

Telephone: 0425 221 036

Email: Andrew.percival@percivallegal.com.au

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By email: operations3@adcomission.gov.au

Director, Operations 3
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601
Australia

Dear Sir,

Non-Confidential

Anti-Dumping Investigation – Exports of Power Transformers from China

As you would be aware, I act for Toshiba International Corporation Pty Ltd and its related bodies corporate in relation to this investigation, including the joint venture company, Changzhou Toshiba Co Ltd (CTC).

This submission is made in response to the Anti-Dumping Commission's email to me dated 18 April 2019 denying a further extension of time for completion of the balance of the exporter questionnaire to CTC.

Obviously, this was disappointing. Nevertheless, our clients will endeavour to comply with the Commission's requirements and continue to cooperate with the Commission. We look forward to the Commission meeting its obligations and completing its investigation within the 155 day statutory timeframe.

Further, the exportation and importation of [REDACTED] power transformers [REDACTED]

[REDACTED], by our clients during the injury period can only be negligible quantities and could not have caused material injury to Wilson Transformers, assuming Wilson Transformers bid for the supply of all or any of those transformers and has the capacity to supply them in accordance with each customer's specific requirements regarding the design, manufacture and supply of the power transformer on the terms and conditions required by the customer.

The comment regarding a Preliminary Affirmative Determination is noted. However, it is unclear how such a Determination could be made in the circumstances – i.e. in relation to capital equipment such as, here, power transformers. [REDACTED], power transformers have been exported to and imported into Australia by our clients under tenders, which involve a variety of considerations such as warranties, compliance with specifications, various terms and conditions for supply, history of supply and other factors. It is not simply a question of price and the power transformers exported to Australia are each

unique as are the terms on which they are supplied, as also are the power transformers supplied in China. They are not directly comparable.

Further, in order for a Preliminary Affirmation Determination to be made, the requirements of s.269TD of the *Customs Act 1901* must be satisfied, as the Commission would be aware. It is unclear how the Commissioner could conceivably be satisfied that the requirements in s.269TD(1) of the *Customs Act 1901* have been satisfied, when each power transformer supplied for export to Australia and those supplied in the domestic market in the country of export are each unique to meet a customer's specific requirements as well as terms and conditions of supply.

Also, as you would be aware, the tender process for capital equipment such as power transformers takes some time and once a contract is awarded to a successful tenderer, the manufacture and supply also takes some time.

“Power transformers are custom designed equipment engineered to suit the requirements of each application, and manufactured to the specifications of the individual utilities, generating facilities and industrial users that purchase the product. Power transformers involve significant capital expenditure and long lead times. When a customer plans a new or replacement transformer, it puts out a request for quotation, detailing the specifications of the unit. Manufacturers, both domestic and international, will then bid on the project and confirm their ability to meet the specifications and required time line for delivery and installation. Development of a bid typically takes three to six weeks and involves a significant degree of engineering input. The period from the date of release of the request for quotation, to the award of the contract, may be three months or more. Once a unit is ordered, completion of the production and test process typically takes six to eight months or more. It is not unusual for more than a year to elapse from the date of the release of the request for quotation to the delivery of the unit.” (Section 2.6.1 of the Consideration Report)

However, if any injury claimed to be incurred by the Australian industry is incurred at the time when it is not the successful tenderer. Any such injury cannot subsequently be remedied by securities on imports pursuant to contracts that have been awarded. What evidence does the Commission have that the taking of securities will prevent injury from occurring during the remainder of the investigation and what injury would be so prevented from occurring to the Australian industry? What evidence does the Commission have that tenders for power transformers will be awarded during the remainder of the investigation and if such tenders are awarded what evidence does the Commission have that those tenders would be awarded to a foreign producer and not the Australian industry? This is effectively recognised in the Consideration Report:

“Power transformers are complex, engineered-to-order capital products with an operating life ranging from 30 to 50 years. The production and sales data for power transformers reflect high fixed costs and high unit prices, and hence a reduction in the capacity utilisation of a producer of such capital goods will severely affect the company's longer term economic and financial performance. Therefore, injury from the loss of a tender contract is likely to have severe and long-lasting injurious effects on the domestic industry.”

No justification is given for the statement that the loss of a tender “is likely to have severe and long-lasting injurious effects on the domestic industry”, particularly when a tender is for the supply of a specific power

transformer that is unique and meets the customer's specific requirements. What are the "long-lasting injurious effects"? This is not addressed.

Further, if the loss of a tender is to have "severe and long-lasting injurious effects", it raises the question of whether there is an underlying problem with Wilson Transformer's power transformer business regardless of the reason why it is unsuccessful in a tender to supply a power transformer. This has not been addressed. In any event, any injury claimed to have been incurred must be "material injury" and that "material injury" must be causally linked to dumping by exporters and there is no evidence of dumping. Indeed, in the previous investigation, it was found that exports from China were not at dumped prices. What has changed? See further below. This also has not been addressed

If any claimed injury is actually incurred with the unsuccessful bid for a contract, whatever the reasons for the bid being unsuccessful. No securities or, for that matter, antidumping measures will remedy any long-lasting injurious effects. The contract has been lost. Any application of securities or, for that matter, antidumping measures, on power transformers supplied under such contracts would be punitive and would not and could not remedy any injury that already may have occurred with the awarding of the contract for supply of a transformer. It simply would be a punitive, revenue raising device for the benefit of the Federal Government, which is not the role of securities and antidumping to prevent material injury to the Australian caused by dumping.

Also, the taking of securities in relation to supply of a particular power transformer assumes that the amount of the security can be quantified in relation to that particular power transformer. That is what is the level of dumping in respect of that power transformer. This would not seem feasible.

In the previous investigation into exports of power transformers to Australia, the Commission used a weighted average value to determine dumping. This was a fundamentally flawed methodology as it failed to recognise that each power transformer supplied for export and for supply into the domestic market in the country of export is unique, as are their terms and conditions of supply, as is recognised by Wilson Transformers and by the Commission. It would seem that the supply of capital equipment, such as power transformers, which are supplied by tenders for each item of capital equipment are trying to be treated as commodity products that is what dumping rules are geared towards and not capital equipment.

Each exported power transformer needs to be compared to a similar domestically sold power transformer. Due to the uniqueness of the power transformers sold for export and on the domestic market it is likely that substantial adjustments would need to be made in order to compare like with like. Even after making substantial adjustments it is unlikely that a fair comparison between an exported transformer and a domestically sold transformer could be made to determine if the price for the supply of a power transformer pursuant to a tender contract was at a 'dumped price'. Further, even if such a comparison resulted in a 'dumping margin' how can the Commissioner be satisfied that the 'dumping' was the cause of material injury when the awarding of a tender for capital equipment, such as a power transformer, is made after the consideration of many factors other than simply the purchase price?

The starting point should be to ascertain the facts in relation to exportations and domestic sales in the country of export and to apply the law to those facts, not the other way around. Perusal of any court cases would confirm this as the appropriate methodology. As an investigative entity, the Commission should first ascertain what the facts are in a particular investigation and then apply the law to those facts.

Here the facts are that the export of each transformer and the sale of a power transformer in the country of export are unique to meet customer specifications and terms and conditions. No two are alike. A weighted average value to calculate dumping margins ignores and does not reflect this commercial reality.

Also, the question arises as to what projects for the supply of power transformers has Wilson Transformers actually bid for? This should be the starting point of the investigation. If it has not bid for certain projects, then it cannot complain to have been injured. Does the Commission know what projects Wilson Transformers has bid for, which it has not bid for, and for those it has bid for, and was not successful, compared to those which it has bid for and was successful? This is essential for the injury assessment and for any Preliminary Affirmative Determination (see s.269TD(4) of the *Customs Act 1901*).

Finally, in its previous application for the imposition of antidumping measures on transformers exported from China, Wilson Transformers used its own pricing to calculate a deductive export price and constructed normal value with “estimated” adjustments to both. It calculated a dumping margin of 34.6% for exports from China. However, the Commission determined that exports from China were at negligible (i.e. less than 2%) levels based on verified information. Wilson Transformers has used the same or similar methodology in its current application and concluded that the dumping margins range from 2.4% to 36.1% with an overall margin of 20.3% or, subject to certain adjustment, an overall margin of 25%.

The problem is that if Wilson Transformers’ dumping calculation in its application in the previous investigation into power transformers from China was unreliable and far from the actual facts, why has it been accepted in its current application? What has changed? What evidence has been provided to support that circumstances are now different than what they were at the time of the previous application?

Also, Wilson Transformer’s application does not comply with Article 5.2 of the WTO Antidumping Agreement. It is “simple assertion, unsubstantiated by relevant evidence” that does not comply with the paragraphs in Article 5.2, including paragraph (iii). In the circumstances, it would seem, with respect, that the Commission has not complied with Australia’s international legal obligations under Article 5.3 of the WTO Anti-Dumping Agreement to determine whether there is ‘sufficient evidence to justify the initiation of an investigation’.

The Commission states in the Consideration Report that, because of the bespoke nature of power transformers, an applicant such as Wilson Transformers can “*only provide information reasonably available to it*”. We submit that this is the wrong test. Article 5.2 of the WTO Anti-Dumping Agreement requires an application to include “*evidence*” of dumping, material injury and causation, and simple assertion unsubstantiated by relevant evidence is not sufficient.

Also, under Article 5.3 of the WTO Antidumping Agreement it is the international legal obligation of the Commission to “*examine the accuracy and adequacy of the evidence provided in the application and determine whether there is sufficient evidence*” to justify the initiation of an investigation. It seems to us that these requirements have not been complied with. The calculations used by the Applicant in its previous application to support its claim of alleged dumping were proven to be “*simple assertion, unsubstantiated by relevant evidence*”. The Applicant has provided similar calculations in its current application without including evidence to support its claims. Accordingly, the investigation should not have been initiated and should be terminated.

Also, there are a number of problems with the Consideration Report, including reliance on Wilson Transformers' dumping calculation methodology. However, there are also problems with other parts of the Consideration Report. For example:

- (a) Section 2.5.2 – a preliminary market size: a market size has been calculated, using information provided by Wilson Transformers, based on “sales values”. This is not meaningful, for several reasons. Wilson Transformers would not know what are the “sales values” of transformers supplied from China. It is mere speculation. Second, it is commonly acknowledged that each power transformer is unique and supplied to each customer after an extensive tender process. This is acknowledged in the Consideration Report itself. It follows that each power transformer will have a different “sales value”. Consequently, there is no homogenous “market” for power transformers;
- (b) Section 4.5.1 – this section details Wilson Transformers' sales volumes but as set out in section 2.6.2 of the Consideration Report, there a variety of economic factors affecting demand for power transformers. This section does not address those economic factors, nor their impact on Wilson Transformers' sales volumes or the categories of power transformers so affected;
- (c) Section 4.5.2 – this section purports to address market share and the comments in paragraph (a) above apply equally here;
- (d) Section 5.4.2 – this section purports to show price undercutting but was based on “estimated” prices of winning bids by Chinese importers. In our submission, this is mere speculation. Further, as is commonly acknowledged, tendering for the supply of power transformers takes a significant period of time and tenders must meet the specific specifications and other requirements of a customer. It is highly unlikely that price would be the sole determinant of a purchasing decision. This is recognised in the Consideration Report:

“Power transformers are highly complex, technical, engineered-to-order capital products. The successful tenderer must demonstrate the capacity to meet the end use requirements of the purchaser, to which end the imported and locally produced power transformer must be functionally identical.”

Has this been assessed?

Further, Figure 7 is misleading, not only because the so-called Chinese prices do not differentiate between power transformers and the terms and conditions on which they are being supplied, but also because it does not identify which tenders Wilson Transformers bid and which ones it was unsuccessful and why. Given the section on sales volumes, it must have been successful in a considerable number of tenders. It also does not identify those tenders that Wilson Transformers did not bid on and why.

Conclusion

For the foregoing reasons it is submitted that:

Blue 2 Pty Ltd trading as Percival Legal
ABN 68 600 589 151

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- (a) this investigation should not have been initiated but the application should have been rejected;
- (b) there is no basis for the making of a Preliminary Affirmative Determination; and
- (c) the taking of securities will not prevent injury in relation to tenders that have already been awarded and would not prevent injury in relation to tenders to be awarded during the remainder of the investigation because the amount of any such securities cannot be quantified given that each power transformer to be supplied is unique.

It is submitted that this investigation should be terminated for the foregoing reasons as well as those in our previous submission.

If you have any queries, please let me know.

Yours sincerely



Andrew Percival

T: +61 (0) 425 221 036

E: andrew.percival@percivallegal.com.au

W: www.percivallegal.com.au

