



9 March 2022

Mr Cameron Kennedy
A/g Assistant Director
Investigations 3
Anti-Dumping Commission

Your ref: 507A

By email: Investigations3@adcommission.gov.au

Dear Mr Kennedy

Investigation 507A Reinvestigation into certain power transformers from China

We act for GE High Voltage Equipment (Wuhan) Co., Ltd and its Australian related party importer (**GE**).

The purpose of this submission is to address the submission made by Wilson Transformer Company Pty Ltd (**Wilson**) published on 29 October 2021 (**Wilson Submission**). For the reasons set out in this letter, it is submitted that the claims by Wilson are either legally or factually incorrect. It is submitted that the Anti-Dumping Commission (**ADC**) proposal in Statement of Essential Facts 507A to terminate the investigation is correct and should be maintained.

1. Arms length issue

Wilson has repeatedly claimed that the arms length issue is central to the investigation. The Anti-Dumping Review Panel (**ADRP**), a single judge of the Federal Court and the Full Court of the Federal Court of Australia have all held that the ADC properly assessed arms length matters for multinational suppliers. We are not aware of any application by Wilson for leave to appeal to the High Court.

The matter is now resolved. Importantly, the finding that neither the ABB nor Siemens entities were engaged in dumping is undisturbed. As such, the ADC decision, as confirmed by the ADRP, to terminate the investigation in respect of the Siemens and ABB entities remains.

The majority of tenders lost to Chinese imports during the investigation period where to Siemens and ABB. This means that despite all of the claims of Wilson, the reality is that its key competitors, and the cause of any loss it suffered, were not engaged in dumping.

The Full Court finding also means that the ADC does not need to revisit the arms length assessment in respect of other multinationals, such as GE.

2. Calculation of the GE dumping margin

Section 2 of the Wilson Submission sets out its claims that the dumping margin has been incorrectly calculated. The GE normal value was previously determined under section 269TAC(2)(c) of the *Customs Act 1901 (Act)* and has now been calculated under section 269TAC(1) of the Act.



Following the decision of the ADRP set out in ADRP Report 100, the ADC has calculated normal value under section 269TAC(1) of the Act. Wilson argues that this approach is highly prejudicial to Wilson. Presumably this is because Wilson believes that the approach resulted in a lower dumping margin. Whether or not the use of a particular methodology to produce a dumping margin is prejudicial to Wilson is irrelevant. The ADC and the Minister's role is to apply the required legislative tests regardless of the dumping margin that is produced. Clearly the ADC should not be selecting a methodology to determine a dumping margin based on the expected outcome of that methodology.

More importantly, Wilson is incorrect in its claim that the use of section 269TAC(1) has had a prejudicial effect on Wilson. The cost to make and sell for GE is the same under section 269TAC(1) as it was under section 269TAC(2)(c). Wilson cannot:

- a) claim that it supports calculation of normal value under section 269TAC(2)(c) and at the same time;
- b) claim that normal value under section 269TAC(1) does not accurately reflect the true normal value of a power transformer; when
- c) both methods use the same costs of production.

Every criticism that Wilson makes of normal value under section 269TAC(1) applies equally to normal value calculated under section 269TAC(2)(c). We make the following specific comments in response to the Wilson criticism:

- Wilson comment – *“Low price special arrangement long term contracts in China result in a low normal value domestic market price”* – GE Response - [REDACTED]
[REDACTED] [DISCUSSION OF GE'S COMMERCIAL ARRANGEMENTS IN CHINA];
- Wilson comment – *“Normal values should not include loss making contracts in China as such contracts produce low normal value domestic market pricing. This is not dissimilar to the claim by GE Wuhan that the high priced product used in SEF 507 should not be used as it was not in the OCOT”* – GE Response – Section 269TAC(1) requires that normal value be based on sales in the ordinary course of trade. This is the approach the Australian parliament has taken to determine the impact that any non-profitable domestic sales will impact the calculation of normal value. Domestic sales are not excluded simply because they will produce a lower normal value.
- Wilson comment – *“If there are artificially low normal values, there will be injury and closure of manufacturing in Australia and elsewhere”* – GE response - Equally, artificially high dumping margins will result in dumping duties being imposed whether there is no justification for such duties under the Act, World Trade Organisation (**WTO**) law or as a matter of policy. Further, there is nothing to suggest that the normal values are artificially low. They are merely lower than the previous ADC calculation which was subsequently found to be incorrect.
- Wilson comment – *“The approach proposed would be reasonably static and would not reflect changes in global material pricing which is occurring in this post COVID era”* – GE Response - The assessment is for sales and exports during the investigation period of 2016 – 2018. The cost of materials in 2022 is irrelevant to the normal value.

The difference in the dumping outcome for GE is due to the ADC being required to follow the decision of the ADRP in ADRP Report 119 when determining the profit margin for GE. Wilson has made no criticism of the calculation of profit, other than to say that profit calculated under regulation 45(2) is more accurate. Given that Wilson does not have access to GE's confidential financial information, it is unclear how Wilson can form an opinion as to what is an accurate amount to account for profit on GE's Chinese domestic sales of power transformers.



3. Has dumping caused material injury

Power transformers are unlike most other products the subject of a dumping duty investigation. They are bespoke products where purchasing decisions are based on factors other than price. To the extent that cost is a factor for the purchaser, it is both the cost of purchasing the transformer and the electricity losses associated with operating the transformer. This should be contrasted to a commodity product where there is a strong direct relationship between sale price and demand.

Given the unusual nature of power transformers, it is not surprising that the ADC conducted an extremely detailed injury causation investigation. Rarely would the ADC have individually investigated such a large proportion of the exports of the goods under consideration. Due to its in depth investigation, the ADC was not relying on assumptions regarding purchasing decisions. Rather, for each unsuccessful tender by Wilson, the ADC obtained evidence as to the purchaser's reasoning.

This meant that the ADC had better information as to power transformer purchasing decision in the Australian market than any other party, including Wilson. In the circumstances, Wilson's criticism of the ADC findings is unwarranted. The ADC's detailed and factual approach is to be preferred to the vague claims by Wilson.

Wilson has made various claims to the effect that the alleged dumping of goods caused injury in the form of lowering the prices of Wilson's successful tenders. Wilson is attempting to reargue issues that have been the subject of findings by the ADRP in ADRP Decisions 122 and 123. Paragraphs 99 and 100 of that decision are relevant and repeated in full:

"99. The applicant also contended that the Commissioner's injury assessment was 'narrow, myopic and static'. The primary complaint appears to have been that the Commissioner should have accepted that dumped goods caused material injury otherwise than through specific loss of tenders. The applicant contended the Commissioner wrongly relied on the proposition that the details of tender pricing were confidential. It contended that it was aware of the pricing of its competitors, including pricing based on dumping, so that it suffered injury by way of price suppression.

100. I do not accept this contention. The argument ignores the effect of successful tenders by the Siemens exporters, which did not involve dumped goods. Those companies appear to have been market leaders. Also, the information compiled by the Commission indicated that the applicant's market information was imperfect."

The Wilson submissions seem to be based on the premise that its main competitors are exporters engaged in dumping. The findings by the ADC were that Wilson's main competitors were Siemen and exports from countries other than China. These goods were not dumped.

Wilson makes the claims that the effect of dumped prices is pervasive in the market and corrosive to fair competition. Wilson points to the broader effects of dumping. This position seems to be based on Wilson's view that all Chinese exporters are engaged in dumping at levels higher than found by the ADC. The reality is that the main Chinese exporters are not engaged in dumping. Where dumping was found, it was of a low volume and at a much lower rate than claimed by Wilson.

There is such a disconnect between Wilson's view of the level of dumping and the findings of the ADC, that any claims made by Wilson about the broader impact of dumping on Australian pricing needs to be treated with extreme caution. Put simply, all of Wilson's injury claims start from an incorrect assumption as to the volume and magnitude of any dumping.

In considering the claims of Wilson, the ADC must remember that a finding that any dumping caused material injury to an Australian industry must be based on facts and not merely on allegations, conjecture or remote possibilities (section 269TAE(2AA) of the Act)



4. Wilson claims regarding Australia's strategic capability

In section 4 of the Wilson Submission, Wilson makes the claim that the alleged injury inflicted on Wilson impact's Australia's sovereign strategic capability in critical infrastructure. Wilson acknowledges that this "may not strictly fall within the ADC's injury framework". This is putting the position far too lightly. If the ADC or the Minister were to take this factor into consideration, the resulting decision would be illegal and open to challenge at the World Trade Organisation.

The Act sets out the legislative requirements that must be met before the Minister has the legal right to impose dumping duties. There is no ability for the Minister to take into account the potential diminution in Australia's national strategic capability to supply electricity infrastructure. Such a claim constitutes an irrelevant consideration under section 5(2)(a) of the *Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)*. Taking into account an irrelevant consideration is an improper exercise of power under section 5(1)(e) of the ADJR Act.

In section 4 of the Wilson Submission, Wilson is essentially requesting the ADC to impose dumping duties outside of the legal requirements of the Act. The Act reflects Australia's obligations as a member of the WTO. Imposing dumping duties outside of the circumstances permitted under the Agreement on Implementation of Article VI of GATT 1994 would rightly be subject to challenge and undermine Australia's position as an advocate for fair and lawful international trade.

GE trusts that the ADC will not be swayed by Wilson's protectionists and nationalistic claims. The ADC's role is not to decide what particular industries are deserving of Government protection. Rather, the ADC's role is limited to applying the provisions of the Act.

Please feel free to contact us with any questions.

Yours faithfully

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