CLAYTON UTZ

For Publication

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Dear Ms Robilliard

Siemens Wind Power Pty Ltd (Siemens)
Investigation into the Alleged Dumping of Wind Towers Exported to Australia from Vietnam (Case 405)

We refer to the Submissions by Ottoway Fabrications Pty Ltd dated 31 August 2017 (**OF Submissions**) and the Verification Visit Report in respect of Siemens published on 13 November 2017 (**Visit Report**). We write to address issues raised by the OF Submissions and the Visit Report, and to supplement our previous submissions.

1. **Export Price**

1.1 In section 4 (Recommendations) of the Visit Report, it is stated that, "*Subject to further inquiries, the verification team recommends that the export price for the goods imported by Siemens from the exporters can be established under s.269TAB(1)(c) of the Customs Act 1901, having regard to all circumstances of exportation. In particular, the verification team considers that the export price should be determined as the FAS price paid by Siemens Denmark to CS Wind Korea plus the cost of loading the goods.*" (page 7).

1.2 Siemens objects to the ADC's preliminary determination that export price should be assessed pursuant to s 269TAB(1)(c) of the *Customs Act 1901*.[1] Siemens submits that the export price should be assessed pursuant to s 269TAB(1)(a), because the ADC has been provided with all of the relevant information concerning the price paid by Siemens Australia and it can thereby quantify the export price after making the specified deductions.

1.3 The phrase "*purchased by the importer from the exporter*" in s 269TAB(1)(a)(i) does not preclude circumstances where the importer places a purchase order with a supplier who is not the manufacturer. That is, there is no statutory requirement that the importer have "directly purchased" from the exporter. Indeed, this construction was applied by the ADC to the case under review in *Pilkington (Australia) Ltd v Anti-Dumping Authority* (1995) 56 FCR 424 (***Pilkington***). The circumstances of the *Pilkington* case were similar to the present, in that an Australian company (OGA) placed orders for clear float glass with a Singaporean company (Asahi Singapore), which placed orders with its partly owned subsidiary in Indonesia (Asahimas Indonesia). Asahimas Indonesia exported the glass to the Australian customer, and invoiced Asahi Singapore, which in turn invoiced OGA. The ADC there treated Asahimas Indonesia as the exporter and OGA as the importer of the glass, and applied s 269TAB(1)(a) to calculate the export price of the goods. There was no dispute in the circumstances that s 269TAB(1)(a) was applicable.

[1] All statutory references in this submission are to this Act.

1.4 Siemens further submits that, in accordance with *Pilkington*, the export price under s 269TAB(1)(a) includes the engineering, project management and mark-up paid by Siemens Australia . In *Pilkington*, the Federal Court overturned the trial judge's finding that the charge for Asahi Singapore's commission on the sale of goods should be deducted from the export price as a "*charge in respect of a matter arising after exportation*" on the basis that, had the goods not been exported from Indonesia, no charge would have been payable to Asahi Singapore. The Federal Court found that the test under s 269TAB(1)(a) is a temporal one related to the point of exportation, and that the expression "*matters arising after exportation*" can refer only to an event in relation to the goods and not a matter which arises on lodgement of the purchase order. The Federal Court found that the commission charged was intrinsically linked with the importer's order for the goods prior to exportation or prior to Asahi Singapore's order for the goods from the exporter: at 429. Similarly, the engineering, project management and mark-up costs paid by Siemens Australia are directly referable to the goods themselves, and intrinsically linked to the order for the goods.

2. Tariff Concession Order made by Keppel

2.1 Siemens previously identified that Keppel had lodged a Tariff Concession Order (**TCO**) application in respect of certain wind tower sections, and made submissions regarding the apparent inconsistency between the making of that application and initiating the present investigation: see our written submissions of 18 August 2017 at section 4.

2.2 It has come to Siemens' attention that Keppel's TCO application (TC 1761480) has been granted: see the Department's website. Siemens respectfully requests that the ADC investigate the bearing of the TCO on the present investigation. To the extent that the goods the subject of the TCO (being "*certain wind tower sections...*") overlap with the goods the subject of the present investigation (being "*certain utility scale wind towers...and sections thereof...*") under tariff code 7308.90.00, Siemens submits that the bringing of the present investigation is inconsistent with the TCO application.

3. OF Submissions

3.1 In respect of the OF Submissions, Siemens makes three brief points.

3.2 First, as to OF's assertion that it could have met the manufacturing schedule for Hornsdale Stage I,[2] that is, respectfully, a hollow claim and wrong. In Siemens' experience with OF during the Snowtown II project, OF was only able to make its first delivery of wind towers in **[Confidential business information]** [redacted] For OF to assert that it had the ability to deliver 29 towers in less than 11 months (in accordance with the time line set out on page 2 of the OF Submissions) is not supported by the evidence. We refer to paragraphs 2.4 - 2.6 of our submissions of 11 August 2017.

3.3 Second, OF's assertion that "*Siemens at no time during the* [Hornsdale tender] *process expressed concerns over on-time delivery or reliability issues*"[3] is, respectfully, wrong. We refer to Confidential Attachment 5 to our submissions of 11 August 2017. **[Confidential business information]** [redacted]

[2] OF Submissions at page 2 - 3.
[3] OF Submissions at page 3.

[redacted] We also submit that in light of the correspondence in Confidential Attachment 4 to our submissions of 11 August 2017, it cannot be said that OF was not on notice of Siemens' concerns in this regard.

3.4 Finally, to the extent that OF seeks to rely on the Siemens press release for Snowtown annexed to the OF Submissions as support for its contention that Siemens "*praised the quality of the wind towers produced by OF*",[4] such reliance is misplaced. That press release, dated 8 August 2013, was published prior to OF's **[Confidential business information]** [redacted]. Accordingly, Siemens had not yet assessed the quality of the wind towers produced by OF, nor their ability to meet the requirements of the contract.

If you have any questions concerning this submission please contact us.

Yours sincerely

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[4] OF Submissions at page 7.