



# Electra Cables

## Alleged dumping of PVC flat electrical cable

### Anti-competitive conduct and trade harassment in the Australian market

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#### **A Introduction**

On 6 November 2014 the Anti-Dumping Commission ("the Commission") published Anti-Dumping Notice No 2014/118 ("ADN 2014/118"), which officially initiated the present anti-dumping investigation concerning polyvinyl chloride flat electric cables from China.

Electra Cables is the major importer of the goods under consideration. The application lodged with the Anti-Dumping Commission by Olex Australia Pty Limited ("Olex Cables") is another regrettable chapter in the long campaign of trade harassment that has been directed against Electra Cables and its Chinese

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cable suppliers by the Australian manufacturers of cable.

**Chapter 1** - Electra Cables has been accused by the Australian industry of selling products that do not comply with Australian standards. Because of those accusations, Electra Cables has had to defend itself in investigations undertaken by the electrical safety authorities of Western Australia, Victoria and Queensland. None of those accusations have been proven. No facts have been found to support the accusations. No action has ever been taken against Electra Cables by any of those authorities.

**Chapter 2** - Electra Cables has found it necessary to sue an Australian testing laboratory for incorrect testing and reporting concerning cables supplied to the market by Electra Cables, which is conduct that has been admitted by the laboratory concerned.

**Chapter 3** - The Australian industry formed an industry association – the Australian Cablemakers Association (“the ACA”) – which has the following stated purposes:

*The ACA has been formed to represent the interests of Australia’s cable manufacturers.*

*The ACA will represent Australian cable manufacturers in interactions with Governments, Government Authorities, supplier and customer associations and other industry bodies such as AIG, NECA and Master Electricians Australia.*

*The ACA will also lobby Governments, Government Authorities and Australian businesses to support and install Australian manufactured cable.*

*In the safety arena the ACA will launch the Approved Cables Initiative (“ACI”) to promote safety standards by arranging independent performance testing of Australian and foreign manufactured cables, enforcing and upholding Australian cable specifications and standards, and, where appropriate, up-specing to meet community expectations in areas such as energy efficiency and electrical and fire safety.*

Although the ACA is a “manufacturers” association, it professes to have a broad based industry objective. The Australian manufacturers are also importers of significant quantities of electric cable. Electra Cables is itself a major importer and a major participant in the electric cable industry and market in Australia. However Electra Cables has never been invited to be a member of that association and has been excluded from it at all times.

Since its establishment the ACA has waged a campaign of trade vilification against imported Chinese cable – indeed, against any cable that is not produced or imported by its own members. It has proven not to be a trade promotion body at all, because it does not have the interests of the entire industry at heart. Instead, it has been used to promote the commercial interests of its members against companies like Electra Cables who also participate in that industry and market.

**Chapter 4** – members of the Australian industry are openly accused by the Australian Competition and Consumer Commission (“the ACCC”) of cartel conduct and exclusionary conduct in the supply and acquisition of electrical cables throughout Australia. Olex Cables, Prysmian Power Cables & Systems Australia Pty Limited (“Prysmian”), Rexel Electrical Supplies Pty Ltd (“Rexel”), Australian Regional Wholesalers Pty Limited (“ARW”), Lawrence & Hanson Group Pty Ltd (“L&H”), Electrical Wholesalers Association of Australia Pty Limited (“EWAA”) and six senior executives from these companies are now respondents in legal proceedings commenced by the ACCC in the Federal Court under the *Competition and Consumer Act 2010* (Cth). As well as the allegations of cartel conduct and exclusionary conduct, the ACCC also alleges that Rexel and Prysmian engaged in bid rigging. The accused parties are said by the ACCC to have entered into these arrangements and to have conducted themselves in those anti-competitive ways with the intention, *inter alia*, of inflicting commercial damage on Electra Cables.

**Chapter 5** – Olex Cables, Prysmian and Advance Cables Pty Limited initiated an earlier anti-dumping investigation against Electra Cables’ suppliers in 2011. After due investigation and consideration by the investigating authority, which was then the Australian Customs and Border Protection Service, it was determined that there had been no dumping of the products imported by Electra Cables. Indeed, the Australian industry applicants had alleged in their application for the initiation of the investigation that the dumping margins in respect of the goods imported by Electra Cables were in the range of 20% to 83%. The no-dumping margin in respect of those goods as ultimately determined by the investigating authority and based on the facts was negative 4.8%.

**Chapter 6** – the Australian industry applicants – not satisfied with their failure to establish that the goods were dumped – then appealed the investigation authority’s finding to the then Trade Measures Review Officer (“the TMRO”). The grounds of review were variously desperate and laughable, including a claim that the investigating authority had not correctly counted Electra Cables’ staff numbers, that because invoices from other Chinese exporters were at low levels then Electra Cable’s suppliers must also be exporting at those low levels, and that there was some strategy of “*artificially high*” export prices that the investigating authority’s full and detailed investigation had failed to detect. The TMRO rejected each and every ground of review advanced by the Australian industry applicants.

Moreover, the TMRO went so far as to disclose that:

*even if Customs had assessed each model separately, no cables which fit the description of the goods under consideration had a positive dumping margin (other than one cable for which the dumping margin was below the “negligible” threshold). [underlining supplied]*

**Chapter 7** – next up was an FOI (“Freedom of Information”) request made to the very investigating

authority that had dismissed the anti-dumping application. The FOI request attempted to obtain access to sensitive commercial and confidential information that Electra Cables had submitted to that authority for the purposes of defending itself against the anti-dumping application that the Australian industry had launched against Electra Cables.

In opposing the FOI request, Electra Cables advised Australian Customs that:

*Documents [sought by the FOI request] contain or are likely to contain information which is used in the trade and business of supplying electric cables by Electra. Electra treats the information as part of its trade secrets. The information is strictly confidential and was disclosed to Customs in the course of cooperating with Customs' investigations in confidence. Such documents, if disclosed to a competitor, are likely to cause real and significant harm to Electra.*

*Further, the documents covered under these categories contain up to date information which is necessary for Electra to maintain its competitiveness in the electric cables market. Disclosing the information to the applicant - which Electra understands is very likely to be one or more of its competitors in the electric cables market - would adversely impact upon the value of Electra's business.*

*In this regard, we note that Electra's competitors have used a number of means to damage Electra's business in recent times, including claims of imports of "dumped" cable from China (which were rejected by Customs) and as-yet unsubstantiated claims of non-compliance of Electra's imported cable with Australian standards (which Electra is presently defending). In the context of this behaviour by its competitors, it would be even more likely that the information in the documents would be used by Electra's competitors in a way that would be detrimental to Electra's business.*

Australian Customs agreed with Electra Cables that the documents were exempt from access and refused the FOI request. Electra Cables believes this to have been yet another attempt by Australian manufacturers and/or the ACA to undermine Electra Cables' commercial interests by obtaining confidential data to which they had no legal right.

**Chapter 8** – now we see that one of the Australian industry members – Olex Cables - has lodged yet another anti-dumping application against Electra Cables' Chinese supplier. And, yet again, Electra Cables is confident that it will be vindicated, notwithstanding the extreme and unfair price pressure that has been forced upon Electra Cables by its "competitors". Electra Cables has no doubt that this price pressure has been facilitated by the anti-competitive arrangements that the ACCC alleges were established by Olex Cables with other members of the industry and with major customers, which the evidence cited by the ACCC states was for the purpose of damaging Electra Cables' standing in the Australian market.

The Australian manufacturing industry has been determined and underhanded in its efforts to damage Electra Cables and to force Electra Cables out of the Australian market. Electra Cables is now "going

public” with these matters, in order to expose its competitor’s behaviour and thereby to assist the Commission in understanding the discrimination it has faced and the attacks it has suffered.

In this submission we highlight aspects of the trade “warfare” that has been waged against Electra Cables. The campaign against Electra Cables betrays a lack of credibility on the part of Electra Cables’ detractors. It demonstrates that the applicant and its fellow ACA members do not observe the principles of “fair trade” that they claim to profess.

And, most importantly, the impact of the anti-competitive conduct of the Australian industry members on the Australian market means that the market has been an unreliable arbiter of price during the period of investigation and that, even if dumping were to be established, price observations could not be used to establish either the cause or effect of any injury claimed to have been suffered by the Australian industry.

## **B A continued and relentless campaign of trade harassment**

Electra Cables has been subjected to a strong, multi-faceted, and repetitious campaign of trade harassment.

### **1 Negligent and malicious claims alleged by the Australian Industry**

Using the façade of the ACA, the Australian industry has made false claims and intimations about Electra Cables which it has widely publicised to the market.

The ACA claims to have the good of the industry at heart. However, Electra Cables and other importers – who are major participants in the market - have been studiously excluded from the ACA and its affairs, and instead have been the target of the ACA’s protests and criticisms. An example of the aggressive and partisan behaviour of the ACA can be seen in this extract from a letter to the ACA to the Electrical Wholesalers Association of Australia Pty Limited (“EWAA”) dated 18 April 2012:

*The ACA is of the view that many electrical cables imported into Australia from Asia are sub-standard, compromise safety in the Australian Community, and are potentially dangerous to life. The purpose of the ACI is to arrange independent testing against Australian Standards of Australian and foreign manufactured electrical cables being sold in Australia.*

*The ACA requests that the EWAA advise each of its members, and that those members advise each of their branches, of the current failing of Electra cable to meet the relevant Australian Standard.*

The same letter was also sent on the same date to the National Electrical and Communications Association. As we elaborate below, the so-called “current failing”, stated by the ACA as if it was a fact

and publicised so widely by the ACA, has never been validated or proven.

## **2 Investigations by safety authorities**

Because of the criticism and misinformation levelled against Electra Cables by the ACA in letters such as that referred to above, Electra Cables has been the subject of various inquiries from regulatory authorities in relation to the cables it has supplied to the Australian market. We reiterate that Electra Cables has never been successfully prosecuted or fined for any alleged failure of its products to meet safety standards. It has had to defend itself against these accusations – and on each occasion it has either been determined that it has no case to answer and/or has not been the subject of any prosecution.

The Western Australia Department of Commerce, Energy Safe Victoria and the Electrical Safety Office Queensland have made inquiries of Electra Cables about the claims made by the Australian industry, and about “anonymous” claims. No investigation by those authorities has resulted in any adverse findings against the products sold by Electra Cables in the Australian market.

Indeed, it is the ACA that has found itself on the receiving end of criticism from the regulators themselves. The Western Australia Department of Commerce initiated an investigation against Electra Cables in August 2013 in relation to allegations that certain electrical cables sold by Electra Cables may not have been compliant with the applicable standards. This investigation was discontinued on 6 December 2013, at which time the Department advised Electra Cables that it would instead:

*...commence an investigation into the entities comprising the Australian Cablemakers Association (ACA)...*

## **3 Investigations by other authorities**

In its history of conducting business, Electra Cables has been investigated by the Immigration Department, by the Australian Taxation Office, by the Australian Customs and Border Protection Service, and by the Australian Quarantine and Inspection Service (“AQIS”), in relation to various matters within the jurisdiction of those authorities.

The Commission should note that no penalties or actions have been taken against Electra Cables as a result of these investigations at any time.

Electra Cables cannot accept that every one of these investigations has been self-initiated, “out of the blue”, by the agencies concerned. It is apparent to Electra Cables, from the correspondence it has

received from these agencies, and discussions with the investigating officials, that the motivation for some of the investigations has come from “complaints” made to the relevant regulators. Electra Cables postulates – in light of all the other attacks on its corporate integrity from its competitors – that “complaints” from those same competitors may have motivated all or some of these investigations.

#### **4 Litigation against the testing agency used by the ACA**

The Australian industry has sponsored and advocated the repeated testing of cable sold by Electra Cables. If this is not the case, we invite the ACA and/or its members to come forward and prove the opposite.

Furthermore, in the case of testing commissioned by members of the ACA, the Commission needs to know that Electra Cables currently has a damages claim on foot against the testing agency concerned in the Victorian Supreme Court for negligence in relation to that testing, and for breach of contract in relation to testing that Electra Cables itself commissioned. Whilst the damages claim is some way from being ultimately adjudicated by the Court, the testing agency has admitted and acknowledges errors in its testing of Electra Cables’ products.

### **C Australian Competition and Consumer Commission prosecution**

On 3 December 2014, the ACCC - a fellow government agency of the Commission – initiated Federal Court proceedings VID725/2014 against Olex Cables, Prysmian, Rexel, ARW, L&H, EWAA and six senior executives from these entities (collectively “the respondents”).

The originating application and amended statement of claim (“the Pleadings”) filed by the ACCC contain all of the allegations against the respondents. We have attached a copy of the Pleadings to assist the Commission.<sup>1</sup>

#### **1 What is alleged by the ACCC?**

The ACCC alleges that from around June 2011, the respondents engaged in cartel activity in the electrical cabling industry within Australia by, variously, engaging in collusive conduct. This alleged conduct involved entering into agreements with each other that contained exclusionary and cartel provisions which are illegal under the *Competition and Consumer Act 2010* (Cth) (“the CCA”). The

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<sup>1</sup> Attachment 1.

alleged illegal provisions involved increasing the fees charged to cut cable; imposing a fee for orders less than the minimum order value; and an understanding of support whereby:

*the Wholesalers would maintain or increase the volume and/or value of electrical cable that they acquired from the Manufacturers<sup>2</sup>*

The ACCC states its central contentions as follows:

*The ACCC alleges that during 2011, Olex, Prysmian, Rexel and L&H entered into and gave effect to an arrangement that included provisions which had the purpose of:*

- *preventing, restricting, or limiting the supply of electrical cable by Olex and Prysmian directly to contractors and other customers,*
- *allocating electrical contractors and other customers to the wholesalers,*
- *preventing, restricting, or limiting the acquisition of electrical cable by certain wholesalers from suppliers other than Olex and Prysmian, and*
- *fixing, controlling, or maintaining the price of cutting services provided by Olex and Prysmian.*

*The alleged conduct mainly occurred at industry association meetings. The ACCC is alleging that the EWAA aided, abetted, and/or was knowingly concerned in the contraventions of the manufacturers and wholesalers.*

*The ACCC also alleges that Rexel and Prysmian engaged in bid rigging by making and giving effect to a contract, arrangement, or understanding that Prysmian would submit a higher bid to Caltex than the price it submitted to Rexel for the supply of electrical cable for an upgrade of the Kurnell Refinery in Botany Bay, NSW.<sup>3</sup>*

The claims made by the ACCC contain very specific details of the meetings and agreements between the respondents as well as the implementation of cartel arrangements by Olex Cables and Prysmian. The ACCC prosecution of the respondents appears to be based on clear and strong evidence it has in its possession.

In other words, the ACCC – a government agency, like the Commission – has detected what it claims to be significant breaches of the CCA and is now prosecuting the respondents based on substantial evidence.

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<sup>2</sup> ACCC Amended Statement of Claim VID725/2014 (“Amended Statement of Claim”), 6 March 2015, page 18, [43].

<sup>3</sup> ACCC takes action against electrical cable suppliers for alleged cartel, 4 December 2014, ACCC Media releases <https://www.accc.gov.au/media-release/accc-takes-action-against-electrical-cable-suppliers-for-alleged-cartel>



We urge the Commission not to ignore the significance of the evidence described by the ACCC and of the accusations that the ACCC has made in the Pleadings. The ACCC maintains that the Australian cable market was subject to massive interference by the respondents. The respondents are Electra Cables' competitors – one of whom has had the temerity to apply for his anti-dumping investigation – and large customer groups. It must be accepted that this has distorted the behaviours of the major players on both the supply and the demand side of the market. Electra Cables has had nothing to do with that conduct. Instead, it has been the target of that conduct. The ACCC has clearly acknowledged that Electra Cables was the intended victim of the illegal cartel behaviour of the respondents. There are multiple references to Electra Cables within the Pleadings<sup>4</sup> which refer to the belief on the part of various of the respondents that Electra Cables presented a commercial threat to them, and to their intentions to target Electra Cables in their cartel activity.

The pecuniary penalty sought by the ACCC against the respondents as a result of the cartel provisions CCA, not including the six executives, is the greater of AUD10m each or the annual turnover received by each respondent.

## **2 The target of the respondents' anti-competitive actions**

It is clear in the Pleadings who the respondents' cartel was attacking. The target, according to the ACCC, was importers of electrical cable, including Electra Cables and General Cables Australia Pty Ltd. These importers are mentioned by name in the Pleadings.<sup>5</sup>

The Pleadings provide context as to why this was the case. They explain how Olex Cables and Prysmian had lost market share in low voltage ("LV") cables between 2008 and 2010,<sup>6</sup> and how in 2011 about half of the electrical cable purchased by end users was supplied by wholesalers, and the other half was purchased direct from the Australian manufacturers.<sup>7</sup>

By way of summary, the Pleadings state that:

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<sup>4</sup> Amended Statement of Claim, 6 March 2015, page 5 [16(e)], [16(f)] and [17(b)]; page 6, [18]; and page 11 [31].

<sup>5</sup> Amended Statement of Claim, 6 March 2015, page 5 [16(e)], [16(f)] and [17(b)]; page 6, [18]; and page 11 [31].

<sup>6</sup> Amended Statement of Claim, 6 March 2015, page 5, [17(a)].

<sup>7</sup> Amended Statement of Claim, 6 March 2015, pages 6-7, [19].

- (a) the objectives of the wholesalers were to “restructure” the channels of supply and stamp out direct supply by Australian manufacturers to end-user customers;<sup>8</sup>
- (b) the objectives of the Australian manufacturers were to restructure the supply chain to prevent wholesalers from stocking what the manufacturers alleged were “cheap sub-standard imports”;
- (c) the wholesalers and the Australian manufacturers held various meetings and reached an agreement that would meet both of their objectives – an agreement which was then implemented.

The Pleadings record that during one such meeting:

- b) there was a discussion during the course of which:*
  - i. Roberts (Prysmian) said words to the effect that:*
    - A. the EWAA members have not acted like true wholesalers and manufacturers have not channelled sales through wholesalers; and*
    - B. the EWAA needs to take the lead and Prysmian would follow, so long as there are some guarantees;*
  - ii. Middendorp (Gemcell) asked what commitment the Manufacturers wanted from EWAA members;*
  - iii. Moncrieff (Olex) said words to the effect that the elephant in the room was Chinese imports;*
  - iv. Moncrieff (Olex) expressed a concern that:*
    - A. if the Manufacturers ceased supplying electrical cable to contractors and end-users; and*
    - B. as a result, the EWAA members increased sales to contractors and end-users, then the EWAA members may supply contractors and end-users with electrical cable that they acquire from Electra, rather than the Manufacturers;*
  - v. Lamond (MEM) said words to the effect that there should be a series of small steps- for example, the Manufacturers won't do any cutting, and EWAA members can put more business the Manufacturers' way;*

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<sup>8</sup> Amended Statement of Claim, 6 March 2015, page 8, [24].

- vi. *Picken (Rexel respondents) said words to the effect that commercial contractors should be addressed first; and*
- vii. *Moncrieff (Olex) asked the EWAA to draft small steps for the Manufacturers to consider and said words to the effect that: if we do X, what do we get in return.”<sup>9</sup> [our underlining]*

The Pleadings then detail the period of negotiation between the wholesalers as well as between the wholesalers and the Australian manufacturers which led to the agreement containing the alleged illegal provisions. As part of these negotiations, an email was circulated amongst the wholesalers which:

- a) *stated words to the effect that the Wholesalers proposed to become the exclusive channel for all LV electrical cable to contractors;*
- b) *set out specific measures that could be proposed to the Manufacturers, including that:*
  - i. *the Manufacturers each agree to:*
    - A. *cease supplying LV electrical cable up to and including 25mm in diameter **(25mm LV cable)** to contractors and end-users; and*
    - B. *cease supplying cutting services in respect of 25mm LV cable;*
  - ii. *the Wholesalers each agree to:*
    - A. *ensure that any order that they placed with the Manufacturers for electrical cable was at least \$5,000 (excluding GST) in value; and*
    - B. *increase the volume and/or value of Australian made electrical cable that it acquired by approximately 5% of the total volume and/or value of electrical cable that it acquired...<sup>10</sup> [our underlining]*

According to the ACCC’s evidence, the collusion continued:

*On about 16 March 2011:*

- a) *a meeting of Gemcell directors was held; and*
- b) *during the meeting, Middendorp or Murphy said words to the effect that:*
  - i. *the EWAA met recently in Sydney to discuss the cable market;*
  - ii. *representatives from Olex and Prysmian were in attendance; and*

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<sup>9</sup> Amended Statement of Claim, 6 March 2015, pages 10 and 11, [31].

<sup>10</sup> Amended Statement of Claim, 6 March 2015, page 12, [33].

- iii. *the EWAA asked the cable suppliers to convert direct business back to the wholesale channel in exchange for the wholesale channel reducing their support of Chinese imports.*

**Particulars**

*The meeting was held at the Sebel Playford Hotel in Adelaide. A copy of the minutes may be inspected by appointment with the ACCC's solicitors" <sup>11</sup>[our underlining]*

The Pleadings then describe the final agreement that was reached between the respondents:

- (a) Olex proposed that 75% of EWAA members' acquisitions of 25mm LV cable would be from the Australian electrical cable manufacturers;<sup>12</sup>
- (b) Prysmian proposed that the Wholesalers commit a significant share of the total cable spend to local manufacturers (ie not limited to LV);<sup>13</sup>
- (c) The wholesalers and Australian manufacturers held a meeting on 23 June 2011 whereby Olex Cables and Prysmian agreed they would each introduce the same cutting fees and minimum volume order fees and in return, the wholesalers would support the manufacturers by *inter alia*:

*maintaining or increasing the volume and/or value of electrical cable that the Wholesalers acquired from the Manufacturers.*<sup>14</sup> [underlining supplied]

These statements are absolutely fundamental to the Commission's investigation. The ACCC is prosecuting the manufacturers and wholesalers for:

- *"directly or indirectly fixing, controlling or maintaining the price of cutting services supplied by the Manufacturers";*<sup>15</sup> and
- entering into an agreement with the *"purpose or a substantial purpose of preventing, restricting or limiting the acquisition of electrical cable by the Wholesalers from persons other than the*

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<sup>11</sup> Amended Statement of Claim, 6 March 2015, page 12, [34].

<sup>12</sup> Amended Statement of Claim, 6 March 2015, page 14, [38].

<sup>13</sup> Amended Statement of Claim, 6 March 2015, page 15, [39].

<sup>14</sup> Amended Statement of Claim, 6 March 2015, pages 17-19, [42] and [43].

<sup>15</sup> Amended Statement of Claim, 6 March 2015, page 19, [45].

*Manufacturers*<sup>16</sup> – namely, excluding parties like Electra Cables.

The ACCC alleges that in carrying out the agreement, the wholesalers actively encouraged their branch offices to support the changes being introduced by the Australian manufacturers. According to the ACCC, L&H, told its branch offices:

- *“we need to make every effort to support the Manufacturers to implement changes throughout the market place”*;<sup>17</sup>
- *“it is important that we support the local representatives and employees of the Manufacturers through this process and resist any temptation to beat them up”*;<sup>18</sup> and
- *“please support these changes...the short term pain will result in the long term gain”*<sup>19</sup>

The ACCC says that Rexel advised its branch managers:

- a) *Prysmian is increasing its cutting services fee to \$85 per cut, which brings it in line with Olex;*
- b) *the Rexel respondents fully support this initiative;*
- c) *we can and should pass the increase on to our customers; and*
- d) *this is one part of a range of commercial changes coming to the cable industry more details of which will be announced when they are to hand.*

*Particulars*

*The reference to the Rexel respondents "supporting this initiative" meant that branch managers should comply with the cutting fee provision and the support provision.*<sup>20</sup>

The contraventions for which the manufacturers and wholesalers are being prosecuted are said to have commenced on dates in the mid to latter half of 2011. The orders sought by the ACCC include orders that the manufacturers and wholesalers stop this anti-competitive conduct and enter compliance

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<sup>16</sup> Amended Statement of Claim, 6 March 2015, page 19, [48].

<sup>17</sup> Amended Statement of Claim, 6 March 2015, page 20 [50].

<sup>18</sup> Amended Statement of Claim, 6 March 2015, page 20, [50].

<sup>19</sup> Amended Statement of Claim, 6 March 2015, page 23, [57]

<sup>20</sup> Amended Statement of Claim, 6 March 2015, page 21, [52]

programs.<sup>21</sup> Accordingly, the ACCC's position is that the contraventions were taking place at all times that are relevant to this investigation, including the period in which the applicant, Olex Cables, alleges that it was caused injury.

The ACCC proceedings relate to low voltage electrical cable up to and including 25mm in diameter. This is applicable to the current anti-dumping investigation which relates to voltages exceeding 80V but not exceeding 1000V. Accordingly the product to which the Australian industry members' cartel arrangements applied is the same as that under investigation by the Commission.

We submit that the Commission cannot make findings of injury for anti-dumping purposes when the competition in the market place was essentially "fixed" or "stitched up" by Olex Cables, Prysmian and their wholesaler associates. The Pleadings indicate that an agreement was not only reached but then implemented which had the stated intention to support Australian manufacturers at the expense of importers, and that Electra Cables was specifically targeted.

The Australian manufacturers

- (a) imposed fees for cutting cable and orders less than the minimum value order;
- (b) directed their business only to certain parties; and
- (c) sought and achieved purchasing support from those wholesalers to the detriment of other companies trying to supply cables to the market, including, most significantly, Electra Cables.

With this framework in place since late 2011, the Australian manufacturers involved would have been fully able to drive down the price of LV cable and still extract cutting fees and minimum order values from the wholesalers, while no doubt enjoying cross subsidies in terms of the wider buying support promised to them by the wholesalers concerned for their products.

The ACCC has presented substantial evidence to support its allegations and the existence of the cartel arrangements. We note that the respondents have filed defences, although many of the underlying facts have been admitted by the respondents. Copies of those defences are publicly available and we are able to provide copies to the Commission if requested.

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<sup>21</sup> ACCC Originating Application, 3 December 2014, pages 7-9.

Electra Cables knew nothing of this activity by the respondents. Of course it saw and was affected by the incredibly tough conditions for sales of LV cable, but had had no idea of the collusion that the ACCC claims was occurring within the industry.

We submit that there are obvious implications arising from this conduct. Olex Cables can have no platform or foundation to claim that it has suffered material injury from imports. In concert with Prysmian, it set up agreed selling conditions with its customers designed to kill the so-called “*elephant in the room*”<sup>22</sup> – namely, Chinese imports – and to avoid its concern that, otherwise, “*the EWAA members may supply contractors and end-users with electrical cable that they acquire from Electra, rather than the Manufacturers*”<sup>23</sup>.

Olex Cables has engaged in non-market based conduct and whatever implications those actions have had on its own financial performance have been decided and engineered for itself and by itself. This is not the fault or responsibility of Electra Cables.

The Australian industry’s application in this matter is fundamentally misconceived. We call on the Commission to recognise this and to terminate its investigation. For legal reasons, for competition-based reasons, and for reasons of public policy the Commission should find that market evidence is not available for the purposes of establishing whether injury was caused by imports, that if anything Olex Cables was responsible for its own injury, and that the Commission cannot proceed other than to terminate.

### **3 Previous instances of anti-competitive conduct**

Electra Cables wishes to highlight that anti-competitive conduct is not a new phenomenon by its opposing companies within the Australian electrical cabling industry, and by their associates in other jurisdictions. The Commission should not offer the Australian industry any leniency in its consideration.

- (a) The European Commission has previously taken action against foreign parent companies of Olex Cables and Prysmian. In or about January 2009, the European Commission raided the offices of multiple electrical cable companies in Europe, including the offices of the Nexans Group and the Prysmian Group, on suspicion of price fixing in breach of European Union

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<sup>22</sup> Amended Statement of Claim, 6 March 2015, pages 10-11, [31].

<sup>23</sup> Amended Statement of Claim, 6 March 2015, pages 10-11, [31].

antitrust rules. As a result of the EC's inquiries, the European Union in April last year fined a group of cable makers involved in an industry price-fixing cartel a total of €301.6 million.<sup>24</sup> Companies within the Nexans Group and the Prysmian Group were included in that cartel.

Joaquin Almunia, the EU's antitrust chief commented that:

*These companies knew very well that what they were doing was illegal. This is why they acted cautiously and with great secrecy.*<sup>25</sup>

- (b) The ACCC has other proceedings underway against the foreign parent companies of Olex Cables and Prysmian. On 23 September 2009, the ACCC commenced proceedings in the Federal Court of Australia in South Australia against Prysmian Cavi e Sistemi Energia S.R.L (the foreign parent company of Prysmian), Nexans SA. (the foreign parent company of Nexans Olex) and Viscas Corporation (a Japanese cable supplier).

The ACCC alleges that the respondents established an anti-competitive arrangement in relation to the supply of high-voltage or extra high-voltage land or submarine cables when responding to an invitation to tender issued by Snowy Hydro Limited in September 2003.

On 5 April 2013, Viscas Corporation admitted that it had established the anti-competitive arrangement alleged by the ACCC and the Federal Court ordered them to pay a financial penalty of AUD1.35million.<sup>26</sup>

A hearing of the ACCC's claims against Nexans and Prysmian is scheduled for July 2015.

Electra Cables requests that the Commission terminate this investigation. It must be accepted that the documented anti-competitive conduct of the other members of the industry renders price observations irrelevant for the purposes of deciding "cause" and "effect" for anti-dumping purposes.

Further, as a matter of public policy, adverse findings should not be made against imported cable in circumstances where the Australian industry members have engaged in unacceptable anti-competitive

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<sup>24</sup> Aoife White, *Goldman Sachs, Nexans Fined by EU for Power Cable Cartel*, 2 April 2014 <http://www.bloomberg.com/news/articles/2014-04-02/goldman-sachs-to-nexans-fined-by-eu-for-power-cable-cartel>

<sup>25</sup> Aoife White, *Goldman Sachs, Nexans Fined by EU for Power Cable Cartel*, 2 April 2014 <http://www.bloomberg.com/news/articles/2014-04-02/goldman-sachs-to-nexans-fined-by-eu-for-power-cable-cartel>

<sup>26</sup> Japanese cable supplier to pay \$1.35 million penalty for cartel conduct, 5 April 2013, ACCC Media releases <https://www.accc.gov.au/media-release/japanese-cable-supplier-to-pay-135-million-penalty-for-cartel-conduct>



conduct designed to manipulate the market and to damage importers such as Electra Cables.

## **D Financial performance reflects the anti-competitive conduct**

Electra Cables asks the Commission to closely consider and examine the financial performance of the Australian industry, from the perspective of the likely strategies of the major players Olex Cables and Prysmian. The evidence supports the likelihood that Olex Cables made a conscious decision to drive down prices in the market, thinking that it would be shielded from the losses it might otherwise have caused itself in a price war by maintaining sales volumes pursuant to the anti-competitive arrangements it had in place with the wholesaler groups. In the case of Prysmian, the more likely scenario is that it decided to reduce costs and increase profits by importing much greater volumes of electric cable. Olex Cables' strategy maintained Australian production levels but caused it some losses on higher volumes of sales, whereas Prysmian's strategy led it to be more profitable than previously.

We make these suggestions, and ask the Commission to investigate them, based primarily on the following evidence:

- (a) The latest financial statements for the four Australian members, which all relate to the 2013 calendar year period, suggest that Olex Cables was the only Australian industry member that showed a significant decline in terms of revenue and profitability. The other three Australian industry members either maintained their previous years' levels of performance or improved.
- (b) In the case of Prysmian, its 2013 Annual Report<sup>27</sup> states:

*Review of Operations*

*The group's profit for the year 2013 amounted to \$7.6 million (2012: loss of \$8.6 million).*

*The company was profitable in a still very competitive market by responding quickly to market changes and customer needs. However the result in 2013 was also affected by a reversal of an unused provision and insurance recovery in relation to claims from a customer.*

- (c) The Prysmian 2013 Annual Report advises of an increase in the purchases of goods by Prysmian from "commonly controlled entities" (ie, related parties) of 37%, from 27.86m in 2012 to

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<sup>27</sup> The Commission should note that the Prysmian 2013 Annual Report relates to the consolidated entity consisting of Prysmian Power Cables & Systems Australia Pty Limited and Prysmian Power Cables & Systems New Zealand Limited.

34.33m in 2013:

**(d) Transactions with related parties**

The following transactions occurred with related parties:

	Consolidated		Parent entity	
	2013	2012	2013	2012
	\$	\$	\$	\$
<i>Sales of goods and services</i>				
Commonly controlled entities	2,943,000	2,437,000	2,998,000	2,437,000
Subsidiary	-	-	4,328,000	2,580,000
<i>Purchase of goods</i>				
Commonly controlled entities	34,325,000	27,860,000	23,577,000	20,871,000
Subsidiary	-	-	11,742,000	10,602,000

This could suggest that it has reduced its costs (by importing, rather than maintaining its previous levels of Australian production) and increased its prices and, with the assistance of the anti-competitive wholesaler loyalty arrangements, maintained reasonable sales volumes.<sup>28</sup>

- (d) Olex Cables is the only Australian industry member not to have maintained or improved performance during the POI, and this may therefore explain why Olex Cables is the only “applicant” in this investigation, whilst the other Australian industry members are in a “support” position. The fact that the other Australian industry members are doing significantly better than Olex Cables, and the reasons for that difference, should be investigated by the Commission.
- (e) For its part, Olex Cables appears to have experienced a 50% increase in its sales volumes. We would assume this to be closely related to price reductions. The Commission should investigate whether Olex Cables believed it could survive a price war with Electra Cables, and did not suffer higher losses, because of the support of the wholesaler loyalty arrangements that are documented in the ACCC prosecution. A possible strategy of Olex Cables was to use the goods under consideration as a “loss leader”, a strategy which Olex Cables could maintain for as long as it had the continued and committed support of the distributors (by way of the exclusionary arrangements uncovered by the ACCC) to buy Olex Cables’ other products.
- (f) Whatever may have been Olex Cables’ overall position, its application indicates a significant growth in sales quantities and revenue in relation to the goods under consideration starting from

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<sup>28</sup> If Prysmian is a large importer of the goods under investigation, as appears to be the case, then Electra Cables asks the Commission to conduct an analysis of the price of Prysmian’s imports. If Prysmian has not yet received an importer verification visit from the Commission, is it intended by the Commission that such a visit will be conducted?

the June quarter of 2013. Moreover, graph 1 at page 13 of the Preliminary Affirmative Determination report suggests that the overall Australian market has not grown since the 2010/11 period, but that the market share of domestic production has increased.

## **E Electra’s disappointment with the PAD**

Lastly, Electra Cables wishes to refer to Preliminary Affirmative Determination Report No. 271 (“the PAD Report”) and Anti-Dumping Notice No 2015/09, which were published by the Commission in this investigation on 19 January 2015. The Commission’s preliminary view as expressed in the PAD Report was that the goods under consideration (“the goods”) were exported to Australia by Electra Cables’ Chinese supplier (“the Guilin Group”) during the investigation period at a dumped level. Based on that finding, the Commissioner imposed securities against those exports based on a preliminary “dumping margin” of 6.4%.

In making these findings, the Commission states that it did not rely on any data or information submitted by the Guilin Group in its exporter questionnaire (“EQ”) response.<sup>29</sup> The Commission said that it was entitled to proceed in this manner notwithstanding the fact that the Guilin Group had provided its EQ responses soon before the PAD Report was published, and that the extension of time that the Commission had provided to the Guilin Group to provide its EQ response did not prevent this from occurring either.

With respect, Electra Cables and the Guilin Group wish to express their disappointment with the making of the PAD and of the findings in the PAD Report. The Guilin Group, and its importer Electra Cables have always provided full cooperation to the Commission and its predecessor, the Australian Customs and Border Protection Service, in both this and the previous investigation. It was established in the previous investigation that the Guilin Group did not export the goods at “dumped” prices. Further, the Commission was aware of the unreliable and unsubstantiated nature of certain claims made by the applicant, especially the claims that the applicant had experienced “*material injury caused by dumping*” in the forms of price undercutting, loss of sales volume, reduced market share, reduced capacity utilisation and reduced employment, because the Commission noted in its PAD Report that these claims were either not supported by the data available to the Commission, or were not supported by any evidence at all. Lastly, we also note that in the case of the one Chinese exporter whose actual

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<sup>29</sup> PAD Report, page 9.

information in relation to the investigation period was considered, the Commission preliminarily found the dumping margin to be negative.

Accordingly:

- despite no previous dumping by the Guilin Group;
- confused and incorrect injury statements by the applicant;
- a finding of no dumping against another Chinese exporter;
- the submission of complete EQ data by Guiling Group within the extended time permitted by the Commission,

the Commission still arrived at a preliminary decision of dumping against the Guilin Group.

Regrettably, this decision allowed the applicant to cause confusion in the market, as it tried to take advantage of the decision to further undermine competition and the interests of consumers.<sup>30</sup>

Despite its disagreement with the approach taken by the Commission in the making of the PAD Report, the Guilin Group has continued its cooperation with the Commission's investigation and has every confidence that the correct decision will ultimately be made by the Commission. Once the Guilin Group's actual information is considered by the Commission, we are confident that the Commission will find that the goods exported by the Guilin Group during the investigation period were not "dumped". Further, the Guilin group maintains that no material injury can be said to have been caused by its exports when the companies against which it was competing did not allow legitimate market forces to determine their prices.

## **F A misconceived application**

Electra Cables insists that the Australian industry's application is misconceived.

Electra Cables is of the view that the goods under consideration were not "dumped". It is certainly true that huge price pressure was aimed at Electra Cables by the Australian industry. Nonetheless, Electra

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<sup>30</sup> See attached notice (Attachment 2) that was issued by Olex Cables to certain parties, the information in which can now be expected to be common knowledge in the market.

Cables and the Guilin Group were still driven by the need to compete fairly and to do their best at all times to maintain profitability.

The ACCC's prosecution of the various respondents in its Federal Court proceedings indicate that market forces were distorted by the anti-competitive conduct of the Australian industry and of the major wholesaler groups that are named as respondents in those proceedings. In that circumstance we do not know how the Commission can possibly arrive at proper findings of cause and effect, for the purposes of an anti-dumping proceeding such as this.

Electra Cables is the competitor that has been financially injured and damaged by the conduct of the applicant and of the other respondents. In the face of a price onslaught by Olex Cables, which the Commission can find to have been supported by the collusive loyalty of the wholesaler groups, Electra Cables was barely able to break even on its sales of the goods under consideration. At the same time, Olex Cables massively increased its market share, and from all reports Prysmian performed very well.

For all of these reasons, the Commission is requested to terminate this investigation as soon as it has reached the requisite degree of satisfaction to do so.

**Daniel Moulis**  
**Principal**