinan and Siemens Wuhan. Both exporters were found not to be dumping during the investigation period;*
- *Analysis of won and lost tenders, as well as responses from purchasers, show that the lowest priced bidder is not always successful, and non-price factors are often considered to be as important as price, in tender evaluations for power transformers; and*
- *Analysis of tenders lost by the Australian industry to Chinese manufacturers found to be dumping indicates that, even in the absence of dumping, the Australian industry is unlikely to have won these tenders based on the submitted bid prices.*

60. The second bullet point is, perhaps, background for the third bullet point.

61. During the Investigation, the Commission identified 68 procurements relating to the supply of 102 power transformers on which the applicant tendered.²¹ Twenty-seven of those projects were won by Chinese manufacturers. Eighteen of projects were won by Siemens Jinan, Siemens Wuhan and ABB Chongqing, exporters which did not dump the goods.

62. After removing projects and transformers which were found to be undumped, eight projects remained where the applicant had lost a tender to a Chinese manufacturer which dumped the goods. The Commissioner found that the applicant was unlikely to have won the tender for those eight projects. This formed the basis of the third bullet point set out above. The analysis of the tenders also formed the basis for the Commissioner's conclusions that price suppression, price depression, volume effects, profit effects and other adverse economic effects were not caused by dumping.²²

63. The application focussed on the loss of these eight tenders. It contended that the dumping of goods from China had the effect that it lost the chance to win eight tenders and that the loss of chances to be the successful tenderer was itself a form of injury, which in this case was material and occurred because of the dumping of goods. It contended that it had significant chances of winning the tenders for

²¹ TER 507, at p 82.

²² TER 507 at pp 100 to 102.

projects 1, 5, 6, 7 and 8. The applicant argued that it lost those chances or commercial opportunities because the competing goods were dumped.

64. Two issues arise:

- How should the loss of a chance to be the successful tender be evaluated under the Act?
- Could the Commissioner have been satisfied that only negligible injury was caused by dumping?

Statutory Background

65. It is necessary to set out some of the statutory background.

66. The Commissioner relied on s 269TDA(13) to terminate the Investigation. It relevantly provides:

(13) ...if:

(a) application is made for a dumping duty notice; and

(b) in an investigation, for the purposes of the application, of goods the subject of the application that have been, or may be, exported to Australia from a particular country of export, the Commissioner is satisfied that the injury, if any, to an Australian industry or an industry in a third country, or the hindrance, if any, to the establishment of an Australian industry, that has been, or may be, caused by that export is negligible;

the Commissioner must terminate the investigation so far as it relates to that country.

67. The applicant applied for the making of a declaration under s 269TG(1) that s 8 of the *Customs Tariff (Anti-Dumping) Act 1975* applied in respect of the goods. A requirement for the making of a declaration under s 269TG(1) is that 'material injury to an Australian industry producing like goods has been or is being caused or is threatened' because of the export of dumped goods to Australia.

68. Section 269TDA(13) operates in the context of s 269TAE, which identifies the matters that the Minister is to consider in deciding whether 'material injury' has been or is being caused.
69. Section s 269TAE(1) applies to an application for the making of a declaration under s 269TG(1). The original application by the review applicant was for a declaration under s 269TG(1), so s 269TAE(1) is relevant to this matter. Omitting the provisions which are not relevant to the making of a declaration under s 269TG, s 269TAE(1) provides:

In determining, for the purposes of section 269TG ... whether material injury to an Australian industry has been or is being caused or is threatened or would or might have been caused, or whether the establishment of an Australian industry has been materially hindered, because of any circumstances in relation to the exportation of goods to Australia from the country of export, the Minister may, without limiting the generality of that section but subject to subsections (2A) to (2C), have regard to:

- (aa) *if the determination is being made for the purposes of section 269TG—the size of the dumping margin, or of each of the dumping margins, worked out in respect of goods of that kind that have been exported to Australia and dumped; and*
- ...
- (a) *the quantity of goods of that kind that, during a particular period, have been or are likely to be exported to Australia from the country of export; and*
- (b) *any increase or likely increase, during a particular period, in the quantity of goods of that kind exported to Australia from the country of export; and*
- (c) *any change or likely change, during a particular period, in the proportion that:*
- (i) *the quantity of goods of that kind exported to Australia from the country of export and sold or consumed in Australia; or*

(ii) *the quantity of goods of that kind, or like goods, produced or manufactured in the Australian industry and sold or consumed in Australia;*

bears to the quantity of goods of that kind, or like goods, sold or consumed in Australia; and

(d) *the export price that has been or is likely to be paid by importers for goods of that kind exported to Australia from the country of export; and*

(e) *the difference between:*

(i) *the price that has been or is likely to be paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and*

(ii) *the price that has been or is likely to be paid for goods of that kind exported to Australia from the country of export and sold in Australia; and*

(f) *the effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the price paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and*

(g) *any effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the relevant economic factors in relation to the Australian industry; and*

...

70. The 'relevant economic factors' referred to in s 269TAE(1) are, in turn, listed in s 269TAE(3):

A reference in subsection (1) or (2) to the relevant economic factors in relation to an Australian industry, or in relation to an industry in a third country, in relation to goods of a particular kind exported to Australia is a reference to:

(a) *the quantity of goods of that kind, or like goods, produced or manufactured in the industry; and*

- (b) *the degree of utilization of the capacity of the industry to produce or manufacture goods of that kind, or like goods; and*
- (c) *the quantity of goods of that kind, or like goods, produced or manufactured in the industry:*
 - (i) *for which there are sales or forward orders; or*
 - (ii) *which are held as stocks; and*
- (d) *the value of sales of, or forward orders for, goods of that kind, or like goods, produced or manufactured in the industry; and*
- (e) *the level of profits earned in the industry, that are attributable to the production or manufacture of goods of that kind, or like goods; and*
- (f) *the level of return on investment in the industry; and*
- (g) *cash flow in the industry; and*
- (h) *the number of persons employed, and the level of wages paid to persons employed, in the industry in relation to the production or manufacture of goods of that kind, or like goods; and*
- (ha) *the terms and conditions of employment (including the number of hours worked) of persons employed in the industry in relation to the production or manufacture of goods of that kind, or like goods; and*
- (j) *the share of the market in Australia for goods of that kind, or like goods, that is held by goods of that kind, or like goods, produced or manufactured in the industry; and*
- (k) *the ability of persons engaged in the industry, to raise capital in relation to the production or manufacture of goods of that kind, or like goods; and*
- (m) *investment in the industry.*

71. In addition, there are matters that the Minister must discount. They are listed in s 269TAE(2A). That subsection provides:

In making a determination in relation to the exportation of goods to Australia for the purposes referred to in subsection (1) or (2), the Minister must consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods such as:

- (a) the volume and prices of imported like goods that are not dumped; or*
- (b) the volume and prices of importations of like goods that are not subsidised; or*
- (c) contractions in demand or changes in patterns of consumption; or*
- (d) restrictive trade practices of, and competition between, foreign and Australian producers of like goods; or*
- (e) developments in technology; or*
- (f) the export performance and productivity of the Australian industry;*

and any such injury or hindrance must not be attributed to the exportation of those goods.

72. Section 269TAE(2AA) is also significant:

(2AA) A determination for the purposes of subsection (1) or (2) must be based on facts and not merely on allegations, conjecture or remote possibilities.

73. The Act does not provide a definition of what is 'material'. Nor does it provide a definition of 'negligible'. I proceed on the basis that 'material' injury and 'negligible' injury are mutually exclusive.

74. On 27 April 2012, the then Minister for Home Affairs promulgated a Ministerial Direction on Material Injury. The Minister directed the Chief Executive Officer of Customs that he consider material injury to be injury that is 'not immaterial, insubstantial or insignificant'.

Loss of a chance

75. The applicant contended that, because of the dumping of goods from China, it had lost the chance of being the successful tenderer for projects 1, 5, 6, 7 and 8 discussed in Part 8.4.2 of TER 507.
76. The applicant said: 'The law recognises that loss of commercial opportunity is an actual loss and such loss may be regarded as injury from dumping'.²³ The applicant contended that it had lost the chance to win those tenders because of the dumped goods.
77. The applicant relied on decisions of the courts in the context of awards of damages for the infringement of personal rights, such as breach of contract or negligence. In some cases the courts will award damages for 'loss of a chance' or loss of an opportunity, even where the probability that the opportunity could be exploited is less than half. The applicant referred to the decision of the High Court of Australia in *Sellars v Adelaide Petroleum*.²⁴ In that case, the majority said:

*In the realm of contract law, the loss of a chance to win a prize in a competition resulting from breach of a contract to provide the chance is compensable, notwithstanding that, on the balance of probabilities, it is more likely than not that the plaintiff would not win the competition As the contract contained a promise to provide the chance, the breach of the contract resulted in the loss of the chance and that loss was for relevant purposes an actual loss, in the sense in which Dixon and McTiernan JJ. used that expression in Fink v Fink And, where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat an award of damages The damages will then be ascertained by reference to the degree of probabilities, or possibilities, inherent in the plaintiff's succeeding had the plaintiff been given the chance which the contract promised.*²⁵

78. However, the Court also confined this loss of chance analysis to future or hypothetical situations. In *Sellars v Adelaide Petroleum* the High Court cited²⁶ with

²³ Attachment 2 at [45].

²⁴ (1992- 1994) 179 CLR 332 at p 349; [1994] HCA 4 at [20] (Mason CJ, Dawson, Toohey and Gaudron JJ).

²⁵ At p 349, paragraph 20 (citations omitted).

²⁶ At CLR p 350; para [23].

approval the following passage from the earlier decision of the Court in *Malec v JC Hutton Pty. Ltd.*:

If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. ... But unless the chance is so low as to be regarded as speculative - say less than 1 per cent - or so high as to be practically certain - say over 99 per cent - the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.²⁷

79. The High Court expanded on the notion of 'future or hypothetical events' in *Malec*. Deanne, Gaudron and McHugh J said:

When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof.²⁸

80. In *Malek*, Brennan and Dawson JJ quoted the following passage:

²⁷ (1990), 169 CLR 638 at p 643; [1990] HCA 20.

²⁸ At CLR p 643; HCA at [7].

*In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.*²⁹

81. The situation which arises in this case is not a hypothetical or future event. It is not a future event because the Investigation was concerned with tenders and sales during the investigation period. Nor are we concerned with hypothetical events. We know that the tenders were lost. The Investigation is concerned with identifying the consequences of the dumping that actually did occur. In the context of investigating the tenders, the question is: did the dumping cause the Australian industry to lose the tender? If those tenders were lost because of the dumping, there may be material injury. If a tender was lost because of dumping, the injury is the loss of the sales that would have resulted from the tender. Conversely, if the evidence does not establish that the tender was lost because of dumping, but was lost for other reasons, there is no injury at all. In the language of *Malek*, it is '*all or nothing*'.³⁰
82. It may be very difficult to establish the reasons a tenderer was unsuccessful in a tender. The difficulty may stem from the fact that full evidence cannot be obtained. The decision to select one tenderer rather than another may be a complex one. The decision may involve a number of individuals with differing opinions. Those matters may lead to discussion in terms of whether it was more likely than not that the applicant lost a tender because of dumping. It may even lead to talk of a 50/50 or 75/25 chance of being successful on the tender. However, this is a discussion about evidence. It just means that it is difficult to assess whether the loss of the tender, and hence the injury, was caused by dumping. The evidentiary uncertainty does not create a new form of injury. If there is enough evidence to establish 'loss by dumping', there is injury (which may or not be negligible or material). If the evidence does not establish 'loss by dumping', there is no injury.

²⁹ At CLR p 640; HCA at [1]. The quote was from the judgment of Lord Diplock in *Mallett v McMonagle* [1970] AC 166 at p 176.

³⁰ At CLR p 643; HCA at [7].

83. It may be that being excluded from a panel of potential tenderers is the loss of an opportunity to which the 'loss of chance' analysis could be applied. If the applicant was excluded from a tender panel because of dumping it would have lost the opportunity to submit tenders.³¹ In the present case, although some purchasers operated panels of tenderers, there was no evidence that the applicant was excluded from panels because of dumping.³²
84. In addition, the legislation deals with the matters to be taken into account in determining whether there has been material injury. The legislation is set out at length above. While the list in s 269TDA(1) is not an exclusive list of the things that may be taken into account, loss of sales clearly falls within the express provisions: s 269TAE(1)(c), s 269TAE(1)(g) and s 269TAE(3). Being an unsuccessful tender means that sales are not made. The effect of being an unsuccessful tenderer can be adequately approached through an analysis of lost sales. This point is reinforced when it is recalled that the applicant had, and took, the opportunity to tender for each of the eight projects. The applicant did not lose the 'commercial opportunity' to tender. The applicant lost the tenders. If the applicant lost those tenders (and the sales associated with them) because of dumping, that loss falls within the s 269TAE(1)(c), s 269TAE(1)(g) and s 269TAE(3).
85. The applicant's 'loss of a chance' analysis does not apply to the tenders for the eight projects identified in TER 507.

Loss of sales

86. The applicant contended that it had a real chance of being the successful tender in relation to projects 1, 5, 6, 7 and 8. It put figures on those chances at paragraph 69 of Attachment 2: 25% for each of projects 1, 5 and 6 and 50% for project 7. This does not support the contention that the applicant was more likely than not to have been the successful tenderer on those projects and, consequently, that it lost those tenders because of dumping.

³¹ The loss of the chance to submit tenders which only had a chance of being successful might not be regarded as 'material injury' by virtue of s 269TAA(2AA).

³² Project 6 involved a panel of tenderers. The applicant was not on the panel but submitted a tender anyway. See TER 507 at p86.

87. However, the applicant also said that it had a 95% chance of winning Project 8.³³

The applicant contended that the Commissioner should have found that it was likely to win the tender. If that contention is correct, and the applicant lost the tender because of the dumping of goods from China, then it has suffered some injury. It is necessary to consider whether it did lose the tender for this reason.

88. It was generally accepted that transformers were 'bespoke' goods, designed for particular circumstances and customer requirements. This meant that it was not easy to compare readily one power transformer with another. It is apparent that evaluating tenders was a complicated task. It involved at least the following considerations:

- Technical issues. This would have including considering whether the transformer met technical standards and was compatible with the technical requirements of the purchaser.
- The 'headline' price of the transformer itself.
- Total price under the contract, which may have included transport to site and installation.
- Other costs associated with the operation of the transformer including matters such as service costs and repair costs. Also, the purchase of a power transformer may involve technical representatives of the purchaser travelling to the place of manufacture to witness crucial stages in the construction or testing of the transformer. Travel to China would be more expensive than travel within Australia.
- The performance of the transformer. In particular, the efficiency of the transformer (or the extent to which there were power losses in operation) and the reliability of the transformer.
- The reputation of the supplier. One tenderer may have greater experience in particular types or sizes of transformers. The applicant was seen as having greater experience in small transformers and less in big transformers. One tender involved a five limb transformer. Although the applicant contended

³³ At [64] of its Attachment 2. At paragraph 69, the applicant assessed its chances on this project at only 50%.

that it had the expertise to make a five limb transformer', it had not made one during the injury period.

- Existing relationships between the purchaser and the supplier. The applicant indicated that one purchaser was not a 'supporter'. It had a very good relationship with another purchaser.
- 'Buy local' policies. Some purchasers of power transformers expressed preferences for buying local, that is Australian, goods.

89. The Commission set about evaluating the reasons the applicant was not the successful tender. Evaluation of the causes of the loss of the tenders in this case was complicated by the following:

- Incomplete and imperfect information was obtained about the decisions by the purchasers to favour one tenderer rather than the other tenderers. The Commission made extensive inquiries but not all purchasers co-operated and not all co-operating purchasers gave comprehensive information. Feedback given about tender decisions may not be entirely accurate. Project 1 was an example of this.³⁴
- Different purchasers will give different importance to different factors in evaluating tenders. Although all the purchasers appear to have agreed that price was not determinative, some purchasers were more cost focussed than others.
- Some tenderers formally weighted the factors that they considered. Others appear to have had a less rigorous process.
- Different factors may be significant on different transactions. For example, reliability would be more important on a transformer that was system critical than on a transformer that was not. Some power transformers presented more technical challenges than others, so that the technical experience of the tenderer would be more important in some tenders than in others.

³⁴ See TER 507, Confidential Appendix 1 at p5.

- Tenders were sometimes public tenders (so that anyone could find out about them and submit a tender). On other occasions, only persons who were on a pre-existing panel were permitted to tender.
90. In considering the effect of dumping on tender success, it is also important to appreciate that the price of the power generator is only one component of the overall price of the tender and that the effect of dumping is only a part of the price attributable to the power generator.
91. It appears that there was a degree of market differentiation based on the size of the transformers. TER 507 divides up projects by power rating, with 'low MVA' being less than 100 megavolt ampere (MVA), 'medium MVA' being 100 to 200 MVA' and 'high MVA' being above 200 MVA.³⁵ Views were expressed to the Commission that the applicant was seen by the industry as not having significant experience in high MVA projects and that this affected tender decisions. Although the applicant contended that it had real capabilities in this area, the Commission was entitled to accept that this was a significant factor in the applicant being unsuccessful for certain tenders.
92. The uncertainty associated with the retrospective evaluation of tenders was a significant factor for the Commissioner. The applicant drew attention to the terms in which the Commissioner expressed his conclusions about projects 7 and 8. The Commissioner said that, on the basis of the evidence, the Commission 'cannot come to a conclusion concerning the outcome of this tender in the absence of dumping'.³⁶ I read this as saying that the Commissioner could not come to a conclusion whether or not dumping had caused the applicant to lose this tender. The Commissioner's conclusions in relation to projects 7 and 8 may be contrasted with his conclusions about projects 1, 2, 3, 4, 5 and 6, where more definite findings are made that the applicant would not have been successful. It may also be contrasted with the conclusion expressed at Part 8.1 of TER 507 that 'the Australian industry is unlikely to have won these tenders based on the submitted prices'. This finding includes projects 7 and 8, although TER 507 did not explain the discrepancy between the two different evaluations of the outcome.

³⁵ TER 507, p 39.

³⁶ TER 507, p 87.

93. If the Commissioner was unable to decide whether a tender, in particular project 7, was lost because of dumping, it would be difficult for the Commissioner to be satisfied that injury caused by dumping was negligible.
94. It appears to me, based on the material relating to project 8, and bearing in mind all the imponderables associated with the tender process, that the applicant was more likely than not to have been the successful tenderer for project 8 in the absence of dumping and that the loss of that tender was probably caused by dumping. The circumstances of that tender are discussed in Confidential Attachment 1 to this Report. I am not persuaded that the applicant was likely to have been the successful tenderer in respect of the seven other identified projects but for the dumping.
95. At this stage it is helpful to recall that s 269TDA(13) requires the Commissioner to dismiss the application if satisfied that the injury caused by the export of dumped goods was 'negligible'. The Commissioner was not required to dismiss the application if he was in two minds on that issue.
96. It follows that I am not satisfied that the injury caused by dumping was negligible.
97. I am not able to assess whether the loss of the tender on project 8 due to dumping would amount to 'material injury'. There are many other factors relevant to that question, not least of which is the success of tenders involving undumped goods by Siemens Jinan and Wuhan, and ABB Chongqing.
98. However, I do not have to reach a conclusion on that point. I am satisfied that the decision that the injury caused by dumping was negligible was not the correct or preferable decision.

Other matters

99. The applicant also contended that the Commissioner's injury assessment was 'narrow, myopic and static'. The primary complaint appears to have been that the Commissioner should have accepted that dumped goods caused material injury otherwise than through specific loss of tenders. The applicant contended the Commissioner wrongly relied on the proposition that the details of tender pricing were confidential. It contended that it was aware of the pricing of its competitors, including pricing based on dumping, so that it suffered injury by way of price suppression.

100. I do not accept this contention. The argument ignores the effect of successful tenders by the Siemens exporters, which did not involve dumped goods. Those companies appear to have been market leaders. Also, the information compiled by the Commission indicated that the applicant's market information was imperfect.

Conclusion in relation to material injury

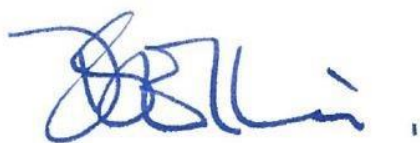
101. I consider that the decision to terminate the Investigation in respect of the goods exported from China by all other exporters under s 269TDA(13) was not the correct and preferable decision. I revoke it.

Conclusions

102. Pursuant to s.269ZZT of the Act and for the reasons given above, I consider that:

- The decision to terminate the Investigation in respect of goods exported by ABB Chongqing Transformer Co., Ltd (ABB Chongqing) and Siemens Transformer (Jinan) Co., Ltd (Siemens (Jinan)) under s 269TDA(1) was the correct or preferable decision and I affirm it.
- The decision to terminate the Investigation in respect of goods exported by ABB Zhongshan Transformer Co., Ltd (ABB Zhongshan) and Siemens Transformer (Wuhan) Co., Ltd (Siemens (Wuhan)) under s 269TDA(1) because the dumping margin was less than 2% was the correct or preferable decision and I affirm it.
- The decision to terminate the Investigation in respect of the goods exported from China by all other exporters under s 269TDA(13) because the injury caused to the Australian Industry was negligible was *not* the correct or preferable decision and I revoke it.

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



Scott Ellis
Panel Member
Anti-Dumping Review Panel
18 May 2020

[REDACTED]

[REDACTED]