NON-CONFIDENTIAL VERSION

SUBMISSIONS OF RIO TINTO LIMITED

ON AN APPLICATION FOR THE IMPOSITION OF ANTI-DUMPING MEASURES ON POWER TRANSFORMERS EXPORTED FROM

THE PEOPLE'S REPUBLIC OF CHINA, THE REPUBLIC OF INDONESIA, THE REPUBLIC OF KOREA, TAIWAN, THAILAND AND THE SOCIALIST REPUBLIC OF VIETNAM

Contents

1 Background

On 8 July 2013, Wilson Transformer Company Pty Limited **(WTC)** lodged an application with the Australian Anti-Dumping Commission **(Commission)** for the imposition of anti-dumping measures on certain power transformers exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam.

On 29 July 2013, the Commission accepted WTC's application and initiated an investigation into the alleged exportation of certain power transformers from the abovementioned countries at dumped prices. The Commission's reasons for accepting WTC's application are set out in Consideration Report No. 219 **(Report).**

As an end-user of power transformers the subject of the application, Rio Tinto Limited **(Rio Tinto)** is an interested party.

2 Executive Summary

Rio Tinto submits that no anti-dumping notice or other measure be imposed. It submits that the conditions for imposing any measures under ss. 269TG(1) and (2) of the *Customs Act 1901* do not exist. In particular, Rio Tinto submits that:

(a) as each power transformer exported to Australia is unique, a constructed normal value and dumping margin will need to be calculated for each power transformer exported to Australia but query whether any such dumping margin can be extrapolated to future imports of power transformers from the subject countries;

(b) in this context the Commission should publish an Issues Paper setting out how it proposes to determine export prices and calculate normal values, dumping margins and the non-injurious price given that each power transformer is unique and are typically supplied as part of a total power solution that does not identify a 'price' for the power transformer;

(c) in addition, the Commission should issue an Issues Paper setting out how the Commission proposes to assess "causation" given that offers of power solutions in response to tenders are not only unique in terms of the power transformer being offered as part of the solution but also unique in terms of factors in the offer, including contractual terms.;

(d) the calculation of export prices and normal values by WTC from "estimated" prices in the case of export prices and WTC's own prices in the case of normal values are wholly artificial and then extrapolating the resulting "dumping margin" to all exports of power transformers from the subject countries is misleading given that, as the applicant has conceded, each power transformer is unique;

(e) the injury and causation analysis in the application and in the Report fail to recognise and account for the fact that not only is each power transformer offered by a suppler is unique but also the total power solution offered by each supplier will be unique. A simple comparison of "prices", assuming "prices" exist and are identifiable, fails to recognise or account for how offers in a tender are evaluated and contracts awarded; and

(f) neither the application nor the Report explains the significant decline in market share of the Australian industry in 2011/12, which decline cannot be attributed to

imports from the subject countries. This failure raises as a question the robustness of the injury and causation assertions in the application and Report when loss of market share in 2011/12 appears from the tables in the Report to be due to imports from countries other than the countries under investigation.

3 Outline

These submissions are arranged in this order:

(a) About Rio Tinto.

(b) Deficiencies in the application.

(c) Rio Tinto's purchases of transformers in Australia.

(d) Transformer manufacture and marketing.

(e) Imported transformers are not "like goods".

(f) Price has not caused injury.

4 About Rio Tinto

Rio Tinto is a dual-listed public company, listed on the Australian and London Stock Exchanges and with operations world-wide. Almost half of its global assets are in Australia, producing iron ore, coal, bauxite, alumina, aluminium, uranium, copper, gold, diamonds and salt from more than [redacted] operating sites and processing plants.

Transformers are used at many of Rio Tinto's sites in the generation, transmission and use of power in mines and plants.

5 Deficiencies in the application

The application for the imposition of anti-dumping measures on certain power transformers contains a number of deficiencies. These are set out below.

5.1 The goods the subject of the application

The goods the subject of the application are stated to be:-

> *"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".*

An "incomplete" power transformer was stated to be subassemblies consisting of the active parts and any other parts attached to, imported with or invoiced with the active parts of power transformers. The "active part" of a power transformer consists of one or more of the following when attached to, or otherwise assembled with, one another:

(a) the steel core;

(b) the windings;

(c) electrical insulation between the windings; and

(d) the mechanical frame.

It is unclear from this description as to whether a subassembly of a power transformer that lacks one or more of these active parts can be described as a "power transformer" or are they more accurately described as parts for a power transformer.

Clearly an "incomplete power transformer" must have the essential character of a power transformer even though it is incomplete.

A "mechanical frame" is just that, a mechanical frame. It would not have the essential character of a power transformer. Similarly as regards electrical insulation and presumably the other items.

It is unclear why what constitutes an incomplete power transformer needs to be defined – either a power transformer is complete or incomplete but in either case it must have the essential character of a power transformer.

Also, it is not evident from the application whether incomplete power transformers had been imported from the countries under investigation and, if so, to what extent. There is no mention in the application of tenders being sought for incomplete power transformers or that incomplete power transformers had been imported with final manufacture taking place in Australia. If the latter occurred, then the entity that completed the manufacture of the power transformer could conceivably be part of the Australian industry producing like goods.

In order to make an application, s. 269TB(1) of the Customs Act 1901 requires that a consignment of goods (i) has been imported into Australia, (ii) is likely to be imported into Australia, or (iii) may be imported into Australia, being like goods to which paragraphs (i) or (ii) applies. There is no evidence in the application that any of these requirements has been satisfied in relation to "incomplete" power transformers. Absent any such evidence, the application should have been rejected to that extent and could not have been validly accepted.

5.2 Each power transformer is unique

At page 6 of the application, WTC states that power transformers are "engineered to suit the requirements of each application" and are "manufactured to the specifications of the individual utilities, generating facilities, and industrial users that purchase the product". For these reasons WTC states that, while power transformers can share common product characteristics, the wide array of potential elements and performance attributes means that each unit is "unique".

Rio Tinto agrees with this assessment. But what follows from this is that each power transformer, if it is being sold, would have a different price. This, of course, assumes that each transformer is being "sold" in a sales transaction.

In this regard, each State and Territory has a Sale of Goods Act that stipulates what is a contract for the sale of goods. For example, s. 6 of the Sale *of Goods Act 1923 (NSW)* provides that a "contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for money consideration called the price".

The supply of power transformers from the manufacturer to the end-user typically involves more than a 'sale'. It typically will require the manufacturer to design, construct, test, install, commission and maintain the power transformer. Various instalments of the amounts payable under the relevant contract become payable when certain milestones are met. While property in the power transformer will pass at some point in the transaction, it cannot be said that there is an identifiable "price" for the power transformer.

Further, amounts payable under the contract reflect not only the obligation to design, manufacture, test, install, commission and, possibly, maintain the power transformer but also the contractual rights and obligations in the contract, as is discussed later below.

The application and, for that matter, the Report fail to address this. That is, WTC has sought to demonstrate that imports of power transformers have been at dumped prices by calculating a deductive export price and a constructed normal value and comparing the two. But this fails to recognise that each power transformer is unique and, without making adjustments to take account of differences between the power transformers, it is not a valid comparison. Further, neither the application nor the Report address the fact that power transformers typically are not 'sold' for a 'price' in a 'contract of sale' but are supplied as part of an overall power solution for a particular project.

What this also means is that of necessity a separate normal value will need to be calculated for each power transformer exported to Australia from the subject countries of export to take account of the fact that each such power transformer exported to Australia is unique. The application fails to do this. Rather, it asserts that all power transformers exported to Australia from the subject countries have been at dumped prices based on a single export price and a single normal value for each country that has been artificially calculated and does not compare like-with-like. The application does not meet the minimum requirements of an application both in the Customs Act 1901 and under the WTO Anti-Dumping Agreement.

5.3 Exports of power transformers to Australia

At pages 20 to 24 of the application are a number of graphs purportedly showing the number and value of power transformers from each of the subject countries.

What is interesting from those graphs is their volatility. There has been no steady increase of power transformers from any of the subject countries. Further, increases in the number of power transformers from one country are not matched by decreases in the number of power transformers exported from another country or countries. No explanation is provided for such volatility.

Further, at page 13 of the Report is a graph showing movements in market share since 2004/05. What is of interest is that the line showing total imports increased in 2011/12, which increase matches the fall in market share by the Australian industry. However, there was only a marginal increase in exports from the countries the subject of investigation. In other words, the significant fall in market share of the Australian industry cannot be attributed to exports from the countries under investigation. It can only be attributed to exports from countries other than those the subject of this investigation.

The application does not explain why the Australian industry's market share declined significantly in 2011/12 but imports of power transformers from the subject countries did not increase by any comparable amount.

5.4 Injury- price undercutting

At page 22 of the Report is a table that purports to demonstrate that the "price" of imported power transformers are undercutting the "prices" of the Australian industry's power transformers. There are a number of difficulties with this table, namely:-

(a) it is not known if what is being compared is like-for-like. As WTC has conceded each power transformer is unique and, consequently, one designed and manufactured in one of the countries under investigation, which are all low cost countries, and one designed and manufactured in Australia will have different

design features and different materials even though both must satisfy the performance requirements of the end-user. These differences are likely to be reflected in differences in "prices", assuming that the amounts payable can be characterised as "prices";

(b) the table does not compare the "prices" of the Australian industry with those of exporters where the exporter was not successful in a tender. In other words it presents only part of the picture and does not address why the Australian industry was successful in some tenders and not successful in others and does not address why exporters were successful in some tenders but unsuccessful in other tenders where the successful bidder was either a member of the Australian industry or another exporter;

(c) it is stated in the Report that the overseas manufacturer's prices in the table are "estimated prices" by WTC but there is no evidence or explanation, either in the Report or the application, as to how those estimates were derived and, therefore, how reliable they are, if at all. In this regard, we note that amounts submitted in a tender process for the supply of power transformers would be confidential. Accordingly, it is unclear how WTC could reliably estimate those amounts since mid-2008 or what they actually included. We are concerned with any possibility that the Australian industry may be aware of competitor pricing given the history of price fixing in Australia on power transformers: see **attached** Australian Competition & Consumer Commission **(ACCC)** media releases; and

(d) finally, WTC, at section A-5 of the application stated that:

> *"Because PTs are produced to order and each unit is unique, sales per period information as* a *means of assessing underselling is not meaningful. PTs not only embody* a *wide variety of design features, they also are produced in* a *wide range of power levels, from 10 MVA to over 500 MVA. The power rating of aPT has* a *very significant impact on its price. Even more importantly, however, two PTs with exactly the same power ratings may have greatly varied features and widely differing prices."*

What is evident from this statement is that the comparison of "prices" in the table on page 22 of the Report is meaningless unless regard is had to differences in the design features and materials used in the manufacture of the power transformers being compared, as well as their power ratings and the contractual terms pursuant to which they are being supplied, so that the comparison is like-with-like. Unless and until that is done, no conclusion can be reached regarding price undercutting.

5.5 Dumping margin calculation

WTC has calculated dumping margins by:-

(a) calculating a deductive export price using the "price" at which an imported power transformer is "sold" to an unrelated party in Australia and then deducting from that "price" various costs and charges to arrive at an FOB export price; and

(b) calculating a normal value by using the price WTC itself offered to sell a power transformer and then deducting and adding various costs and charges to arrive at a constructed normal value.

It is not clear why WTC has calculated a deductive export price when the graphs on pages 20 to 24 contain customs values of transformers at an FOB level. In any event, no doubt actual export prices will be used.

It also is not clear how WTC calculated a deductive export price "using the price at which an imported power transformer is sold to an unrelated party in Australia". How did WTC obtain such prices? Are not amounts offered by competitors to an end-user for the supply of a power transformer confidential? Again, we are concerned with any possibility that the Australian industry may be aware of competitor pricing given the history of price fixing in Australia on power transformers.

Similarly, it is not clear why WTC used its own prices in constructing normal values. It assumes that power transformers manufactured in each of the subject countries uses similar designs, technologies, materials and manufacturing processes and have similar labour and energy costs, etc, as WTC. Clearly that is not the case. WTC itself acknowledges in the application that each power transformers is unique.

The fact that each power transformer is unique also gives rise to the issue of how can the "price" of a power transformer exported to Australia be compared to the "price" of a power transformer sold in the exporting country. It is not a comparison of like-with-like as required by WTO rules. In this context, how is the deductive export price calculated by WTC comparable to the constructed normal value it calculated using its own pricing as the starting point? What adjustments have been made to ensure a like-with-like comparison is made? This is not addressed in the application.

Further, as indicated earlier above, WTC has calculated for each country under investigation a deductive export price and a constructed normal value using a methodology that is wholly artificial and compared them to derive a dumping margin, which it then asserts is representative of all power transformers exported from each of those countries notwithstanding:-

(a) the comparison of the deductive export price with the constructed normal value is not a comparison of like with like;

(b) assumes that the supply of power transformers in both the export and domestic markets involve "sales" of power transformers for a "price"; and

(c) fails to recognise that each power transformer is unique and, consequently, the calculation of a dumping margin for one power transformer exported to Australia is not representative of any other power transformer exported from the country in question.

5.6 Conclusion

Based on the foregoing, it is apparent that WTC's application was wholly deficient and, consequently, should not have been accepted and this investigation should not have been initiated.

Given that it has been initiated, then the abovementioned deficiencies should be rectified. Specifically:

(a) that it be determined whether incomplete power transformers have in fact been imported and, if not, what evidence is there that they may be. Absent such evidence, incomplete power transformers should be excluded from the investigation;

(b) an Issues Paper be published on how the Commission proposes to calculate export prices, normal values and dumping margins given that each power transformer is unique and submissions be sought from interested parties on this issue;

(c) an explanation be obtained from the applicant as to how it obtained or estimated "prices" by exporters in tenders for the design, manufacture, supply, install and commission power transformers, particularly given the history of price fixing in the industry;

(d) an explanation as to why the Australian industry's market share fell in 2011/12 but this was not matched by an increase in the market share of the countries under investigation;

(e) an Issues Paper be issued by the Commission explaining how it will approach "price undercutting" given that each power transformer and the power solution to which it relates is unique and that power transformers are not typically "sold" for a "price" under a "sales contract"; and

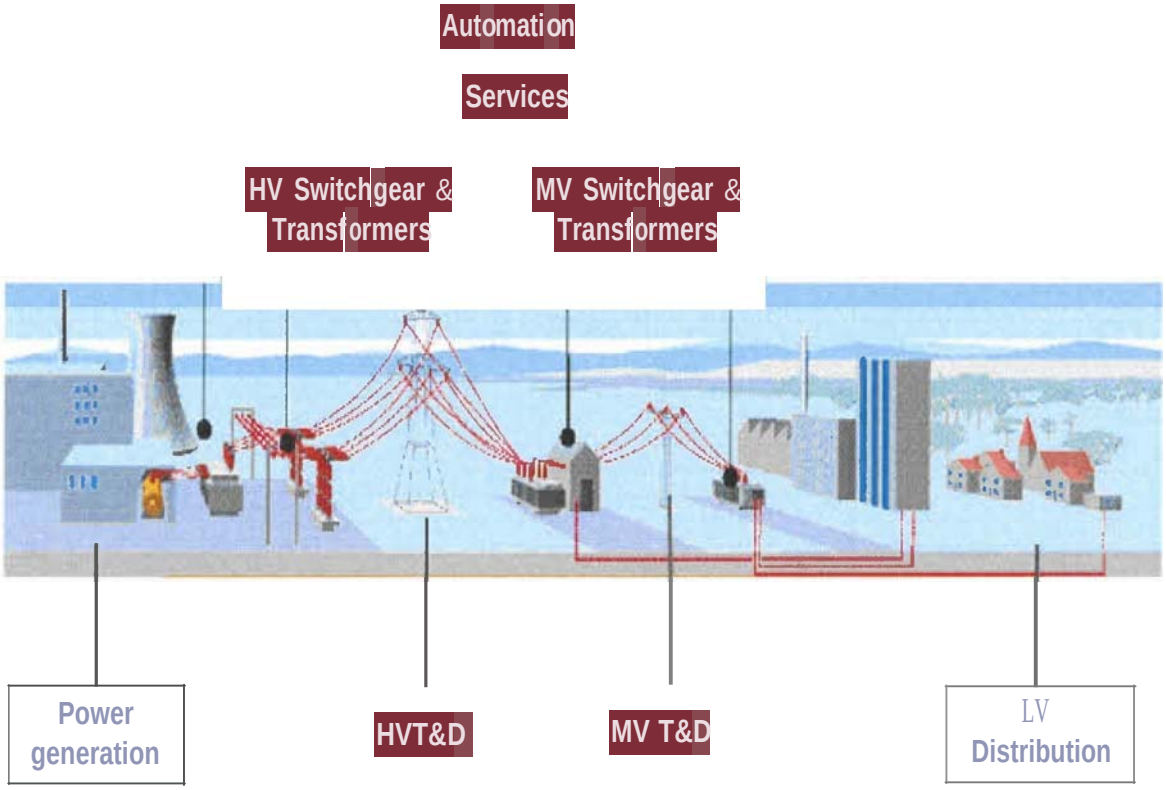
(f) the Australian industry provide to the Commission details of the tenders that it has won and associated "pricing" so that a complete table can be prepared that supercedes the table on page 22 of the Report.

6 Rio Tinto's acquisition of transformers in Australia

Over the period relevant to this enquiry- June 2010 to July 2013- Rio Tinto has acquired approximately transformers of the general type referred to in the Report for use in Australia. A number of transformers were delivered in that period, but had been acquired- and the cost was determined- before the relevant period.

Rio Tinto uses transformers at all stages of the power generation, transmission, distribution and consumption process. [redacted]

Those stages are represented in the following diagram, which is a broad overview of the process:



HV T&D = High Voltage Transmission & Distribution (Above 66 Kilovolts)

MV T&D = Medium Voltage Transmission & Distribution {Typically 66 Kilovolts)

LV Distribution = Low Voltage Distribution (Typically 415 Volts) typically households and very small factories or buildings

Transformers are used at the four locations indicated with black dots- moving left to right they are at the cooling tower, at the power generation plant, at the substation and again at the distribution hub.

In the subject period, Rio Tinto acquired transformers for use in:

(a) regulators between HV power source and MV transmission, and between MV transmission and LV transmission (that is, between points 2 and 3 and between points 3 and 4 on the above diagram), stabilising or transforming the power generated from the source to enable it to be transmitted and used safely and consistently;

(b) within sites to "step up" power to a higher voltage for use in equipment requiring higher voltage;

(c) power plants as generator transformers; and

(d) transformer-rectifier package for aluminium smelter.

6.1 Transformers are part of a power solution

A critical fact is that Rio Tinto often purchases transformers as part of a broader power solution as indicated in the above process. "Power solutions" can involve one or more stages of the process, in any combination. For example, a supplier might be contracted

to construct a power plant (stage 1, including transformers as a small component), or a power plant and a substation (stage 3), or any combination.

Power solutions could also involve part of one of the stages, for example switchgear within a substation or transmission hub, in combination with one or part of the other stages including transformers.

These power solutions involve manufacture, supply, installation, commissioning, maintenance and spare parts.

Power transformers of the kind manufactured and sold by WTC can be utilised at each of those stages, but WTC does not manufacture or supply switchgear, transmission lines, power generators, or power plant and substation construction. This is part of what is meant by the "power solution". Other suppliers of Rio Tinto are able to provide the complete distribution network from power plant to transmission lines, substations, switchgear and all ancillary equipment.

Lifetime of a typical transformer is around 25-30 years, depending of course on factors such as environment, usage, quality, equipment duty cycle, gap between designed and actual equipment duty, insulation, material workmanship and maintenance.

The result of this method of acquiring power transformers, which Rio Tinto believes to be standard in the industry, is:

(a) it can be very difficult, if not impossible, to identify the "price" of the transformer element of the power solution, that is, whether the "price" is discernible is dependent upon whether the supplier specifically itemised this in its pricing of the power solution;

(b) even if identifiable, the "price" allocated to the transformer element of the solution almost certainly would not reflect the price if the transformer were purchased alone;

(c) the "price" of the transformer element of the power solution may be lower than the price of a similar transformer purchased alone;

(d) suppliers who are able to supply the full package have an advantage over those who are only able to supply transformers; and

(e) it is impossible to identify "like goods" since power solutions are infinitely variable and the transformer is an integral and inextricable component of the total solution.

6.2 General type of transformer

Although the transformers acquired by Rio Tinto as part of a power solution were of the general type described in the Report, that type was very broad and covered many different specifications and applications. This is explored in greater detail under the succeeding headings. Each transformer is unique, both in specification and in the power solution of which it forms part. It is artificial to attempt to label these as "like goods" except in the broadest sense, relevantly meaningless for the purposes of Part XVB of the *Customs Act 1901.*

The transformer's specifications are developed, designed and derived from the unique need of the equipment solution of which the transformer is part. Transformers of the type described in the Report have a unique design and specifications in terms of the electrical rating (MVA or kVA), applicable standards, winding connection, insulation level, type of cooling, sound level, impedance, losses, overload, short-circuit withstand, duty cycle, efficiency, physical and mechanical dimensions and the layout diagram.

A principal characteristic of a transformer is its physical size and weight. Each transformer is designed for a particular location, as well as for a particular application and purpose. Size and weight determine the simple factor of where it can be used as well as the more complex factors mentioned above, such as rating. The majority of transformers of the size in the discussion (1OMVA or bigger) would be sited outdoors in a concrete bund. It is unlikely that a 1OMVA or bigger transformer would be in a building

These specifications are determined by the unique requirements of the individual equipment solution. They are carefully defined after considering the nature of the application, performance requirements, life expectancy, environment, weather and the other factors related to the equipment solution.

A typical specification for a transformer can run to 70-odd pages, as attached at **Confidential Annexure A.** But even this is not a complete specification. It must be read in conjunction with the specification with the "data sheet", specifying physical attributes such as size, weight, environment, external housing etc. Only when those documents are taken together can a supplier know how to construct the transformer.

6.3 Procurement principles

Rio Tinto has strong policies on procurement which must be followed in purchasing all items, including transformers. A copy of the Procurement Principles is at **Confidential Annexure B.** The principles are not mere policies but are applied rigorously. It would be expected that all of the companies purchasing transformers in Australia would have similar policies and procedures, given the nature of the product and those who would be buying them.

A convenient summary of the principles appears on p 12:

> *"Awards will only be made to suppliers who are able to:*
>
> *• meet Rio Tinto's HSE standards;*
>
> *• comply with all bidding requirements;*
>
> *• meet the internal customer's stated needs and required standards;*
>
> *• make the best bid in reference to the relevant selection criteria; and*
>
> *• meet the values articulated in this document and Rio Tinto's global code of business conduct* "

Of particular note relevant to these submissions are the following sections in Rio Tinto's Procurement Principles at the stated pages:

(a)	The role of Rio Tinto's Procurement function	p6
(b)	How we work with our suppliers	p10
(c)	Our workplace	p13
(d)	Environment, sustainable development and human rights	p15
(e)	Business integrity	p 17

6.4 Acquisition process

Rio Tinto, like most other entities acquiring power transformers, has a detailed and exhaustive procurement process. This is designed for multiple purposes, including obtaining the right product for the particular need, applying good governance to the procurement process to avoid bribery, corruption, fraud, anti-trust and general anti-competitiveness, purchasing and operating ethically, sustainably, safely and humanely.

Its overall sourcing process is this:

In line with its Procurement Principles, Rio Tinto would usually only acquire a transformer from a supplier with whom it already has a long term relationship or supply contract. Acquisitions may be made where no long term contract is in place, where for example there is an emergency or contracted suppliers cannot supply for whatever reason. These long term contracts are lengthy, detailed and hard-fought. They are entered into after a detailed prequalification assessment of potential suppliers, followed by a tender process, assessment of tenders, selection of short list of potential suppliers, negotiation of contractual terms and execution. Because of this, the contract with each supplier is different, even if arising out of the same tender process.

There are two very broad stages to the overall procurement process. These stages are firstly, forming a long term supply contract and secondly, acquiring goods under those contracts. [redacted]

The first stage of the process, forming a contract, in summary is:

(a) Identification of a need for new contracts

(b) Identification of potential suppliers (from existing contracts and industry research and knowledge)

(c) Conducting detailed prequalification process of identified suppliers, including issuing questionnaire and conducting supplier site visit (if necessary)

(d) Drafting a detailed Request for Proposal **(RFP)** in consultation with numerous internal business units **(BUs)**

(e) Issuing RFP to potential suppliers

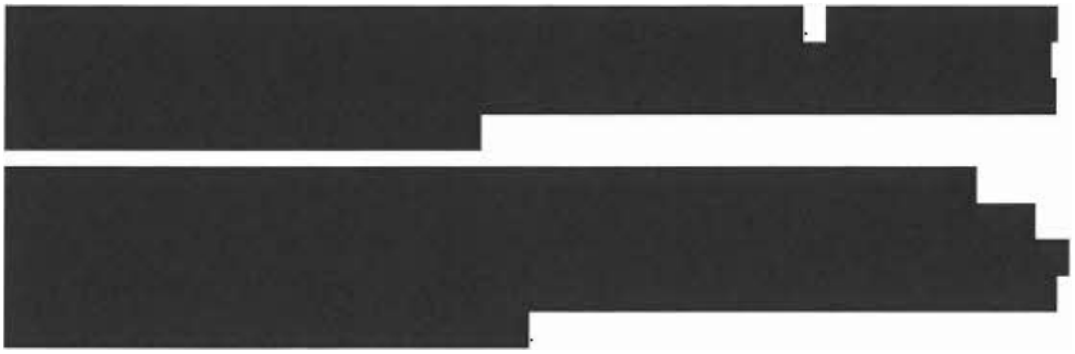
(f) Receiving and assessing proposals from suppliers

(g) Conduct transformer site visit and audit

(h) Making a Recommendation to Award **(RTA)**

(i) Negotiating contractual terms with suppliers

U) Executing contracts



This means that at any one time, Rio Tinto will have a number of suppliers with whom it has differing long term supply contracts to whom it can turn when a need arises. When that occurs, the relevant BU will approach all or some of those suppliers for a detailed proposal on the particular project.

Identification of potential suppliers

From research and industry knowledge, Rio Tinto identifies suppliers of transformers who might be able and interested to supply. As part of its preliminary, exploratory investigation of potential suppliers, Rio Tinto examines the following matters, amongst others:

Request for Proposal

The Request for Proposal **(RFP)** sets out the various factors important to Rio Tinto in entering a contract with suppliers. All factors mentioned in the RFP are relevant to the decision to varying degrees. Particular attention for present purposes is drawn to the following considerations referred to at the stated pages in the RFP:

[redacted]

(j) [redacted] p 7

A copy of an RFP is attached at **Confidential Annexure** C. the response boxes in the RFP expand as suppliers enter responses.

Recommendation to Award

[redacted] Following this exhaustive process, the project team makes a Recommendation to Award **(RTA)** to the responsible Steering Committee. The RTA will include a of factors in the rticular I, which mi ht differ from project to project. [redacted]

Once a proposal is accepted following an RTA, the supplier would be selected and we would then move to negotiating the contract. A copy of an RTA is attached at **Confidential Annexure D.**

Contract negotiations

Differing contracts between suppliers arise from their differing requirements, abilities and negotiating positions after protracted negotiations around the following controversial provisions:

[redacted]

With the multitude of potential variations of the above terms, contracts with different suppliers can be significantly different, with those differences having a marked bearing on which supplier Rio Tinto selects for any particular project. For example, a lower quality and "price" might be appropriate where there is a longer defects liability period and no, or a higher, limit of liability.

In other words, overall risk is a crucial factor in selecting a supplier and acquiring a power solution that includes a transformer. This will be developed later when considering the factors that are taken in to account in selecting a supplier.

This significant difference between contracts with various suppliers is one reason it is not possible to label the transformers "like goods", since the terms of the contract are an integral part of the goods themselves. This will be explained further under the heading "Imported transformers are not 'like goods'." For example, a transformer with a defects liability period of 1 year, no warranties and a limit of liability of $100,000 is a different product from one with a defects liability period of 10 years, full warranties and no limit of liability. A significantly higher amount might be paid for the latter product.

Particular purchases

Quotations provided by suppliers are more than mere "prices" - they include all of the items in proposals following an RFP, but specifically for the requested transformer or package. The BU's assessment of the quotation would follow a similar process to the RTA process, being evaluated technically, commercially and generally in detail. Only after that assessment would a decision be made as to which supplier's quotation to accept to supply the particular transformer or power solution.

There are thus three stages where a multitude of factors are brought to bear on the decision to procure a "power solution" - when deciding to whom to send an RFP, when deciding to whom to award long term contracts and when deciding with whom to place a

particular order. [redacted]

6.5 Factors in purchasing

There are many factors in determining which transformer to acquire, particularly since its acquisition will be part of a broader power solution and will typically require manufacture, supply, installation, commissioning, maintenance and spare parts.

Risk is the overriding determinant in the decision to acquire. Risk is an amalgam of factors, each given different weight depending on the project. Weighting given to different factors may vary between projects, which have different purposes and different risk profiles themselves.

Factors forming the risk synthesis, and therefore determining the acquisition decision, can be grouped under the following broad headings of Product, Supplier, Contract as follows:

[redacted]

(viii) –

Please note that each factor listed under each heading is not an exhaustive list and may vary with each RFP.

7 Transformer manufacture and marketing

Transformers are specialised engineered products and their manufacturing processes are very complicated and detailed. A simplified demonstration of the manufacturing process can be viewed at http://www.youtube.com/watch?v=i4eyG99jC1c.

As far as Rio Tinto is aware, transformers of the type under consideration are only made to order and to specification. They are not mass produced, or even manufactured "on spec" in advance of an order. They are such specialised and costly pieces of equipment that they can only be manufactured to order. It is not common at all for the desired combination of capacity (MVA / kVA) and voltage rating to be available "off the shelf'. Almost every order needs to be produced from scratch.

Marketing of transformers is typically done by suppliers pointing to their factory's ability and/or to their past projects. Most suppliers of the subject transformers are known to Rio Tinto and similar purchasers, given the market, and capabilities are generally known.

Rio Tinto notes that WTC asserts that end-users of power transformers provide feedback on its offers to supply power transformers and seek WTC to offer its "best price" based on that feedback and WTC complies. We do not know what information the end-user provides to WTC to encourage it to reduce its price, and this should be investigated, but WTC has behaved in response to such requests in a way that encourages end-users to request WTC to lower its prices. End-users seemingly are aware that the initial 'price' offered by WTC is not its best price but simply its opening gambit and that it will reduce its price if pressed.

This would seem to be self-inflicted injury unless WTC actually knew the "prices" of competing bidders, which would under usual tender conditions would be a breach of confidence. The issue, therefore that needs to be investigated is why WTC reduced its "prices"? Was it merely on the basis of representations from the end-user, who presumably would be seeking the best deal for itself, or was it based on something more. If it was based on the mere representations of the end-user, the question arises as to whether that was a rational commercial decision. This must be investigated by the Commission.

8 Imported transformers are not "like goods".

Transformers acquired by Rio Tinto are not "like goods" to those produced in Australia and vice versa for three reasons:

(a) each transformer is unique, being designed, built and installed only to order and for particular uses;

(b) transformers constitute a bespoke part of a broader power solution such as a substation; and

(c) what is being supplied is not the transformers alone, but typically a total power solution that includes the design, manufacture, testing, supply, installation and commissioning of a power transformer as part of the solution and it also include the contractual terms for the project, which differ (sometimes markedly) from supplier to supplier.

In considering whether goods are "like goods", it is submitted that these three factors should be considered not only separately, but also in combination with each other and any other relevant factor. Matters which may not be so significant alone can assume greater significance when taken with other matters, and can combine to render goods unalike.

8.1 Each transformer is unique

As recognised numerous times in the application and in the Report, transformers are bespoke items. They must comply with specific internal standards as well as the project-specific contract specifications and the datasheet. It is not possible to accurately compare one to another. In terms of the definition of "like goods": in s 269T(1)of the *Customs Act 1901,* the transformers are clearly not identical in all respects.

The *Dumping and Subsidy Manual* identifies the following characteristics for the purpose of assessing whether or not goods that are not alike in all respects, do in fact have characteristics closely resembling each other:

(a) physicallikeness

(b) commercial likeness

(c) functionallikeness

(d) production likeness

Rio Tinto submits that those characteristics should be examined not only separately but also in combination for the cumulative effect to determine whether the Australian and imported transformers closely resemble each other. A number of apparently inconsequential differences in each likeness might, in accumulation, amount to products which do not closely resemble each other.

Physical likeness

Transformers could only be said to have a physical likeness in the broadest sense, as can be seen from the images below. . Apart from that, transformers do not have a physical likeness. The size of transformer Rio Tinto purchases can range from the size of a 4m x 4m room, to the size of a building 1OOm long and 2 storeys high.

External housing of transformers is equally variable, dependent upon the location, climate, life span and associated equipment.

Rio Tinto submits that "physical likeness" is not limited to appearance but also takes into account the physical attributes the subject of the specifications mentioned above, eg winding connection, insulation level, type of cooling, sound level etc. As pointed out, those attributes vary significantly from transformer to transformer, rendering them physically unalike. Of course, some transformers can be found which bear a physical likeness, but the fact that some can be found does not mean that generally the subject transformers produced by the Australian industry are physically like the imported transformers.

Commercial likeness

The contractual and any other commercial terms are particularly relevant in consideration of commercial likeness. A transformer with full warranties, a defects liability period of 10 years and unlimited liability is substantially commercially different from one with limited warranties, a defects liability period of 1 year and liability limited to $100,000. All relevant commercial factors must be considered in determining commercial likeness.

As has been emphasised above, the contracts and commercial terms vary considerably between suppliers, even for transformers of similar specifications.

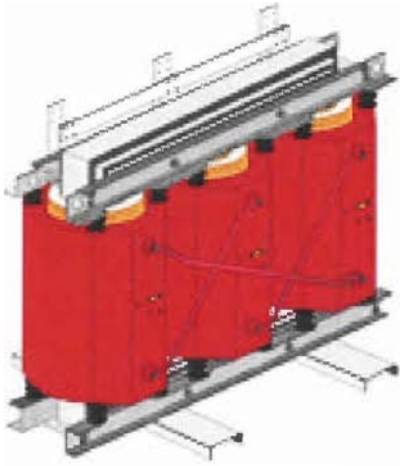
Functional likeness

There are many different types of transformers performing different functions. A principal difference is the voltage for which the transformer is designed, and this difference applies to all of the different types of functions detailed here.

The different types of transformers and their different functions are:

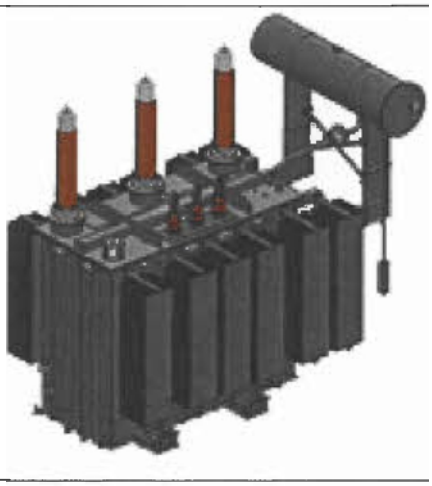
SOT Small Distribution Transformers
Single phase transformers, made usually with wound core system and rectangular windings. Specially in use in the British Standard countries as in USA, particularly adapted for small power
Power range: Usually from 50 to 200 Kva within 35 Kv
Main use: Distribution in rural areas and countryside
Main advantages: Small production costs with possibility of good automation

DST Distribution Transformers
Usually three phase transformers, immersed in liquid oil as dielectric insulation and enclosed in a tank with cooling system. Recently made hermetically sealed for reduced maintenance and better quality.
Power range: Usually from 250 to 2500 Kva within 35 Kv
Main use: Distribution of energy in cities and centre with different houses
Main advantages: Great extension of use in different outdoor application

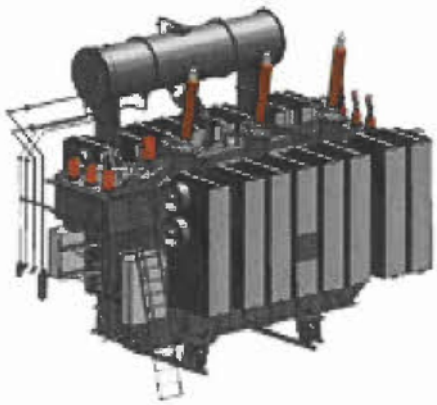


CRT Cast Resin Transformers Usually three phase transformers, but instead of being immersed in oil, the HV side is cast into a resin which will be its dielectric insulation.
Power range: Usually from 250 to 4000 Kva within 35 Kv
Main use: Underground systems, mines and skyscrapers.
Main advantages: Fireproof and explosion-proof, particularly adapted for Indoor applications

DTH Dry Type Transformers H class insulation
Usually three phase transformers, but instead of being immersed in oil, the HV side is impregnated into an insulating varnish which will be its dielectric insulation along with open air.
Power range: Usually from 250 to 4000 Kva within 35 Kv
Main use: Underground systems, mines and skyscrapers.
Main advantages: Fireproof and explosion-proof, particularly adapted for Indoor applications



LOT Large Distribution Transformers
Three phase transformers, usually immersed in liquid oil as dielectric insulation and enclosed in a tank with cooling system.
Power range: Usually from 2500 to 20000 Kva within 35 Kv
Main use: Grid interconnections, Industrial application, special application as furnace or railway..
Main advantages: Big power within the tension of distribution 35 Kv

	**MPT Medium Power Transformers** Three phase transformers, adapted for grid interconnections for small distance Transmission lines till 220 Kv. **Power range:** Usually from 250 to 4000 Kva Main use: Interconnecting grids. Main advantages: Big power and high tension
	**LPT Large Power Transformers** Three phase transformers, adapted for grid interconnections for large distance Transmission lines above 220 Kv. **Power range:** Usually from 250 to 1000 MVA **Main use:** Interconnecting grids and main power station. **Main advantages:** Big power and high tension

Production likeness

Again, there is a superficial likeness to the production of the different transformers but as can be seen from the many different functions they perform and the different specifications they can have even within the same function, the production processes to produce a power transformer can vary significantly between the different types of power transformers and between power transformer manufacturers.

No close resemblance

From considering those four factors, alone and in combination, it is clear that the imported transformers do not closely resemble the Australian transformers within the meaning of Part XVA of the Customs Act 1901.

8.2 Transformers are purchased as part of a broader package

Not only are the individual transformers unique, but the power solutions of which they form part are also unique. The transformer cannot be separated from the power solution since they are acquired for and as part of the overall solution. This means that, to compare Australian with imported transformers, a valid comparison also needs to be drawn between the solutions for which both sets of transformers were used. Patently, this is not possible. Power solutions differ widely depending on the purpose, location, specifications and all other variable factors inherent in the applications.

The solutions are certainly not identical in all respects and have fewer characteristics closely resembling each other than do the transformers, as described above.

8.3 "Goods" include the contractual terms

It is wholly artificial and unreal to consider the transformers in isolation from the commercial and legal terms under which they are sold in determining whether they are "like goods". As illustrated a number of times above, the commercial and legal terms can make a vast difference to the nature of the goods. A transformer with a 10 year defects liability period is a different good from one with a 1 year period. It naturally and inevitably commands a different price, because the purchasing is paying for something very different and the supplier is supplying something very different.

9 "Price" has not caused injury

Since "price" is not the determinant of the decision to acquire, it has not caused any alleged injury in the Australian market.

A causal relationship between the dumped imports and the alleged injury to the domestic industry must be demonstrated. This demonstration must be based on an examination of all relevant evidence.

Typically the analysis required to demonstrate that imports have "caused" injury to the Australian industry consists of the following:-

(a) an assessment of whether imports are undercutting the Australian industry's prices and, if so, whether that price undercutting is due to imports being imported at dumped prices;

(b) an assessment of whether that price undercutting is having the following price effects on the Australian industry:

  (i) price depression, that is, forcing the Australian industry to lower its prices; and

  (ii) price suppression, that is, preventing the Australian industry from increasing its prices in line with increases in its cost to make and sell;

(c) an assessment of whether that price undercutting is resulting in the Australian industry selling less quantities of the goods in question; and

(d) an assessment of whether the price and/or volume effects are reducing the Australian industry's revenues and, consequently, reducing its profits and profitability and whether that reduction in profits and profitability is material.

Price undercutting, price depression, price suppression, reduced sales volume and market share do not, of themselves, constitute injury but, rather, are observable behaviours in a market, which, if present, provide the links in the causation chain to enable a conclusion to be drawn that dumping is causing injury in the form of reduced revenues and profits.

This approach to 'causation' is reflected in Article 3 of the WTO Anti-Dumping Agreement, which s. 269TAE of the *Customs Act 1901* is intended to give effect.

The issue here is how to assess "price undercutting". A simple comparison of "prices", assuming "prices" for the power transformers being supplied exist, will not suffice. Even if a power transformer is being "sold" for a "price" under a "contract for sale", given the solution each supplier of power transformers would offer would be different in terms of design, materials, delivery time, contractual terms, etc., would be different even though each would be meeting the end-user's specifications, a price comparison that did not take into such differences would not be comparing like-with-like. Further, it is unclear

how those differences could be accounted for in such a comparison and hence the earlier proposal that the Commission issue and Issues Paper on how it proposes to address this issue and invite comment from interested parties.

In addition, Article 3.5 of the GATT 1994 requires that known factors other than dumped imports that may be causing injury must be examined and gives examples of such factors, such as changes in the pattern of demand, and developments in technology, that may be relevant. That Article stipulates that injury caused by such "other factors" must not be attributed to dumped imports. This is reflected in s. 269TAE(2A) of the Customs Act 1901.

Price cannot be the cause of any alleged injury since it is not the determinant of the decision to acquire.

It is not for Rio Tinto or any other responding party to prove what might have caused the alleged injury. The burden rests on the applicant to show that any injury was caused by price. But Rio Tinto can suggest other causes for the injury alleged by WTC (not accepting that it has been suffered, or suffered to the extent claimed).

In 1997, WTC brought an application to the ACCC seeking approval to enter a joint venture with AW Tyree Transformers Pty Ltd **(AWT)**[1] to jointly sell their different transformer products. In that application, WTC said that:

(a) it faced the threat of imports due to falling tariffs;

(b) there was evidence that demand was falling; and

(c) the number and size of existing competitors would provide AWT and WTC with significant competition.

It is submitted that these trends have continued apart from falling customs tariffs. However, the entry into preferential trade agreements by Australia with a number of countries not the subject of this investigation means that those countries can export power transformers free of any customs duties. In addition, Thailand, Indonesia and Vietnam are also parties to preferential trade agreements with Australia and, consequently, power transformers exported from those countries also attract a "free" rate of customs duty..

Also a number of Australian transformer suppliers, including WTC, were heavily fined for cartel activity between 1993-1999. The ACCC website records:

> *"The cartel included the principal manufacturers and suppliers of transformers in Australia and covered virtually 100% of the industry. The collusion involved executives at the highest level, and featured secret meetings in hotel rooms, airport lounges and private residences in various locations across Australia. These meetings rigged the outcomes of multimillion dollar contracts, with at least 27 tenders being rigged between 1993 and 1999.*
>
> *Some aspects of the cartel ran from 1989 to 1999. A 2004 study by the Australian National University concluded that the cartel extracted an extra $70 million to $80 million from its customers between 1994 and 1999.*
>
> *The Federal Court imposed penalties of more than $35 million on the participating companies and some of their executives. The Court was particularly scathing about the fact that the arrangement was coordinated by senior*

[1] *AW Tyree Transformers Pty Ltd and Wilson Transformers* Co *Pty Ltd* (1997) ATPR (Com).

executives, including managing directors. Total penalties imposed on individual executives exceeded one million dollars, with the highest being $200 000."

This has left some end-users a little wary of Australian suppliers and, where all things are equal, might influence a decision in favour of overseas vendors.

In the period 2010-2013:

(a) Rio Tinto's demand for transformers in Australia fell generally;

(b) demand for transformers in Australia generally fell. This is reflected in the application and the Report;

(c) tariffs on imports fell;

(d) the quality of imports improved;

(e) new overseas manufacturers of transformers entered the Australian market;

(f) imports became more available;

(g) the reliability of imports improved; and

(h) Rio Tinto (and probably other purchasers) tried and proved hitherto unproven overseas suppliers and transformers.

These economic factors are likely to be the "cause" of injury to the Australian industry, together with the fact that Australia is a high cost country, with the cost to manufacture some products up to four times that in other countries and twice that in Europe, that is seeking to compete with low cost countries, such as the countries the subject of this investigation.

Conclusion

Transformers of the kind the subject of this application are typically highly individualised, bespoke products of multifarious characteristics, with all of those characteristics being important considerations in the decision to source from a particular supplier.

There is no evidence in the application or in the Report that power transformers are being imported from the countries in question at dumped prices. Further, no methodology has been advanced as to how to assess whether power transformers have been imported from the countries in question at dumped prices given that each power transformer exported to Australia is unique just as each power transformer for use in the country of export is unique.

It is unlikely that the Australian industry has incurred material injury through the effects of dumping given that power transformers typically are supplied as part of an overall power solution and are not "sold" under a "contract of sale" for a "price". Rather potential suppliers are evaluated on their total offer and not solely or predominantly on the cost of the power transformer. Further, as each solution offered in a tender will be different, including the design of the power transformer being offered as part of the solution, a comparison of the costs of the power transformers being offered will be largely meaningless unless those differences are taken into account.

For these reasons Rio Tinto submits that the grounds for the imposition of anti-dumping measures do not exist but, rather, this investigation should be terminated.

Attachment

Folio 53

Federal Court orders $14.5 Million penalties against cartel participants, and orders major penalties for managing directors

3 May 2002

Nearly $15 million in penalties were ordered today against Schneider Electric (Australia), Wilson Transformer Company and AW Tyree Transformers for their involvement in price-fixing and market-sharing contraventions of the *Trade Practices Act 1974* after Justice Finkelstein in the Federal Court, Melbourne declared their actions unlawful.

The arrangements covered the supply of power transformers and distribution transformers in Australia.

The court also imposed major pecuniary penalties against the managing directors of each of the corporations for their awareness of, and participation in, the covert and illegal conduct.

"The size of the penalties indicates the seriousness of the contraventions", Australian Competition and Consumer Commission Chairman, Professor Allan Fels, said today. "These breaches were long-running arrangements in markets worth hundreds of millions of dollars".

The orders were made as part of two important sets of proceedings brought the ACCC that alleged extensive cartel conduct between the principal firms in the Australian transformer industry.

Reasons for the decision are likely to be published by Justice Finkelstein on Monday following consideration of certain confidential material.

"His Honour's reasons are likely to be of great interest", Professor Fels said.

Distribution Transformer Proceedings

Schneider Electric (Australia), Wilson Transformer Company and AW Tyree Transformers each made admissions to the court that they engaged in extensive market sharing and price fixing cartel conduct in the market for distribution transformers during the 1990s which continued until 1999. This market in Australia is estimated to be worth approximately $100,000,000 per annum.

THE PENALTIES ORDERED IN THESE PROCEEDINGS TODAY WERE AS FOLLOWS:

Party	Penalty
Schneider:	$7 million
Russell Stocker: (Former Managing Director of Schneider)	$150,000
WTC:	$2.5 million

Robert Wilson: (Managing Director of WTC)	$125,000
AWTyree:	$3.5 million
Ray Boyce: (Managing Director of AW Tyree)	$150,000

Note: Alstom has already paid pecuniary penalty of $1.5 million for its participation in this conduct.

Power Transformer Proceedings

Wilson Transformer Company also made admissions to the court that it engaged in extensive market sharing and price fixing cartel conduct in the market for power transformers during the 1980s and from late 1993 until the end of 1995. This market in Australia is estimated to be worth approximately $60,000,000 per annum.

THE PENALTIES ORDERED BY THE COURT IN THESE PROCEEDINGS TODAY WERE AS FOLLOWS:

Party	Penalty
WTC:	$1.5 million
Robert Wilson (Managing Director of WTC)	$100,000
David Toogood, ABB	$35,000

Note Alstom has already paid pecuniary penalty of $5.5 million for its participation in this conduct.

On 5 April 2001 the Federal Court ordered Alstom Australia Limited to pay a pecuniary penalty of $5.5 million for its articipation in this conduct. The Managing Director of Alstom was ordered to pay penalty of $150,000.

In both sets of proceedings the court also made other orders including injunctions against the corporations and relevant senior management restraining them from engaging in similar conduct in the future.

The ACCC argued that the level of penalty ordered by the court should reflect a number of factors, including, the seriousness and covert nature of the unlawful conduct, the number of separate contraventions, the amount of commerce affected by the arrangements, the size of the companies and the level of management involved.

"Like in many covert price-fixing conspiracies, these companies and their senior executives from time to time abused the opportunity to meet with their competitors before or after industry association meetings", Professor Fels said. "Secret meetings to rig the outcomes of multi-million dollar contracts took place in hotel rooms, airport lounges and even private residences in various parts of Australia".

The customers affected by these illegal arrangements included many of the largest electricity transmission and distribution utilities across Australia.

"Although these conspiracies were directed at the tender processes for power and distribution transformers, it is the Australian consumer who has ultimately paid the price".

The penalties ordered by the court in the case of the companies managing directors are equivalent to the highest individual penalties imposed by the court in the history of trade practices proceedings in Australia.

The investigation commenced following an anonymous e-mail to the ACCC.

"Secret collusion is always difficult to get to the bottom of and requires painstaking and lengthy investigation", Professor Fels said.

In these proceedings each of Schneider Electric (Australia), Wilson Transformer Company and AW Tyree Transformers admitted their involvement in the unlawful conduct and cooperated with the ACCC.

In its submissions to the court the ACCC submitted that the pecuniary penalties imposed by the court would have been much higher if it was not for the substantial cooperation provided by these companies and their management to the ACCC during its investigation and throughout the court proceedings.

The ACCC has published a flexible policy of cooperation and leniency in enforcement and it will make submissions to the court in accordance with that policy in appropriate circumstances.

Release number:
MR 104/02
Media enquiries:
Ms Lin Enright- (02) 6243 1108

ACCC institutes against distribution transformer manufacturers

10 November 2000

The Australian Competition and Consumer Commission has instituted court proceedings alleging price fixing and customer sharing conduct against ABB Transmission and Distribution Limited, ABB Power Transmission Pty Ltd (in liq), Wilson Transformer Company Pty Ltd, Schneider Electric (Australia) Pty Ltd, AW Tyree Transformers Pty Ltd and Alstom Australia Limited in the Federal Court, Melbourne.

ABB Transmission and Distribution Limited, Wilson Transformer Company Pty Ltd, Schneider Electric (Australia) Pty Ltd, AW Tyree Transformers Pty Ltd and Alstom Australia Limited are the principal manufacturers and suppliers of distribution transformers in Australia. Distribution transformers are used in the electricity distribution networks and where large amounts of electrical power is required. The primary consumers of distribution transformers are electrical utilities. The annual value of distribution transformers acquired by electrical utilities is approximately $100 million.

The ACCC has alleged that senior executives of ABB Power Transmission Pty Ltd (in liq), Wilson Transformer Company Pty Ltd and AW Tyree Transformers Pty Ltd reached collusive agreements from in or about 1993 not to compete for tenders let by utilities for the supply of distribution transformers in Australia. Schneider Electric (Australia) Pty Ltd allegedly became a party to the price fixing and customer sharing arrangements from in or about 1995. Following a corporate restructure of the ABB group of companies, ABB Transmission and Distribution Limited also allegedly became a party to the price fixing and customer sharing arrangements from 1 January 1996.

The ACCC further alleges that these agreements were put into effect on many occasions until early 1999 though the exchange of detailed pricing information. The arrangements not to compete and subsequent price agreements were allegedly made during a series of covert meetings and telephone calls between senior executives of the companies throughout the period. It is alleged that the parties arranged that each of them would win specific tender items by agreeing which company would tender the lowest bid for those items.

It is alleged Alstom Australia Limited agreed to enter into and give effect to customer sharing and price fixing arrangements in respect of two tenders for the supply of distribution transformers in 1994 and 1996.

The ACCC is seeking orders against ABB Transmission and Distribution Limited, ABB Power Transmission Pty Ltd (in liq), Wilson Transformer Company Pty Ltd, Schneider Electric (Australia) Pty Ltd, AW Tyree Transformers Pty Ltd and Alstom Australia Limited including declarations, injunctions, findings of fact and costs. The ACCC is also seeking pecuniary penalties against each of these companies and ten senior executives.

The ACCC notes that after being informed of the investigation Wilson Transformer Company Pty Ltd, Schneider Electric (Australia) Pty Ltd, AW Tyree Transformers Pty Ltd and Alstom Australia Limited have provided the ACCC with a substantial degree of continuing cooperation.

These proceedings are related to proceedings previously instituted by the Commission in October 1999 against ABB Power Transmission Pty Ltd (in liq), Alstom Australia Limited and Wilson Transformer Company Pty Ltd and eight senior executives of these companies in respect of alleged price fixing and market sharing conduct in the market for power transformers.

A directions hearing has been set down for 8 December 2000.

Release number:
MR 312/00
Media enquiries:
Ms Lin Enright- (02) 6243 1108

ACCC Transformer Cartel bust: Record $35 million penalties

7 *Apri/2004*

Penalties of $14 million were ordered today against ABB Power Transmission Pty Ltd (in liquidation) and ABB Transmission and Distribution Ltd [the ABB respondents] for their involvement in price-fixing and market-sharing contraventions of the *Trade Practices Act 1974* after Justice Arthur Emmett in the Federal Court, Sydney declared their actions unlawful.

The penalties were imposed following a settlement agreement between the Australian Competition and Consumer Commission and the ABB respondents.

The court also imposed penalties totalling $200,000 against the ABB managing director, Mr Douglas Pitt, based on his awareness of the covert and illegal conduct. Three other senior executives received penalties totalling $145,000. This brings the total penalties imposed on company executives involved in the cartels to just over $1 million.

The penalties handed down today bring to $35,045,000 the total penalties handed down against companies and senior executives involved in the power transformer and distribution transformer cartels. This eclipses the $26 million the court ordered against the companies involved in the animal vitamin cartel case.

The arrangements covered the supply of power transformers and distribution transformers in Australia.

"The size of the penalties indicates the seriousness of the contraventions", Australian Competition and Consumer Commission Chairman, Mr Graeme Samuel, said today. "These breaches were long-running arrangements in significant markets.

"The penalties imposed by the court clearly demonstrates that the court views very seriously when managing directors acquiesce in the conduct of their subordinates and take no positive action to stop the cartel conduct".

Mr Samuel said that it was significant that this investigation began following an anonymous e-mail to the ACCC from a person codenamed 'dibber-dobber'.

"The ACCC often relies on whistle blowers to identify collusive conduct which by its nature is secret and hard to detect. The ACCC's recently issued Leniency Policy encourages whistle blowers by offering complete immunity to those who involved in the conduct and are first through the door".

The orders were made as part of two important sets of proceedings brought over allegations of an extensive cartel between the principal firms in the industry.

Distribution Transformer Proceedings

The court found that that there was extensive market-sharing and price-fixing cartel conduct in the market for distribution transformers from 1993 until 1999. This market in Australia is estimated to be worth approximately $100,000,000 per annum.

Power Transformer Proceedings

The court found that there was extensive market-sharing and price-fixing cartel conduct in the market for power transformers from late 1993 until the end of 1995.

In both sets of proceedings the court also made other orders including injunctions against the corporations and relevant senior management restraining them from engaging in similar conduct in the future.

The ACCC argued that the level of penalty ordered by the court should reflect a number of factors, including, the seriousness and covert nature of the unlawful conduct, the number of separate contraventions, the amount of commerce affected by the arrangements, the size of the companies and the level of management involved.

"Like in many covert price-fixing conspiracies, these companies and their senior executives from time to time abused the opportunity to meet with their competitors before or after industry association meetings", Mr Samuel said. "Secret meetings to rig the outcomes of multi-million dollar contracts took place in hotel rooms, airport lounges, and even at a private residence in various parts of Australia".

The customers affected by these illegal arrangements included many of the largest electricity transmission and distribution utilities across Australia.

"Although these conspiracies were directed at the tender processes for power and distribution transformers, it is the Australian consumer who has ultimately paid the price.

"Secret collusion is always difficult to get to the bottom of and requires painstaking and lengthy investigation", Mr Samuel said.

In these proceedings each of the ABB companies, Schneider Electric (Australia), Wilson Transformer Company, Alstom Australia and AW Tyree Transformers admitted their involvement in the unlawful conduct and cooperated with the ACCC.

In its submissions to the court the ACCC submitted that the pecuniary penalties imposed by the court would have been much higher if it was not for the substantial cooperation provided by these companies and their management to the ACCC during its investigation and throughout the court proceedings.

As part of the settlement agreement ABB Transmission and Distribution Ltd has agreed to pay the penalty imposed on ABBB Power Transmission Pty Ltd (in liquidation).

Release number:

MR 057/04

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