

19 December 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 submission regarding Statement of Essential Facts 507
(SEF 507)**

The ADC's injury analysis is critically flawed

WTC makes the following further submissions regarding the ADC's injury analysis in SEF 507:

1. The ADC failed to recognise the nature of injury suffered by WTC, loss of commercial opportunities (see section 1 below).
2. The ADC causation analysis is myopic, static and ignores likely second order effects (see section 2 below).
3. The ADC's framework of analysis was applied inconsistently and to WTC's prejudice (see section 3 below).

WTC considers in any event that the ADC failed to properly assess arms length matters for multinational PT suppliers. If the ADC had properly assessed those arms length matters then it would have found greater injury caused by dumping. WTC's submissions concerning the ADC's treatment of arms length matters in Investigation 507 are contained in WTC's submissions dated 26 November 2019 and 12 December 2019.

Siemens financial data cannot be relied upon

WTC has previously queried the reliability of Siemens' financial data used to calculate dumping margins.¹ The 2018 data recently filed by Siemens for its Jinan plant containing revised 2017 data confirms WTC's concerns. See section 4 below for WTC's further submissions concerning Siemens' financial data.

¹ WTC submission of 10 November 2019 at section 5.

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1. The ADC failed to recognise the nature of injury suffered by WTC, loss of commercial opportunities

WTC considers that the ADC has failed to recognise the nature of injury suffered by WTC, namely the loss of commercial opportunities.

The ADC appears to labour under a misapprehension that it must definitively find that, absent dumping, WTC would have won a tender before it ascribes any injury to the dumping.² The ADC's narrow view of what constitutes injury in Investigation 507, at least for volume injury, is starkly stated at page 83 of SEF 507:

The decision point, where any injury in the form of lost volumes are crystallised, is when a tender is evaluated and a winning party is chosen.

Loss of a commercial opportunity is actual loss

WTC considers that the ADC's narrow view of what constitutes loss in this investigation fails to recognise actual loss suffered by WTC in the form of loss of commercial opportunity. WTC makes the following observations regarding the loss of commercial opportunity:

- It is settled law that loss of a chance or opportunity is to be regarded as actual loss.³
- The principle has broad application: the courts have recognised that damages for such loss may be awarded for deprivation of any commercial opportunity whether resulting from breach of contract, tort or statutory contravention.⁴
- The loss of a chance of being the successful tenderer for a commercial undertaking is expressly recognised in the case law as an example of such an actual loss.⁵
- The resulting loss or injury suffered can be quantified by reference to the degree of likelihood of the outcome of the tender (or other commercial opportunity).⁶
- Loss is recognised even if the realisation of the opportunity (eg winning the tender) was improbable, even as little as a one per cent chance of realisation.⁷

It is open to the ADC to assess injury arising from the loss of commercial opportunities caused by dumping

WTC is not aware of any instances where the ADC has assessed the injury caused by the loss of a commercial opportunity however the matters the ADC may have regard to are broad and couched in terms that permit an assessment based on likelihood of the outcome of an opportunity. In particular the ADC may have regard to:⁸

any effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the relevant economic factors in relation to the Australian industry

In any event s 269TAE(1) expressly provides that the broad matters to which the ADC may have regard should not limit the generality of the question of whether material injury has been caused to the Australian industry.

Accordingly, WTC considers that it is open to the ADC to assess injury that is caused by dumped imports depriving the Australian industry of the loss of commercial opportunities (ie tenders). Further, many PTs are

² See SEF 507 section 8.4.2 generally and the analysis of Projects 1, 5, 6 and 8 in particular.

³ *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [20] and *Naxakis v Western General Hospital* [1999] HCA 22, per Gaudron J at [29].

⁴ *Cheshire & Fifoot, Law of Contract*, 10th Australian Ed at 23.14; *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [38].

⁵ *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [11].

⁶ *Cheshire & Fifoot, Law of Contract*, 10th Australian Ed at 23.14.

⁷ *Cheshire & Fifoot, Law of Contract*, 10th Australian Ed at 23.15.

⁸ See s 269TAE(1)(g).

sold in the Australian market by tender and so WTC considers that that would be a correct and preferable approach to assessing injury causation in this case.

Clear on the facts: WTC lost real and valuable chances of being the successful tenderer

WTC considers that it is clear on the facts before the ADC that WTC lost real and valuable chances of being the successful tenderer of its PTs.⁹ That loss was caused by dumped PTs and materially injured WTC.

WTC considers that at least for Projects 6, 7 and 8, WTC lost real and valuable chances of being the successful tenderer due to bids by suppliers of dumped PTs.

In particular, WTC was effectively deprived of a real and valuable chance of being the successful tenderer for Project 8 by substantially dumped PTs. SEF 507 states that for Project 8 the “significant price difference” influenced the purchaser and that price was the “deciding factor”.¹⁰ It is clear that adjusting the price of dumped PTs to an undumped price substantially lessened the price difference¹¹ and, by the ADC’s own analysis, brought the price difference within the threshold where WTC might have won the tender notwithstanding some remaining price difference.¹² While the ADC found itself unable to reach a conclusion regarding the outcome of Project 8 in the absence of dumping it must at least concede that dumping in that case deprived WTC of a real and valuable chance of being the successful tenderer; on that basis WTC suffered actual loss¹³ and, given the size of Project 8, that loss was materially injurious.¹⁴

It is also clear from the facts of Project 6 that the substantial adjustment for dumping to the winning bid opened up the bidding for undumped PTs. The ADC considers that the second placed (presumably non dumping) bidder would have been awarded the tender and so WTC would have had the real and valuable opportunity to bid against undumped PTs; it can be readily inferred that that may have resulted in WTC achieving a place or higher ranking in the shortlisting with resulting further commercial opportunities (for example being included on the panel for future bids).

SEF 507 states that the supplier of dumped PTs in Project 6 was a member of at least one panel¹⁵ and that inclusion on panels is based, in part, on bids from potential suppliers.¹⁶ On that basis, given that bids are based on dumped prices¹⁷ WTC might well be displaced on panels by suppliers of dumped PTs; it can be readily inferred that that would result in WTC being deprived of valuable opportunities to bid for projects (this is mitigated only in part by the fact that purchasers will sometimes go “off panel”).¹⁸

⁹ *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [11].

¹⁰ SEF 507 at page 80.

¹¹ SEF 507 at Figure 19.

¹² SEF 507 at page 79.

¹³ *Sellars v Adelaide Petroleum NL* [1994] HCA 4, per the majority at [20] and *Naxakis v Western General Hospital* [1999] HCA 22, per Gaudron J at [29].

¹⁴ In any event WTC considers that it would have won Project 8 in the absence of dumping. Attachment 4 of WTC’s 10 November 2019 submission demonstrates why, absent dumping, WTC would have won Project 8: in particular the loss cost detailed there would add another AUD 80,000 to the cost of each imported PT.

¹⁵ SEF 507 at page 86.

¹⁶ SEF 507 at page 85.

¹⁷ As the facts of Projects 1 – 8 show, see Figure 19.

¹⁸ SEF 507 at page 86.

2. The ADC causation analysis is myopic, static and ignores likely second order effects

WTC considers that the ADC causation analysis is myopic, static and ignores likely second order effects.

The ADC's analysis of Project 6 is instructive¹⁹ (although problems with the ADC's analysis is not limited to Project 6). Figure 19 of SEF 507 shows that the winning bid in Project 6 was dumped in the Australian market by a very substantial margin.²⁰ By the ADC's own analysis,²¹ the price of the winning bid adjusted for dumping put WTC's price within the threshold where it might have won the bid.

The ADC's conclusion is that WTC did not suffer injury because the project would have been awarded to the second placed bidder (the second placed bidder was not WTC and not a Chinese supplier).²²

WTC considers that the ADC rather misses the point. The counterfactual is not a world where WTC wins every bid but a world where WTC competes fairly with transformers that are not dumped. In that particular instance, it may be that WTC would not have won the tender; but it can be readily inferred from the facts before the ADC that in the course of similar bids over time, if WTC had the opportunity to compete fairly with undumped transformers, that it would win a fair share of such business. In any event, as WTC explains in section 1 above, that opportunity is itself valuable and its loss an actual loss.

WTC considers that the ADC has ignored the corrosive effects of dumping on the competitive process. Those corrosive effects can be readily inferred from the facts of Project 6. The substantially dumped Chinese transformer precluded WTC and a supplier of (presumably) undumped transformers from fairly competing. The ADC ignores the high degree of likelihood that WTC would win more bids over time if it was not forced to compete with dumped transformers.

The legislation and the Ministerial direction on material injury give the ADC a broad scope to assess injury. For example s 269TAE(1)(g) provides that the ADC may have regard to (emphasis added) "*any effect*" that the dumping has had on the economics of the Australian industry. On that basis the ADC may have regard to second order effects that can readily be inferred from the evidence before the ADC. The evidence from Project 6 shows that WTC's opportunity to compete fairly has been precluded by dumping (see section 1 of this submission).

The ADC's static and myopic analysis may be at its most stark when it states concerning price depression:²³

The Commission considers that the opaque nature of the tender process during the investigation period, as discussed in the section above, reduces the potential for a [causal] link between dumped prices and the bids submitted by the Australian industry. Consequently, the Commission does not find that dumping has caused injury in the form of price depression experienced during tender negotiations.

Evidently the ADC considers that only a direct response to a known dumped price in the context of a single bid can amount to injury caused by dumping. The ADC's static approach ignores the reality that the presence of dumped prices in the market becomes apparent over time and causes WTC and other non dumping suppliers to respond by dropping prices in anticipation of dumped prices (with resulting impacts on profits and profitability). That effect over time can be readily inferred from the facts before the ADC²⁴ and finding injury through such second order effects is not precluded by the legislation.²⁵

¹⁹ SEF 507 at page 79.

²⁰ The adjustment required to correct for dumping appears to be approximately one third of the winning bid price, SEF 507 at Figure 19.

²¹ SEF 507 at pages 78 to 79.

²² SEF 507 at page 80.

²³ SEF 507 at section 8.5.2.

²⁴ SEF 507 at section 7.6.

²⁵ See for example s 269TAE(1)(g) stating that the ADC may have regard to *any effect* impacting the industry's economics.

WTC considers that the ADC's myopic and static causation analysis is incapable of yielding the correct and preferable assessment of injury causation.

3. The ADC's framework of analysis was applied inconsistently and to WTC's prejudice

WTC considers that the ADC's framework of analysis was applied inconsistently and to WTC's prejudice.

The ADC observed that there were instances where WTC had won tenders despite being the higher bidder.²⁶ Evidently purchasers place value on taking supply of WTC's Australian produced transformers. The ADC calculated a "threshold" as a measure of that value within which WTC may win a bid despite bidding a higher price.²⁷ Where the difference between WTC's bids and winning bids adjusted for dumping were outside that threshold, ie in Projects 2, 3 and 4, the ADC considered that WTC would not have won those tenders in the absence of dumping.²⁸

That approach is not without issues (particularly given the ADC's acceptance that transformers are bespoke assets)²⁹ however WTC accepts that the ADC may use such inferential reasoning in reaching its views. The issue is that this analysis in SEF 507 is applied inconsistently and in such a way that prejudices WTC. The ADC uses the threshold to reason that WTC was not injured by dumped transformers in Projects 2, 3 and 4³⁰ but the ADC fails to make obvious inferences in other projects that WTC had been injured by dumping.

Project 8 is an obvious case in point. The ADC entirely abandoned its assessment of Project 8, declining to reach any view when it was clearly open on the facts for the ADC to infer that WTC likely would have won the bid and so suffered injury. The adjustment to the dumped price in Project 8 was significant and resulted in an adjusted price that was close to WTC's bid price.³¹ The ADC's own analysis showed that the winning price adjusted for dumping was within the threshold where WTC could have won the tender. Indeed, WTC considers that if the ADC further adjusted the winning bid for the per kW cost of losses (and other costs) then WTC's bid would be the lowest bid;³² on that basis it is clearly open to the ADC to find that WTC would have won Project 8 in the absence of dumping.

Project 1 is another obvious case where the ADC failed to make inferences that were supported by the evidence. WTC's price and the dumped price were close. The ADC observed that non price factors were the determining factor WTC losing the bid to the dumped transformers.³³ The ADC failed to appreciate that an assessment on non price factors is exactly what would be expected when prices are close; where prices are not close such an assessment is less relevant (this is exactly the same commercial dynamic underlying the ADC's finding that Projects 2, 3 and 4 would not give rise to injury). On that basis the ADC could readily infer that the significantly higher adjusted price of the dumped transformers would have tipped the tender in favour of WTC.

²⁶ SEF 507 at page 78.

²⁷ SEF 507 at pages 78 and 79.

²⁸ SEF 507 at page 79.

²⁹ SEF 507 at page 91.

³⁰ SEF 507 at page 79.

³¹ SEF 507 at page 78.

³² As demonstrated in Attachment 4 of WTC's 10 November 2019 submission.

³³ SEF 507 at page 78.

4. Siemens financial data cannot be relied upon

WTC has previously disputed the costs used for calculating the Siemens dumping margins.³⁴ WTC was concerned then that the dumping margins were so low compared with similar entities that it raised questions regarding how Siemens structured its costs and bidding. These concerns were supported by market intelligence regarding how Siemens operates. WTC urged the ADC to reassess Siemens' costs and profits in China.³⁵

WTC recently received information casting further doubts on the reliability of Siemens' financial data. The recently received information included Siemens Jinan's company filings for 2018 (which contained revised data for 2017). The following table shows Siemens Jinan filings for 2016 to 2018 inclusive. Both the earlier filed 2017 accounts and recently revised 2017 financial accounts have been included.

Between 2014 and 2018, Siemens Jinan Gross Profit reduced by [Siemens financial data removed] (Refer Confidential Attachments). The data for the investigation period follows [Siemens financial data removed]:

Manufacturer	Siemens Jinan	Siemens Jinan	Revised Siemens Jinan	Siemens Jinan
Year	2016	2017	2017	2018
Exch (CNY to USD)				
Sales (USD million)				
Gross Profit				
Gross less Pretax Profit				
Pretax Profit				
Total Assets				
SH Funds				
Gross Profit/Sales				
GP - PBT /Sales				
Pretax Profit/Sales				
Sales/Empl (US\$ '000)				
Employees				

It is clear from the table that Siemens Jinan has very substantially revised its 2017 results. WTC would make the following additional observations from the table:

- Between its earlier and recent filings for 2017 sales dropped by [Siemens financial data removed], while a pretax loss became a significant pretax profit. Somehow, even the number of employees changed by 33 people.
- Siemens Jinan's Gross Profit less Pretax Profit changed from [Siemens financial data removed]. These changes, if correct, would indicate enormous year on year cost savings; WTC considers that no business would be able to achieve such cost savings.

³⁴ WTC submission of 10 November 2019 at section 5.

³⁵ WTC submission of 10 November 2019 at section 5.

WTC considers that the Siemens data simply beggars belief. Given that these figures span the investigation period WTC considers that they are far from being sufficiently reliable to use in calculating dumping margins. The figures indicate either or both of:

- a substantial lack of controls or accuracy in Siemens' accounting systems; or
- substantial shifting of assets, costs, people or profit between different Siemens' companies.

Siemens has not filed results for Siemens Wuhan for 2017 and 2018. WTC considers that this significantly reduces the transparency of that entity; this is exacerbated by the fact that the ADC did not visit Siemens Wuhan to verify its information. In addition, the information that Siemens Wuhan has filed (2015 and 2016) shows that it operates on negative shareholders funds, in effect a loan from shareholders to the company; it is not clear to WTC that the costs of this loan have been properly accounted for in the ADC's assessment of Siemens Wuhan's costs.

WTC considers that the ADC has not been furnished with sufficiently reliable information by Siemens and should therefore revisit the calculation of Siemens' dumping margins using export prices and normal values determined under ss 269TAB(3) and 269TAC(6) respectively.

Yours sincerely,



Robert Wilson
Executive Chairman

Confidential Attachment: Siemens Financial Data [Siemens Financial Data removed from Public Document]