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Non-Confidential version

Mr Geoff Gleeson
Director Operations 1
Anti-Dumping Commission
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By email: Operations1@adcommission.gov.au
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Dear Geoff

██████████ and ██████████ (Importers)
Investigation into alleged dumping of 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

We refer to our previous correspondence and confirm we act on behalf of ██████████ and ██████████ (Importers) ("**Clients**") referred to in that correspondence.

Our Clients have now instructed us to make the following submissions in response to the SEF and for these purposes, defined terms have the same meaning as in the Schedule of Definitions to this letter.

Our Clients also reserve the right to make further submissions, whether in response to the SEF or otherwise.

1. Summary

Our Clients are of the view that there has been no material injury caused by alleged dumping.

Our Clients believe that the analysis by the ADC in the SEF is fundamentally flawed in a number of areas which are identified below.

Our Clients remain firmly of the view that:

- (a) there has been no material injury to the Australian Industry caused by the alleged dumping;
- (b) any material injury to the Australian Industry has been caused by a combination of:

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- (i) a decrease in the Australian market driven by a decrease in heavy industry and resources projects and a decreased demand for electricity;
 - (ii) over-capacity and ongoing fixed costs (such as depreciation) caused by over expansion in a declining market, which continue regardless of demand (and which will become a proportionally higher cost); and
 - (iii) problems with the product and sales by the Australian Industry, as detailed in the SEF;
- (c) the ADC has not identified much of the evidence on which it has formed its conclusion;
 - (d) the ADC has relied on a number of assumptions (not facts) in reaching its conclusions; and
 - (e) any implementation of measures on the GUC detailed in the SEF will lead to those measures applying to goods not manufactured by WTC contrary to the Act and the WTO Agreement and adversely affecting purchasers of the GUC.

For these reasons, our Clients do not believe that measures should be applied on the GUC exported to Australia.

2. The Australian Market, the Economic Conditions of the Industry, whether Dumping caused Material Injury and whether that Injury is likely to continue (Chapters 5, 7, 8 and 9 of the SEF)

- 2.1. The Clients wish to address these issues together as there are many related issues.
- 2.2. The Clients are of the view that the claims by WTC that allege material injury has been caused by alleged dumping have not been proved to a standard to support the imposition of measures.
- 2.3. For the purposes of the preceding paragraphs, the Clients wish to make the following observations:

Decline in Australian market unrelated to dumping or investigation

- (a) At paragraph 5.4 of the SEF, the ADC refers to a number of comments by other interested parties as to reasons for decrease in demand for the GUC. They support the view that a significant cause is a large decrease in demand for electricity in the Australian market. A similar decline has occurred in heavy industry and major resources projects, which are other sources of demand for the GUC.
- (b) The SEF also refers to reasons provided by those interested parties for the increased willingness to purchase the GUC overseas. We note that the ADC does not appear to have rejected any of those observations or claims which, in fact, have been confirmed by other parties.
- (c) At paragraph 5.5 of the SEF, the ADC suggests (in Figure 2) that the decrease in size of the Australian market may have been caused in part, by the commencement of the Investigation with the supply of the GUC being held pending an outcome from the Investigation. However, no evidence has been provided by the ADC to support this conclusion. The Clients do not believe that orders or imports of the GUC would have been held back pending the outcome of the Investigation given the nature of the market, the nature of the GUC and the uncertainty as to the extended term and result of the Investigation. It is unreasonable for the ADC to use this argument to explain a reduction in the size of the Australian market.

No evidence that Australian industry has lost market share for reasons relating to dumping

- (d) At paragraph 7.4 of the SEF, the ADC makes certain observations regarding the claims of injury through loss of sales volume and reduced market share as made by WTC. Those observations include:

- (i) that movement in the Australian industry market share followed a similar trend to the volume of GUC sales, ie rising from 2008-2009 and then falling each year to 2012-13;
 - (ii) that the ADC considers that the rise in the Australian industry's sales volume and market share between 2008-09 and 2010-11 may be attributable to completing orders on hand; and
 - (iii) Figure 4, which illustrates that Australian industry market share is at the same level in 2012-13 as it was in 2008-09.
- (e) Put differently, the ADC's own analysis indicates that Australian industry market share rose between 2008-09 and 2010-11 due to completing orders on hand, which is of course a temporary effect, and then returned to 2008-09 levels. This does not support a finding of loss of market share such as contained in paragraph 7.4.1 of the SEF.

Decreased volumes unrelated to alleged dumping

- (f) The Clients further believe that the information contained in the SEF similarly fails to connect loss of sales volumes to the alleged dumping. For these purposes, the Clients would refer to the following factors:
- (i) The Australian Industry continued to increase its market share from 2008-09 to a peak at the commencement of the Investigation Period despite falling demand, with Australian Industry market share being maintained above 2008-09 levels for the entire Investigation Period.
 - (ii) The Australian Industry has maintained volume from 2008-09 and only after 2010-11 was there any correction in the markets.
 - (iii) The decrease in the Australian Industry market share in 2012-13 was, in fact, due to non-dumped exports (see revised Figure 7) and, as noted above, a natural correction to the increase in market share due to completing of orders in hand.¹
 - (iv) The actual increase in market share for 2013-14 for the Australian Industry is not consistent to the idea of a business being adversely affected by dumping.
 - (v) The future demand for electricity will continue to contract according to the AEMO Report in a manner consistent to recent experience.

Accordingly, the Clients believe that the information provided by the ADC to support its conclusions in the SEF does not actually support the loss of sales volume having been caused by alleged dumping.

Price and profit effects unrelated to alleged dumping

- (g) At paragraph 7.5.1 of the SEF, the ADC refers to alleged price undercutting. The ADC alleges that it was able to confirm that in a number of instances, exports from nominated countries had "undercut" the Australian industry's prices. However, details have not been provided.
- (h) In paragraph 7.5.3 of the SEF, the ADC refers to its price suppression analysis, and in paragraph 7.6 its profit analysis. However, the Clients do not agree with the analysis:
 - (i) The ADC acknowledges demand has been falling and at the same time, that the capacity of WTC has significantly increased (by approximately 40% or more) but it does not draw any conclusion that this has had an effect on competitive performance. It seems unreasonable for the ADC to conclude that profitability should be constant in those market conditions.

¹ It is not clear from the SEF whether the Australian Industry figures include Alstom Australia up until the end of 2012. If so, this is another reason why Australian industry market share would have reduced automatically with that local manufacturer having closed.

- (ii) No explanation has been offered by the ADC as to the change in profitability of WTC between 2011-12 and 2012-13. The only differences appear to be a market share increase for non-dumped exports (see revised Figure 7) and the commercial decision by WTC to increase capacity in a declining market.
- (i) In paragraph 7.7 of the SEF, in considering other economic factors, the ADC refers to an increase in capacity and a decrease in capacity utilisation. Given the trend of decrease in the Australian market in terms of demand for the GUC, it seems more likely that a decrease in capacity utilisation is purely a function of the increase in capacity which was undertaken by WTC at the same time as the demand had decreased. The AEMO Report and similar industry reports for major industry and resource projects suggests that demand is likely to continue to fall, causing a further decrease in capacity utilisation and a proportionate decrease in profitability. The effect on capacity and its utilisation appears to be caused by a lack of demand rather than by any alleged dumping.

Additional concerns about the analysis of injury

- (j) In paragraph 8.3 of the SEF, the ADC provides its assessment as to whether dumping has caused material injury to the Australian Industry.

Our Clients make the following observation on the assessment.

- (i) The ADC has expressed the view that the loss of a sale of one power transformer due to dumping could cause material injury to the Australian Industry. Given the specific unique requirements in relation to each power transformer and the significant risk of loss of any one tender in the competitive market, the Clients have difficulty with that view.
- (ii) Paragraph 8.3 sets out the ADC's assessment of effect of the measures on WTC. However, the ADC has not provided an assessment of the expected effect of measures on the Australian market for the GUC as required by paragraph 6.2 of the Streamlining Document. The assessment also does not identify the expected effect of any measures on market concentration and domestic prices. Assuming that the SEF will comprise the findings and recommendations to the Minister, the Clients are of the view that the SEF is deficient. The ADC should have presented evidence of the likely effect of the measures to allow the Minister to weigh the impact of the measures on parties other than the Australian industry.
- (k) The Clients have the following additional observations regarding the discussion of other possible causes of injury as set out in paragraph 8.5 of the SEF:
 - (i) Given that WTC has significant under-utilisation of its factory and that exports to Australia have dropped, there must be a significant question regarding the competitiveness of the offerings from the Australian industry.
 - (ii) Alstom withdrew from the Australian market for reasons other than the alleged dumping.
 - (iii) On page 75 of the SEF, the ADC noted that WTC's corporate and financial costs have increased each year. The costs of depreciation of the upgrade over a 20 year period have impacted on WTC's results. However, that same depreciation would still apply even if the factory capacity utilisation remained high. If a party starts to under-utilise capacity (as in the case of WTC), then the fixed high operating costs become disproportionate to overall revenues (with profits going to paying higher fixed costs). This will become worse if market demand continues to decrease. The decrease in demand for the product generally at the same time as an increase of capacity by WTC at the same time should be seen as the reason for the losses rather than dumping.
 - (iv) The ADC has dismissed certain examples where WTC was unsuccessful in tenders or did not complete contractual negotiations as not detracting from its overall injury findings. However, if the ADC persists with its view that even the loss of one sale could constitute material injury, it appears unreasonable for the ADC to dismiss the impact of those examples.

- (l) In paragraph 9 of the SEF, the ADC has formed the view that dumping and material injury are likely to continue. In so far as that is based on an assessment of alleged current dumping and material injury, the Clients reject the proposition that it should continue in the future as it does not believe that it exists at this point. The Clients believe the decrease in the size of the Australian market, over – investment, ongoing depreciation costs, the lack of successful marketing and tendering procedures and under – utilisation of capacity as being more likely causes of injury to WTC other than any alleged dumping. For these purposes, the Clients would draw the attention of the ADC to the AEMO Report which refers to future further decreases in demand for electricity, and widespread similar reports of declining heavy industry and resources projects. This will further have an adverse impact on WTC and the Australian Industry by way of additional under-utilisation of capacity with fixed costs such as depreciation. The Clients are concerned that the SEF does not appear to have taken account of broader economic factors or their likely effect on the Australian Industry.

Given the commentary above, our Clients are of the view that the findings of the ADC are insufficient to support findings of alleged dumping having been the cause of material injury in the past and in the future.

3. The Goods (paragraph 3 of the SEF)


- 3.1. The Clients share the view of other interested parties that the description of the GUC is so broad as to almost render it meaningless and unworkable especially given that WTC did not, and could not manufacture the full range of those GUC during the Investigation Period. Accordingly, the imposition of any measures on **all** of the goods which fall within the GUC will impose an unnecessary additional expense to parties purchasing the GUC which are, not, in fact, manufactured by WTC. This would be contrary to the Act and the WTO Agreement as well as having an anti-competitive effect.
- 3.2. The Clients also note the extent of the uncertainty regarding whether the Investigation applies to "distribution transformers" and the nature of those transformers. While the Clients agree with the observations by the ADC at paragraph 3.5 of the SEF regarding the characteristics of distribution transformers and that they are not like goods to the GUC, the Clients believe that this confusion further emphasises the problems associated with the breadth of the description of the GUC.
- 3.3. The Clients request that if the ADC is, in future, called upon to consider an application by WTC or other Australian manufacturer of the GUC, the ADC must adopt a more precise description of the goods subject to that application. That description should only relate to the goods actually produced by any applicant. Any concerns on proper identification of the goods could be addressed by adoption of additional statistical codes in the relevant tariff classification.

4. Imposition of Measures

In the commentary above we have identified concerns regarding the description of the GUC covering goods other than that which WTC produces. Further, the ADC has observed that the loss of one sale, could, in itself, constitute material injury. In those circumstances, the imposition of measures on all of the GUC on an indiscriminate basis (with the aim of stopping the loss of one sale alone) could lead to the imposition of measures on a range of GUC produced and exported to Australia which have not been the cause of material injury to the Australian Industry. The imposition of measures in those circumstances would be contrary to the provisions of the WTO Agreement and the terms of the Act to impose measures on goods which are not the cause of material injury to the Australian industry. Even if there is the view that there has been alleged dumping causing alleged material injury to the Australian Industry, then the measures should only be applied to specific products actually produced by the Australian Industry.

We look forward to discussing these matters with you in more detail.

Yours faithfully



Andrew Hudson
Partner

Schedule of Definitions

In this letter, the following terms shall have the following meanings:

- (a) **Act** means the *Customs Act 1901*.
- (b) **ADC** means the Anti – Dumping Commission.
- (c) **AEMO** means the Australian Energy Market Operator.
- (d) **AEMO Report** means the National Electricity Forecasting Report for the National Electricity Market published June 2014.
- (e) **Anti-Dumping Act** means the *Customs Tariff (Anti – Dumping) Act 1975*.
- (f) **Australian Industry** has the same meaning as in the SEF.
- (g) **GUC** means the goods under consideration being the goods the subject of the Investigation.
- (h) **Investigation** means Investigation 219 by the ADC into alleged dumping of power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam.
- (i) **Investigation Period** means the period referred to in the SEF.
- (j) **PRC** means the People's Republic of China.
- (k) **SEF** means the Statement of Essential Facts No. 219 in relation to the Investigation.
- (l) **Streamlining Document** means the document entitled "*Streamlining Australia's anti – dumping system. An effective anti – dumping and countervailing system for Australia*" published by the Australian Government dated June 2011.
- (m) **WTO Agreement** is the World Trade Organization Agreement on Implementation of Article VI of the GATT.
- (n) **WTC or Applicant** means Wilson Transformer Company Pty Ltd being the applicant for the measures referred to in the Investigation.