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26 November 2019

Mr Matthew Williams
Director, Investigations 3
Anti-Dumping Commission
Level 35, 55 Collins Street
Melbourne VIC 3000

**PUBLIC DOCUMENT**

Dear Matthew,

**Anti-Dumping Commission (ADC) Investigation 507**
**Power Transformers (PTs) exported from the People's Republic of China (China)**
**Wilson Transformer Company's (WTC's) Further Response to the Statement of Essential Facts 507 (SEF 507)**

WTC has further reviewed SEF 507 following its submission dated 10 November 2019. Following this further review WTC considers that in SEF 507 and in Investigation 507 generally:

1. The ADC failed to recognise the importance of properly establishing whether relevant transactions should be treated as arms length.
2. The ADC failed to apply the correct (or any) statutory test for whether exporter / importer transactions should be treated as arms length.
3. The ADC failed to properly characterise the commercial relationships between related parties of multinational importers/exporters.
4. The ADC wrongly treated transactions as arms length and so failed to use the correct provision for determining export prices.
5. The ADC failed to correctly calculate export prices and dumping margins.
6. The ADC failed to properly assess the materiality and causation of injury that should be attributed to dumping by multinational PT suppliers.

WTC considers that the ADC's failures stemmed from fundamental errors and was not merely a failure to properly write up its findings. The ADC fundamentally failed to investigate the matters and ask the questions that it was obliged to. As a result, the ADC failed to properly calculate export prices, dumping margins and to assess injury.

WTC considers that the ADC has no option but to properly investigate arms length issues between China based multinational exporters and related party importers and make the resulting necessary corrections to its analyses in SEF 507. WTC should be given greater access to details of the ADC's arms length and injury analyses.

## Contents

## 1. The ADC failed to recognise the importance in this investigation of properly establishing whether relevant transactions should be treated as arms length

WTC considers that the ADC has failed to recognise the importance in this investigation of properly establishing whether relevant transactions should be treated as arms length.

*Arms length issues of primary importance generally*

WTC considers that identifying arms length issues and ensuring that dumping margins are not affected by any non-arms length transactions is given primary importance in the *Customs Act 1901* (Act).[1] It is incumbent on the ADC to obtain reliable prices that are unaffected by any association or compensatory arrangement[2] otherwise exporters and importers (and particularly related exporters and importers) could drive a horse and carriage through the Act by arranging their transactions to wrongly show that there is no dumping.

*Arms length issues never more relevant and crucial than in Investigation 507*

WTC considers that properly establishing arms length transactions has never been more relevant and crucial to the outcomes than in Investigation 507. Properly establishing arms length transactions is highly relevant and indeed crucial to Investigation 507 because each of the main exporters is related to an Australian importer. In addition each of these exporter / importer pairings is related to a large foreign-owned multinational company. In particular:

| **Related importers** | **Related exporters** | **Related multinational company or group** |
|---|---|---|
| Siemens Australia | Siemens Jinan, Siemens Wuhan | Siemens AG |
| GE Grid Australia Pty Ltd | GE Wuhan | General Electric Company |
| ABB Australia Pty Ltd | ABB Zhongshan, ABB Chongqing | ABB |
| Toshiba International Corporation Pty Ltd | Changzhou Toshiba Transformer Co Ltd | Toshiba conglomerate |

*ADC nonetheless gave scant or erroneous attention to arms length matters*

Notwithstanding the clear relevance of arms length assessments to this investigation WTC considers that the ADC gave scant or erroneous attention to the issue. WTC considers that the ADC failed to apply the correct (or indeed any) statutory test for whether exporter / importer transactions should be treated as arms length and that this failure infected the subsequent calculation of dumping margins and its assessment of injury.

[1] Sections 269TAA, 269TAB(1), 269TAC(1).

[2] Manual at chapter 5; Reinvestigation – A4 Copy Paper, 11 December 2017 at 6.4.2.

## 2. The ADC failed to apply the correct (or any) statutory test for whether exporter / importer transactions should be treated as arms length

WTC considers that the ADC failed to apply the correct statutory test for whether exporter / importer transactions should be treated as arms length. In key documents, the ADC does not state and does not refer to *any* statutory test in assessing whether transactions should be treated as arms length.

*Statutory test for treating transactions as arms length – not stated or referred to in SEF 507*

WTC understands that the statutory framework for when the Commission must not or may not treat the purchase or sale of goods as arms length is contained in s 269TAA of the Act.[3] Subsection 269TAA(1) is of particular relevance to Investigation 507; it states that a purchase or sale of goods shall not be treated as an arms length transaction in any of the following circumstances:

> (a) there is any consideration payable for or in respect of the goods other than their price; or
>
> (b) the price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or
>
> (c) in the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

It is curious that, given the clear importance of establishing arms length in this case (see section 1 of this submission), the ADC in SEF 507 neither states the statutory test nor even refers to s 269TAA.

*Statutory test not stated or referred to in importer reports*

WTC considers it is fatal to the ADC's findings in SEF 507 that the visit reports to the related party importers neither state the statutory test nor refer to s 269TAA; the findings in these reports form part of the foundation for the findings in SEF 507.[4] Apparently absent statutory guidance those verification teams purportedly reached (cursory) findings on arms length;[5] unsurprisingly the test used by the importer verification teams was not the correct statutory test for treating transactions as arms length contained in s 269TAA(1).

*Statutory test wrongly stated in exporter reports*

The visit reports to related party exporters at least refer to s 269TAA however these do not state the correct test. For example the exporter verification report for the Siemens exporters states a test in the following terms (referring to s 269TAA, emphasis added by WTC):[6]

- there was any consideration payable for, or in respect of, the goods other than its price; or
- the price *was* influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or
- the buyer, or an associate of the buyer, was not directly or indirectly reimbursed, compensated or otherwise received a benefit for, or in respect of, the whole or any part of the price.

Putting aside the differences between the ADC's third bullet point and the Act, the ADC in bullet point 2 has applied a test of whether price *was* influenced by certain relationships. The correct test (contained in s 269TAA(1)(b)) is whether price *appears to be* influenced by those relationships.

[3] Subsequent references to statutory provisions refer to provisions in the *Customs Act 1901*.
[4] SEF 507 at footnote 22.
[5] See for example section 3.8 of the Siemens verification visit report.
[6] EPR document 42.

*The ADC not at liberty to ignore the express words of the statute*

The ADC is simply not at liberty to ignore the express words of the statute and to replace those words with its own preferred test. If the ADC imagined that its test and the statutory test were the same then WTC would refer the ADC to the elementary rule of statutory interpretation that all words in a statute must be given meaning and effect.[7] That rule of statutory interpretation states the general principle that the courts are not at liberty to consider any word or sentence as superfluous or insignificant;[8] through the courts' role in supervising the legality of administrative decision making[9] the ADC must adhere to the same principle of statutory interpretation or face having its decisions struck down on review.

*The ADC's error is foundational to the investigation*

The failure of the ADC to apply the correct (or in some cases any) test for arms length is foundational. The importer questionnaires fail to broach the topic at all. The exporter questionnaires do so only as a box ticking exercise; see for example the cursory (two line) question and equally cursory (and redacted) response at B-1.3 of the Siemens exporter questionnaire response.

WTC considers it clear on the face of the ADC documents that the verification teams failed to apply the correct (or in some cases any) statutory test for treatment as arms length in an investigation where this is a highly relevant and crucial question.

WTC considers that it would not suffice in this case for the ADC to rely on disclaimers made in its visit reports that the views of the case team may not reflect the final position of the ADC. It is clear that proper and adequate inquiries concerning the relationships between multinational importers / exporters of PTs have simply not been made.

[7] *Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ; *Beckwith v R* (1976) 135 CLR 569 at 574 per Gibbs J; *Leon Fink Holdings v Australian Film Commission* (1979) 141 CLR 672 at 679 per Mason J with whom Barwick CJ agreed at 674 and Aickin J agreed at 680; see the numerous other cases cited at 2.26 of *Statutory Interpretation in Australia* 8ed, Pearce and Geddes.

[8] Section 2.26 of *Statutory Interpretation in Australia* 8ed, Pearce and Geddes.

[9] *Judicial Review of Administrative Action and Government Liability* 6ed, Aronson, Groves and Weeks at section 2.10.

## 3. The ADC failed to properly characterise the commercial relationships between related parties of multinational importers/exporters

WTC considers that the ADC failed to properly characterise the commercial relationships between related parties of multinational importers/exporters as appearing to influence prices.

*The conclusion reached by the ADC was highly surprising and was despite all appearances*

The ADC's uncritical acceptance of the claims of multinational importers / exporters belies all appearances that would be, frankly, beyond obvious to even a casual member of the public. Would a casual member of the public think for a moment that prices between subsidiaries of a multinational company were set in a manner that was not influenced by that relationship? WTC considers that the casual member of the public would be very surprised to learn that a body tasked with investigating such matters, in this case the ADC, reached such a conclusion. If the ADC reached such a conclusion on the basis of scant or erroneous inquiry the public would be entitled to be highly sceptical of that conclusion.

*The ADC drew wrong conclusions from (wrongly stated) tests*

WTC observes that the circumstances in s 269TAA(1)(a)-(c) strictly govern the treatment of transactions as arms length; if one or more of those circumstances pertains then the chapeau of s 269TAA(1) makes it clear that there is no statutory discretion, the transactions must not be treated as arms length. Neither is it the case that these are merely matters that should be considered in making an assessment of arms length; they are standalone considerations that, if any of those circumstances pertain then transactions must be treated or deemed as not arms length.[10]

On that basis the conclusion in the exporter reports for Investigation 507, following stated findings in terms of s 269TAA(1) (although incorrectly stated as set out in section 2 of this submission), is wrong. That conclusion, for example in the Siemens Jinan exporter verification report is that, based on the (incorrectly stated) tests in s 269TAA(1), "the verification team *therefore* considers that all export sales to Australia made by Siemens Jinan during the period were arms length transactions" (emphasis added).[11] It is clear that the verification team wrongly considers that the matters in s 269TAA(1) are concerned with whether in fact the transactions are or are not arms length rather than whether (as the provision states) such transactions must be *treated* as arms length.

Similarly the conclusion in the importer reports for Investigation 507, following stated findings similar to those findings in the exporter verification reports, is also wrong. That conclusion wrongly treats the matters in s 269TAA(1) (again wrongly stated and the statute is not referred to) as "considerations" in making an arms length assessment.[12] The matters in s 269TAA(1) are not considerations in making an arms length assessment and so (even had those matters had been correctly stated) would be an incorrect application of the tests in s 269TAA(1).

*The ADC failed to properly assess whether transactions were arms length in fact*

WTC considers it clear that the ADC misconstrued the matters in s 269TAA(1) as "considerations" in making an arms length assessment rather than standalone criteria that, if satisfied, would require the ADC to treat the transactions as non-arms length.

WTC observes that the term arms length is not defined in s 269TAA(1),[13] that subsection only states circumstances where transactions must not be *treated* as arms length. Neither is the term defined elsewhere in s 269TAA or the Act. Arms length is not a term of art such that the ADC would consider transactions as arms length when no one else would; rather the ADC must follow a well-known rule of

[10] *Nordland Papier AG v Anti-Dumping Authority* [1999] FCA 10 at [19].
[11] *Exporter Verification Report, Siemens*, EPR document at section 6.3.
[12] See for example for example the Siemens importer verification report at section 3.8.
[13] *Nordland Papier AG v Anti-Dumping Authority* [1999] FCA 10 at [17].

statutory interpretation that, in the absence of a definition, terms should be taken to be used in their ordinary sense.[14]

On that basis if the ADC had properly found that s 269TAA(1) did not apply, and so there was no requirement that the ADC must not treat the transactions as arms length, it was not then excused from assessing whether the transactions were in fact arms length (in the ordinary sense of that term).[15] That would have been the correct approach in the circumstances of Investigation 507 where, frankly, Blind Freddy could see the multinational PT suppliers have a strong case to answer concerning the arms length nature of their intra-group transactions.

Instead the ADC erroneously treated the matters in s 269TAA(1) as the considerations in making an in-fact assessment of arms length and so failed to conduct a fulsome and proper in-fact assessment of arms length as it should reasonably have done. The ADC is the investigatory body tasked with making these assessments and so the failure is significant.

*Prices between related party companies of multinationals would appear to be influenced by relationship*

The ADC has not applied the correct statutory test for whether or not to treat exports by the multinationals as arms length. In particular the ADC has not properly applied s 269TAA(1)(b). That test is whether price between, for example, Siemens Australia and Siemens Jinan *appears* to be influenced by the commercial or ownership relationship between them; this test lowers the normal (civil) standard of proof of the balance of probabilities (consistent with Article 2.3 of the Anti-Dumping Agreement setting procedures where export price "appears" unreliable)[16] and requires that the ADC approach the issue, as stated in the relevant explanatory memorandum, "based on what the available information *suggests*" (emphasis added).[17]

If the ADC had applied the correct test WTC considers that prices between related party companies of these multinationals would appear to be influenced by that relationship. On that basis, transactions must not be treated as arms length.

[14] *R v Peters* (1886) 16 QBD 636 at 641 as cited in Statutory Interpretation in Australia, 8ed, Pearce and Geddes at [3.30].

[15] The ADC has itself made this very point, see its report *Reinvestigation – A4 copy paper – Brazil, China, Indonesia, Thailand*, 11 December 2017 at page 21.

[16] Anti-Dumping Agreement at Article 2.3; Explanatory Memorandum to the *Customs Amendment (Anti-dumping Measures) Bill 2013* that amended s 269TAA(1)(b) introducing the words "appears to be" at [21]; *Statutory Interpretation of Legislation* 8ed, Pearce and Geddes at [2.26] that the principle of statutory interpretation that all words in a statute have meaning and effect is "more compelling" if words have been added by amendment.

[17] Explanatory Memorandum to the *Customs Amendment (Anti-dumping Measures) Bill 2013* at [22]; see also ADC report *Reinvestigation – A4 copy paper – Brazil, China, Indonesia, Thailand*, 11 December 2017 at section 4.4.2.

## 4. The ADC wrongly treated transactions as arms length and so failed to use the correct provision for determining export prices

WTC considers that the ADC wrongly treated transactions between related parties of multinational importers/exporters as arms length and so failed to use the correct provision for determining export prices.

As set out above in section 3 of this submission WTC considers that if the ADC had applied the correct test in s 269TAA(1)(b) it would find that prices between related party companies of multinational PT producers would appear to be influenced by their commercial and ownership relationships. On that basis, the ADC wrongly treated transactions between related parties of multinational importers/exporters as arms length.

*The ADC wrongly used s 269TAB(1)(a) and multinationals' internal transfer prices to determine export prices*

Having erred in its arms length assessment the ADC compounded the problems in its analysis by applying s 269TAB(1) using that erroneous finding. The ADC's uncritical acceptance of multinational PT producers' arms length claims resulted in the ADC for the most part using s 269TAB(1)(a) to determine export prices. That resulted, for example, in the ADC uncritically accepting the Siemens' internal transfer prices as the starting point for its export prices.[18]

Surprisingly, even though the Toshiba exporter was uncooperative, the ADC treated its sales to the Toshiba importer as arms length and uncritically accepted the Toshiba internal transfer price as the starting point for its export price.[19]

*The ADC should have calculated a deductive export price under s 269TAB(1)(b) or s 269TAB(1)(c)*

WTC considers that the ADC should rather have used s 269TAB(1)(b) (or perhaps s 269TAB(1)(c)) to determine export price. Consistent with the statutory requirement not to treat transactions as arms length the ADC should rather have calculated a deductive export price in accordance with s 269TAB(1)(b) or using a deductive export price methodology under s 269TAB(1)(c).

[18] SEF 507 at 6.9.2 and 6.10.2.
[19] SEF 507 at 6.6.2.

## 5. The ADC failed to correctly calculate export prices and dumping margins

WTC considers that the ADC failed to correctly calculate export prices and this in turn led to the ADC incorrectly calculating dumping margins for the multinational PT suppliers.

As set out above in this submission, WTC considers that the ADC applied the wrong test for whether multinational importer / exporter prices should be treated as arms length. The ADC did not apply the statutory test as it should have done, and so wrongly treated transactions between related parties of multinational importers/exporters as arms length.

*The ADC failed to cure arms length issues that rendered export prices and dumping margins unreliable*

Australia's anti-dumping legislation, reflecting the WTO Anti-Dumping Agreement, amply provides for circumstances where it appears prices are rendered unreliable by arms length issues.[20] The ADC has failed to use those provisions to cure arms length issues in Investigation 507 and so dumping margins using those export prices have themselves been rendered unreliable.

WTC considers that, had arms length issues been properly investigated and cured then importers / exporters such as Siemens would have been found to be dumping and dumping margins for other importers / exporters would have been materially greater.

[20] Article 2.3 of the WTO Anti-Dumping Agreement provides: "In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine"; consistent with the WTO Anti-Dumping Agreement, s 269TAB(1)(b) provides for calculating a deductive export price using as a the starting point the price at which the importer sold the goods to a person not associated with the importer and the ADC practice is to use the same methodology under s 269TAB(1)(c) to cure arms length issues (see section 6.4.2 the ADC report *Reinvestigation – A4 copy paper – Brazil, China, Indonesia, Thailand*, 11 December 2017).

## 6. The ADC failed to properly assess the materiality and causation of injury that should be attributed to dumping by multinational PT suppliers

WTC considers that the ADC failed to properly assess the materiality and causation of injury that should be attributed to dumping by China based multinational exporters.

*Arms length errors infecting the dumping margin render injury analysis materially flawed*

WTC considers that the dumping margins used by the ADC in its injury and causation analysis are infected by the ADC's failure to properly investigate and cure arms length issues in the transactions of multinational PT suppliers. Accordingly, the ADC's injury and causation analysis, relying as it does on flawed dumping margins, is likewise foundationally and materially flawed.

*The ADC's assessment of projects lacks transparency, consistency and in some cases simply fails to reach a view*

The ADC's assessment of 8 projects substantially lacks transparency. It is not clear for example when the ADC's analysis uses actual tender prices or "adjusted bid pricesThe ADC's assessment lacks consistency, for example it discounts injury in projects 2, 3 and 4 on the basis that the "tender evaluations were based solely on price"[21] (it is not clear if this is based on the "threshold" although the threshold is itself entirely price based) yet elsewhere the role of price in tenders is played down.[22] For project 5 the ADC appears to have entirely abandoned any with and without analysis when it uncritically repeats the tender evaluation documents that WTC ranked lower on the "value for money" principle; the ADC does not appear to even consider how WTC's ranking would change in the absence of dumping.

For two projects, projects 7 and 8, the ADC entirely abandons the field of play and declines to come to any conclusion of the outcomes in the absence of dumping;[23] this appears to be a basic failure by the ADC to perform its statutory function to investigate and reach a view on such matters. ".[24] For project 8, the ADC clearly did not evaluate the cost of losses and other matters presented as a confidential attachment in WTC's first response to the SEF. WTC also observes that these non findings were in spite of the tender being awarded to the lowest priced bidder (project 7) and price appearing to be the deciding factor (project 8);[25] that is inconsistent with the ADC stating that there was no injury for projects 2, 3 and 4 on the basis of price.

In the interests of transparency WTC lawyers should be given access to the details of this analysis (subject as necessary to non disclosure undertakings).

[21] SEF 507 at page 79.
[22] SEF 507 in section 8.4.2 generally.
[23] SEF 507 at page 80.
[24] SEF 507 at page 77-78.
[25] SEF 507 at page 80.

## 7. The ADC must properly investigate arms length issues between China based multinational exporters and related party importers

WTC considers that the ADC has no option but to properly investigate arms length issues between China based multinational exporters and related party importers and make the necessary concomitant corrections to its analyses in SEF 507.

A proper investigation of such matters must include an assessment of whether such transactions must not be treated as arms length for the reason that one or more of the circumstances in s 269TAA(1) pertain and, if none of those circumstances pertain then an investigation of whether the transactions are in fact arms length.

*Multinationals will resist a proper investigation of arms length matters*

WTC considers that the ADC, if it resolves to properly investigate arms length matters, will face significant resistance from these multinationals. This will no doubt be compounded by lawyered up multinational PT suppliers insisting on confidentially and that the arrangements between constituent subsidiaries of the multinationals will almost certainly be complex and opaque.

*WTC lawyers must be allowed access to information from multinationals in further arms length investigations and to details of injury analyses*

WTC is concerned that the ADC has uncritically accepted arms length claims of multinational PT suppliers and WTC is not confidant that the ADC would stand up to these suppliers in further arms length investigations. In order to address this genuine concern and to ensure some degree of transparency WTC considers that its own lawyers should be allowed to draft questions for the ADC to put to the multinational PT suppliers and, subject to suitable non disclosure undertakings, attend any further interviews with multinational PT suppliers and be provided with all information provided to the ADC in any further assessment of arms length matters. WTC considers that nothing less will restore confidence in the ADC's resolve and ability to properly investigate arms length issues in Investigation 507.

In addition WTC's lawyers should have access to details of the ADC's injury analyses.

Yours sincerely,

**Robert Wilson**
**Executive Chairman**