

10 October 2014

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commercial + international

By email

Dear Director

## **Power transformers exported from China, Indonesia, Korea, Taiwan, Thailand and Vietnam Comments of ABB group companies concerning SEF No. 219**

We refer to the Statement of Essential Facts that was published in the abovementioned investigation on 18 September 2014 ("the SEF").

This is a joint submission of ABB Limited, of Thailand ("ABB Thailand") and of ABB Ltd, of Vietnam ("ABB Vietnam"). The views expressed by ABB Thailand and ABB Vietnam are endorsed by the other ABB group companies that are interested parties in this matter. Collectively, the views of the two companies will be referred to as those of "the ABB companies".

The ABB companies reject the positive dumping margin findings of 3.6% and of 4.7% announced by the Commissioner in the SEF in respect of exports of power transformers to Australia by ABB Thailand and ABB Vietnam respectively.

The finding has no grounding in the *Customs Act 1901* ("the Act"), or under any other Australian law, or under the rules of the World Trade Organisation ("WTO") *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("the Anti-Dumping Agreement").

Our clients have the following comments in relation to the matters dealt with by the SEF and the Commission's overall investigation.

1. The Commission has practised zeroing against the ABB companies in the calculation of their respective dumping margins. Australian law does not permit zeroing. The World Trade Organisation's Dispute Settlement Body has rejected zeroing. Australian agencies and policy makers, such as the Productivity Commission and the Department of Foreign Affairs and Trade, have publicly stated that Australia does not use the practice of zeroing and that Australia should not adopt the practice. The Commission's own Dumping Manual is written on the basis that the practice of zeroing is not employed in Australia.
2. The ABB companies have been denied procedural fairness. The Commission's intention to practice zeroing to thereby transform significant negative margins (no-dumping margins) for

- the ABB companies into significant positive dumping margins, and the way that was to be done, was advised to the ABB companies on the day before the Statement of Essential Facts was issued.
3. **[CONFIDENTIAL TEXT DELETED – matters of concern to the ABB companies regarding probity and representational issues]**
  4. **[CONFIDENTIAL TEXT DELETED – matters of concern to the ABB companies regarding the potential misuse of information]**
  5. Section 269TACB(3) can have no application to ABB Thailand because ABB Thailand only had one purchaser of the goods in the period of investigation, namely ABB Australia.
  6. The application of Section 269TACB(3) to ABB Vietnam has not been properly considered because the examination of whether export prices “*differ[ed] significantly*” does not relate to the purchasers of the goods concerned.
  7. Without detracting from 5 and 6:
    - (a) the Commission’s method of considering whether the export prices of the ABB companies “*differ[ed] significantly*” is inconsistent with the Commission’s declared purpose, as the ABB companies have pointed out in separate correspondence; and
    - (b) the transactions as identified by the Commission for the purpose of Section 269TACB(3) do not “*differ significantly*” nor do they “*differ significantly*” in a way that would render the methods of working out whether dumping has occurred and levels of dumping inappropriate.
  8. The transaction to transaction methodology is appropriate for calculating dumping margins in respect of the ABB companies.
  9. In its application of Section 269TACB(3), the Commission has not used a transaction to weighted average normal value methodology. It has used the transaction to transaction methodology, and has then merely labelled it as a transaction to weighted average normal value methodology.
  10. The sales of the ABB companies with export prices that the Commission alleges “*differ significantly*” took place in respectively confined periods. The Commission’s identification of the entire three year period of the period of investigation as the period of inappropriateness for the purposes of Section 269TACB(3) is illogical and incorrect.
  11. In order to publish a Notice under Section 269TG(1) or (2) of the Act, the Minister must be satisfied that the amount of the export price of the goods is less than the normal value of those goods. The export prices and the normal values of the like goods exported to Australia by any particular exporter are to be determined under Sections 269TAE and 269TAC respectively. The Commission’s resort to zeroing is in conflict with the Minister’s power and cannot be taken into account by the Minister in the exercise of that power.
  12. We perceive that the Commission has not properly considered the question of termination of the investigation against certain exporters on the basis of negligible volumes, because it appears that it has used value and not volume in that consideration.
  13. The comments of the ABB companies which follow concerning the issues of the applicant’s financial position and performance, and whether dumping has caused material injury to the

applicant, are without prejudice to the position of the ABB companies that positive dumping margins cannot be assessed against them in relation to their respective exports over the totality of the period of investigation.

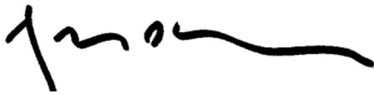
14. The Commission's threshold of materiality of injury – that the loss of one sale due to dumping could cause material injury to the Australian industry– is irrational. Plainly, injury from such a loss would be negligible.
15. The Commission's assessment of the Australian industry's over-investment in itself as not being a cause of injury is unconvincing. Its failure to consider this to be an indication that the industry is not being injured by dumping is a serious omission.
16. The Commission does not properly evaluate the implications of the over-expenditure on power transformers by utilities in the lead up to the period of investigation, and the major contractions in demand that have followed, in its consideration of whether material injury was caused by dumping.
17. Injury caused by transformers that the Commission believes were not dumped must have been severe given the fact that they far exceed the number of allegedly dumped transformers. Injury caused by this factor and by other non-dumping factors should be considered to have reduced any injury caused by dumping to a negligible level, and must not be attributed to dumped imports.
18. The definition of distribution transformers, being transformers that are expressly excluded from the goods under consideration, is not merely a function of their capacity. The definition of a distribution transformer is composed of a number of technical facts as to what a distribution transformer is, and cannot be dictated by capacity or by the production capabilities of the Australian industry or indeed of any other manufacturer.
19. Information available from the Australian Securities and Investment Commission (please refer to the enclosed financial returns)<sup>1</sup> indicate the following information relating to the position of various companies related to the applicant during the period of investigation:
  - (a) Jaberope Pty Limited ("Jaberope") is a trust company that holds the shares in Wilson Transformer Holdings Pty Ltd ("WTH");
  - (b) the shareholding in WTH is Jaberope's major asset;
  - (c) Jaberope is owned by Robert Wilson, Rocavini Nominees Pty Limited and Lumreekie Pty Limited;

<sup>1</sup> The financial returns are not confidential. They are available to the public from the ASIC website on the payment of a fee. However, we understand that when this submission was originally placed on the public record of this investigation, the applicant objected to that placement. We were not made aware of the basis of that objection. The submission was then removed from the public record. Subsequently the Anti-Dumping Commission advised us that it had made enquiries of ASIC and advised that permission from ASIC might be required before the financial returns could be reproduced on the public record of this investigation. We have had no response to our email inquiries to ASIC investigating whether permission would be required, and seeking such permission. Telephone inquiries of ASIC in that regard have been equally fruitless. Accordingly we requested the Commission to place this letter (dated 10 October 2014) with this later-added footnote (added 4 November 2014) on the public record without requiring us to obtain permission for the financial returns to also be placed on the public record. Subparagraphs 19(a) to (i) of this letter set out facts that have been reported to ASIC in those financial returns by the entities concerned.

- (d) Rocavini Nomiees and Lumreekie Nominees are owned by Robert Wilson;
- (e) the directors of Jaberope have been Robert Wilson and Catherine Wilson;
- (f) the applicant, Wilson Transformer Company Pty Limited ("WTC"), is wholly owned by WTH;
- (g) Jaberope had retained earnings of \$9.8m in FY2011, \$13.2m in FY2012 and \$15.4m in FY2013;
- (h) Jaberope had revenues of \$1.6m in 2011 and \$3.9m in 2012, and a profit before income tax of \$2.6m in 2013;
- (i) WTH repaid a \$2.5m loan to Jaberope in FY2013.

Accordingly, the applicant can be seen to have generated significant returns to its investors over the period of investigation. These circumstances must be carefully considered and properly evaluated in the Commission's assessment of the applicant's claim that it has been caused material injury by reason of dumping.

Yours sincerely



**Daniel Moulis**  
Principal

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