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08 February 2019

**The Director
Investigations 1
Anti-Dumping Commission
55 Collins Street
Melbourne
Victoria 3000**

By email

Dear Director

Electra Cables (Aust) Pty Limited Comments concerning Electra visit report and PAD 469

As you know we represent Electra Cables (Aust) Pty Limited (“Electra”) and Guilin International Wire and Cables Co., Ltd. (“Guilin International”) in this investigation.

We refer to the importer verification report concerning Electra (“the Electra visit report”), and the recently published ADN 2019/05 (“the PAD”).¹ In this submission, we would like to draw the Commission’s attention to a number of methodological and accounting errors in the Electra Report, which have fatally impacted upon the dumping margin calculation with respect to Guilin International as reflected in the PAD.

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¹ See Doc 018 – Electra Cable Verification Report

A Electra's purchases took place at arm's length

Under Section 269TAA(1) of the Customs Act 1901 ("the Act"), there are three circumstances in which a purchase of goods is not to be treated as an arm's length transaction. The Commission considered these in the Electra visit report and Guilin International visit report with respect to the transactions between Guilin International as exporter/seller of the goods under consideration and Electra as importer/buyer of those goods.

The three circumstances are where one or other of the following is established:

- (a) there is any consideration payable for or in respect of the goods other than their price"; and
- (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".
- (c) 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

The Electra visit report advises that no evidence of either circumstances under (a) or (c) was found by the Commission.²

However, the Commission went on to express the opinion that Electra, as the importer, had on-sold the goods under consideration ("GUC") in Australia at a loss.³ If that is the case, then the circumstance in which a purchase of goods can be found to be a non arm's length transaction under (c) may be triggered.

The Electra visit report preliminarily concluded that Electra's sales of the GUC were made at a loss and that this could be treated as indicating that Electra would be reimbursed, be compensated or would otherwise receive a benefit in respect of the price from Guilin International.

The precondition necessary for serving as that indication – that Electra's on-sales took place at a loss – does not exist, as we now wish to explain.

1. Foreign currency gains and losses have been wrongly excluded

As explained in detail during the verification process, including in the discussions with the Commission in finalising the Electra visit report, the Commission's determination of Electra's profitability contains a critical error, in that Electra's foreign exchange gains and losses have been excluded. Section 3.2.5 of the report states:

Electra's selling, general and administration cost (SG&A) calculation included foreign exchange gains or losses. The verification team excluded foreign exchange gains and losses which had the effect of increasing SG&A.

² See Doc 019 at page 8.

³ Section 269TAA(2) refers.

Electra submitted that this approach has no proper basis, and it continues to make that submission. Excluding these amounts is inconsistent with generally accepted accounting principles and contradicts the Commission's approach in its previous verifications of Electra and in many other verifications in which we have participated. The standard approach has been to include such gains and losses in the Commission's calculation, as part of the cost to import and sell the goods concerned.

Once again, Electra respectfully submits that foreign exchange gains and losses are an integral part of its business operations concerning the importation and sale of the goods under consideration ("the GUC").

For your convenience, we refer to the explanations Electra provided to the verification team during the verification process:

Electra's auditor advises that as a matter of business and accounting policy, as an importer and distributor, with high exposure to currency fluctuation, foreign exchange gain or losses are a fundamental cost of running the business and are not simply bottom line accounting entries. The fact that foreign exchange gain and loss could swing in wide range year by year does not mean that it is not part and parcel of the business' cost (whether positive cost or negative cost) of running a business sensitive to foreign exchange fluctuation. It simply means that such fluctuation demands extra attention in finance management and commercial dealings.

The foreign exchange gain and loss relates directly [to the] importation of the goods the price of which is nominated in foreign currency, which requires conversion of the cost of importation from the foreign currency to AUD when the goods enter the inventory and when payment is made. Foreign exchange gain and loss reflects the full cost in AUD terms to Electra's business. The fact that the foreign exchange gain and loss could result in large variation of the SG&A is a distraction. The foreign exchange gain and loss reflects the cost effect of Electra's cost of importing and selling the goods, whether such effect is taken up as part of the SG&A or as part of the overall "cost of import and sell" is only a difference in terminology. This is because, the cost of imports shows the cost of import in AUD terms based on the standard exchange rate used for inventory entry purpose in each month, however the true cost in AUD terms can only be accounted for once the relevant exchange gain or loss is taken into account. Otherwise the AUD based cost to make omits a key piece of the commercial and financial position of the importer. Whether this is considered as part of the "financial" expenses as part of the SG&A or as a standalone cost item that must be taken into account in working out the cost of import and sale is not practically important. In this sense, it is correct to say that the SG&A ratio (without foreign exchange gain/loss) would tend to be flatter. However the foreign exchange gain and loss is still a key and realistic part of Electra's actual cost of import and sell. Whether it results in a higher SG&A or lower SG&A is a commercial reality for Electra.

The only relevant question is whether the foreign exchange gain and loss is a cost associated with and incurred for the importation and sales of the goods. This is not different to the Commission's general practice of treating foreign exchange gain and loss as part of an exporter's SG&A/CTMS. In the present case, the foreign exchange gain and loss directly reflect the costs associated and incurred in relation to the importation and sales of the goods by Electra.

We trust that this additional explanation clarifies the issues surrounding the treatment of foreign exchange gain and loss. In our view is a simple issue that the foreign exchange gain and loss value is part of the cost to import and sell, and that such gain and loss cannot simply be ignored in the calculation of Electra's profitability and recoverability of selling the goods under consideration –

indeed it forms part of the amount of profit that the Commission has worked out for the purpose of calculating deductive export price.

In response to further specific questions and comments of the verification team, Electra also provided these detailed explanations:

A breakdown of foreign exchange gain and losses

Further, in relation to the comments that:

We note that Electra, in addition to incurring foreign exchange (FX) gains (or losses) for the conversion of current assets (i.e. cash and cash equivalents and trade and other receivables) and current liabilities (i.e. trade and other payables and borrowings); it also has [CONFIDENTIAL TEXT DELETED – details of Electra’s financial statement] non-current assets (trade and other receivables and financial assets) and non-current liabilities (i.e. trade and other payables and borrowings) which can impact on its foreign exchange gains and losses. In particular, the Commission understands from the notes to draft financial statements that [CONFIDENTIAL TEXT DELETED – details of Electra’s financial statement]. These non-current receivables and non-current assets are likely to be in foreign currencies and would have likely impacted Electra’s foreign exchange gains during the investigation period.

Electra is happy to provide detailed explanation about the composition of the foreign exchange gain and losses amount and to address these comments one by one.

- ...in addition to incurring foreign exchange (FX) gains (or losses) for the conversion of current assets (i.e. cash and cash equivalents and trade and other receivables) and current liabilities (i.e. trade and other payables and borrowings);

This represent a large part of the foreign exchange gain and loss, arising directly from Electra’s payment of the goods imported, at a gain of [CONFIDENTIAL TEXT DELETED – amount]. Naturally, this is directly arising from the importation of the goods. Further, over [CONFIDENTIAL TEXT DELETED – percentage] of Electra’s bank accounts are in AUD, therefore any cash and cash equivalent related foreign exchange gain and loss (in the form of balance date adjustment) is [CONFIDENTIAL TEXT DELETED – comment on amount], amounting to [CONFIDENTIAL TEXT DELETED – amount] in 2017.

- it also has [CONFIDENTIAL TEXT DELETED – details of Electra’s financial statement] non-current assets (trade and other receivables and financial assets) ... which can impact on its foreign currency exchange gains and losses

These assets have no impact on Electra’s foreign exchange gains during the investigation period because they are all in AUD dollars.

- non-current liabilities (i.e. trade and other payables and borrowings) which can impact on its foreign currency exchange gains and losses.

Most of Electra’s non-current borrowings relate to loans from [CONFIDENTIAL TEXT DELETED – source of loans]. The [CONFIDENTIAL TEXT DELETED – source of loan] loan is in AUD and thus not exposed to foreign currency fluctuations. Therefore, no exchange gains or losses can arise when we repay this loan. The loan from [CONFIDENTIAL TEXT DELETED – source of loan] is exposed to foreign currency fluctuations and would have an impact on Electra’s foreign exchange gain [and loss] during the investigation period, for 2017, this

amounted to a gain of [CONFIDENTIAL TEXT DELETED – AUD amount]. This forms part of Electra's cost of the general business operation.

- In particular, the Commission understands from the notes to the draft financial statements that Electra [CONFIDENTIAL TEXT DELETED – details of Electra's financial statement]. These non-current receivables and non-current assets are likely to be in foreign currencies and would have likely impacted Electra's foreign exchange gains during the investigation period.

Most of the non-current receivables relate to loans to [CONFIDENTIAL TEXT DELETED – comment about loans] which are all in AUD. Therefore they are not exposed to and not captured in foreign exchange gain/loss. The holding of non-current assets of [CONFIDENTIAL TEXT DELETED – comment about source of non-current assets] are accounted for in the financial statements by applying the equity method of accounting, therefore also not exposed to or captured in foreign exchange gain/loss.

Lastly, we respectfully submit that it is incorrect to describe foreign exchange gain and losses as “used to offset actual costs incurred by Electra which artificially reduces the SG&A percentage”. The foreign exchange gain and losses are integral part of Electra's accounting record and an integral part of Electra's actual cost. It functions as a necessary piece of the picture that is Electra's financial condition with AUD as the currency for reporting purpose. Without the foreign exchange gain and loss, the AUD based financial statement would be inaccurate and incomplete – in so far as any foreign currency related income and costs have been converted to AUD without proper financial and accounting treatment. This is the same position for every company and is consistent with the Australian accounting practice and principle.

Electra notes that this is the first time that these questions have been raised with Electra. As noted before, Electra understands that foreign exchange gain and losses are generally treated as part of a company's cost of operation, and they either directly or indirectly relating to the goods under consideration. In any case, Electra trusts that the above address each of the concern you have identified, and can continue to provide further clarities if there is any questions.

We respectfully submit that the Commission must recognise that Electra's foreign exchange gain and loss must be included in the determination of the SG&A and, ultimately, the determination of profitability/profit earned by Electra in its sales of the GUC under Section 269TAA(3) of the Act.

The Commission is welcome to seek the views of the Australian industry members as to whether foreign exchange gain and losses should properly be taken into account in assessing costs and profitability. We understand that the Australian industry members are also active in importation of electric cables and other materials into Australia. and would expect that they similarly account for gains and losses on their trading activities in the same way.

Once the foreign exchange gains and losses are properly taken into account, the Commission will find that Electra's sales of the GUC were indeed profitable, meaning that the Commission cannot treat the export sales between Guilin and Electra as being non arm's length transactions.

2. GUC profitability assessment uses the wrong universe of Australian sales

Section 269TAA(2) directs the Minister to assess whether transactions with respect to the GUC are arm's length by testing whether they have been subsequently sold by the importer at a loss in Australia:

(2) Without limiting the generality of subsection (1), where:

- (a) goods are exported to Australia otherwise than by the importer and are purchased by the importer from the exporter (whether before or after exportation) for a particular price; and*
- (b) the Minister is satisfied that the importer, whether directly or through an associate or associates, sells those goods in Australia (whether in the condition in which they were imported or otherwise) at a loss;*

the Minister may, for the purposes of paragraph (1)(c), treat the sale of those goods at a loss as indicating that the importer or an associate of the importer will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or a part of the price.

[underlining supplied]

The assessment required by Section 269TAA(2) must relate to the GUC – being the goods exported by Guilin International during the investigation period (“the POI”), and the subsequent sales of *those goods* in Australia by the importer.

In this regard, Electra submitted and the Commission agreed that for time-lapse purposes the correct approach towards matching Electra’s selling prices for any particular consignment of the GUC should be determined based on Electra’s average selling prices in the month after the importation:

Electra was unable to determine the end-customer in Australia for any given consignment of cable. Electra calculated the revenue by calculating a unit price of the GUC from its sales listing by month and state and determined a revenue for the GUC in each selected shipment... The verification team... calculated a weighted average unit price of the GUC sold in the relevant state in the month after the importation month from the same sales data...⁴

and:

As explained in Section 3.2.4 above, in its questionnaire response, Electra stated that it was unable to trace the selected importations to individual sales to its customers. Therefore, for the purposes of calculating the profitability of sales, the verification team had regard to the weighted average net selling prices of the goods in the relevant state one month after that consignment’s date of entry for home consumption.⁵

However, inexplicably, this method has not been followed in the Commission’s “profitability and recoverability” assessment in Confidential Attachment 2 to the Electra visit report. In that assessment the Commission has conducted a comparison of Electra’s monthly weighted average sales prices from January 2017 to December 2017, with a “fully absorbed cost of the GUC” based on the export prices of the GUC exported in the same months, being January to December 2017. Accordingly the profitability and recoverability test has clearly erred. It fails to closely match the goods *exported* during the POI with

⁴ See Doc 18 at page 5.

⁵ Ibid at page 7.

the relevant prices charged by the importer for selling *those goods*. In so doing it contradicts the way in which the Electra visit report clearly states that the matching should be carried out.

2. Likelihood of recovery of losses within a reasonable time has not been considered

For the reasons expressed above, Electra's sales of the GUC in Australian have not taken place at a loss.⁶ Nonetheless, we further note the meaning and implication of Section 269TAA(3)(c) of the Act, which provides:

In determining, for the purposes of subsection (2), whether goods are sold by an importer at a loss, the Minister shall have regard to:

- (a) the amount of the price paid or to be paid for the goods by the importer; and*
- (b) such other amounts as the Minister determines to be costs necessarily incurred in the importation and sale of the goods; and*
- (c) the likelihood that the amounts referred to in paragraphs (a) and (b) will be able to be recovered within a reasonable time; and*
- (d) such other matters as the Minister considers relevant. [underlining supplied]*

The Commission's analysis appears to have been limited to a comparison of export prices and import costs during the 12 months of the POI, and Electra's monthly prices for the same 12 months of the POI. Thus, there does not appear to have been any assessment, or any proper assessment, of the likelihood of the recovery of any alleged losses within a reasonable time.

The following succession of facts is relevant to this consideration:

- copper prices were highly volatile during the POI;
- in response, Guilin International's prices to Electra **[CONFIDENTIAL TEXT DELETED – pricing pattern]**;
- Electra's ability to pass on price **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**; and
- Electra **[CONFIDENTIAL TEXT DELETED – Electra's pricing pattern and market condition]**.

In light of the above, we submit that the conclusion in the Electra visit report to the effect that the loss incurred by Electra on its sales of the GUC (which is denied) is "*very unlikely to be recovered in a foreseeable future*" has not been properly nor fully considered.

We submit that the better view is that the short term losses the Commission incorrectly observed during the second half of the POI are not indicative of a likelihood that Electra will not recover its costs of the importation and sale of the GUC imported during the POI. Rather, the volatility of copper prices, the fact that Electra **[CONFIDENTIAL TEXT DELETED – pricing pattern]**, and the healthy profit level of Electra's overall operation all provide strong indications of the likelihood of recovery of such costs.

⁶ This is without limiting Electra's other concerns about the accounting logic of the loss-making finding, which have been communicated to the Commission in confidential emails relating to the Confidential Attachments. The concerns we are airing in this letter are in themselves a full answer to the suggestion that Guilin International's invoice prices to Electra are not the export price of the GUC, under Section 269TAB(1) of the Act.

3 Price negotiations between Electra and Guilin are commercial and market-based

We take note of the comments in the Electra visit report as now follow:

In addition, the verification team notes that there are no formal records of negotiations taking place between Electra and Guilin International Wire and Cable Group Co., Ltd. Electra explained that the negotiations are taking place over the phone and stated that prices are determined with regards to what is happening in Australian market, such as pricing behaviour of local competitors and copper price movement. Electra also stated that it can negotiate a time delay as to when price increases can take effect or can negotiate the percentage of increase by Guilin International Wire and Cable Group Co., Ltd. Considering Electra's ability to influence the export prices from Guilin International Wire and Cable Group Co., Ltd. by having regard to the Australian market conditions and its ability to delay the reflection of cost increases to the export price, the verification team considers that the price appears to be influenced by a relationship between the buyer (Electra), and the seller (Guilin International Wire and Cable Group Co., Ltd.), or an associate of the seller.⁷

We also take note of the comments in the Guilin International visit report that:

In respect of exports to Australia by Guilin International to its related entity Electra during the investigation period, the verification team considers that 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. The verification team has relied upon information obtained during the exporter verification process and information obtained during the Electra importer verification, which indicated joint shareholding of individuals and other companies at both Electra and Guilin, various inter-company loans between Electra, Guilin and other shareholding companies, a price negotiation process where the importer has more influence on the purchase price than it would have otherwise not been able to have and the finding that the importer subsequently selling the goods at a loss. The verification team therefore considers that sales between the exporter and importer of the goods during the investigation period were not arms' length transactions.⁸

Electra respectfully submits that these observations are wrong and unfair, and provides the following comments for the Commission's due consideration.

- (a) There is nothing remarkable about the fact that negotiations were not taking place with "formal records" of the type that the Commission appears to insist upon, and such insistence is misplaced. Both Electra and Guilin explained to the verification teams that negotiations took place through modern technology in the form of **[CONFIDENTIAL TEXT DELETED – information about communication methods]**.
- (b) Electra's advice to the visit team that the content of its negotiations with Guilin sometimes involves **[CONFIDENTIAL TEXT DELETED – negotiation process]**, highlight the fact that Electra and Guilin engaged in such price negotiations in the pursuit of their respective, independent commercial interests. In any negotiation a buyer complains about market conditions and its ability to make a profit on re-sale, and a seller complains about the cost increases it faces and its needs to make money on its investment. The evidence cited actually

⁷ Ibid at page 6.

⁸ See Doc 19 at page 11.

highlights the arm’s length nature of those transactions. Electra does not dictate the price from Guilin International, nor does Guilin International dictate the price to Electra.

- (c) Electra’s bargaining position in the negotiations it undertakes with Guilin International is that of a very large customer operating in a market that is of major significance to its supplier.
- (d) The finding that Electra “has more influence on the purchase price than it would have otherwise not been able to have”⁹ is without basis and plainly incorrect. If it did, then Electra would clearly be in a perfect position to ensure that it did not “subsequently sell[] the goods at a loss”. Why would an importer use its influence to establish a non-arms length transaction only to be making a loss in reselling the imported goods?
- (e) The record shows that Electra [CONFIDENTIAL TEXT DELETED – pricing pattern and commercial arrangement].
- (f) Electra’s negotiations with Guilin International reflected its desire to remain competitive in the Australian market for the GUC, which was highly influenced in the POI by the sharp increase in copper prices, the basic commodity nature of the GUC, and the pricing behaviour of other players in the Australian market. Indeed, it is apparent that the Australian industry members’ resolved, whether individually or collectively, not to pass on cost increases. As shown in Figures 8 and 9 of the PAD:

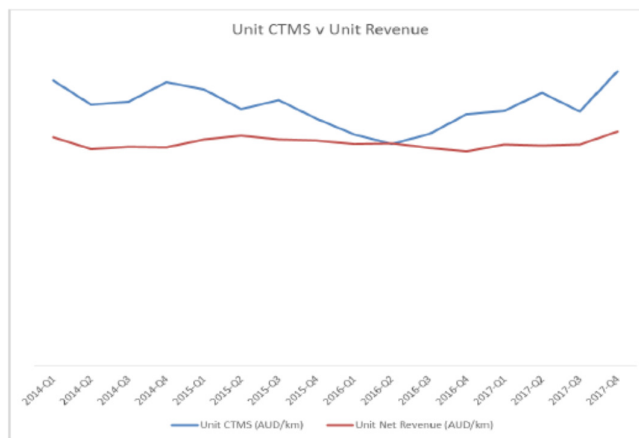


Figure 8: Comparison of Prysmian's unit CTMS and unit selling prices

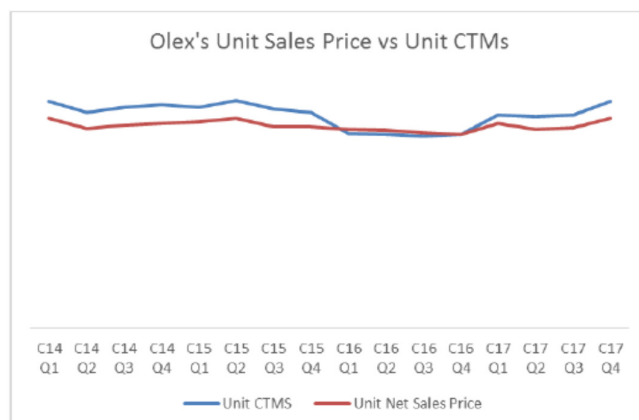


Figure 9: Comparison of Olex's unit CTMS and unit selling prices

⁹ Ibid at page 11.

Once again, we respectfully request the Commission to reconsider its conclusion, for the cogent reasons we have set out herein, and to reverse its opinion that the export sales of the GUC were not arm's length transactions. The correct and preferable conclusion is that the export prices for the GUC should be determined under Section 269TAB(1) of the Act.

B Incorrect calculation of the deductive export price

It is Electra's primary submission that the export transactions between Guilin International and Electra during the POI took place at arm's length, and that Guilin International's export prices must be ascertained pursuant to Section 269TAB(1)(a) of the Act.

Even if the export price is to be determined under Section 269TAB(1)(b), we submit that the Commission's preliminary calculations do not comply with the requirements for calculating the "deductive export price" as required by that Section. In our view, the key non-compliances are the following:

- failure to use the relevant price at which the goods were sold by the importer under Section 269TAB(1)(b), leading to an incorrect opinion about the amount of profit for the purposes of Section 269TAB(2)(c);
- failure to use a relevant profit on the sale of the goods by the importer in the exercise of the discretion in that regard under Section 269TAB(2)(c);
- incorrect inclusion of certain post-exportation costs and expenses under Section 269TAB(2)(b)

We explain each issue in turn, as follows.

1 Deductive export price calculation adopts the wrong universe of Australian sales

The Electra visit report states:

The verification team is of the opinion that, due to an accurate comparison of the importations with corresponding sales to Electra's customers not being reasonably practicable, if the Commission considers that the export price should be calculated under subsection 269TAB(1)(b) of the Customs Act 1901 (the Act), the profit rate for the purposes of a deductive export price, should be calculated by having regard to the sales of the general category of the goods instead of the GUC. The verification team calculated Electra's profit rate using its company wide net profit rate in 2017 calendar year from Electra's profit and loss statement.¹⁰

Section 269TAB(1)(b) provides

For the purposes of this Part, the export price of any goods exported to Australia is:

...

(b) *where:*

- (i) *the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and*

¹⁰ See Doc 18 at page 7.

- (ii) *the purchase of the goods by the importer was not an arms length transaction; and*
- (iii) *the goods are subsequently sold by the importer, in the condition in which they were imported, to a person who is not an associate of the importer;*

the price at which the goods were so sold by the importer to that person less the prescribed deductions; [underlining supplied]

Applying these requirements to the circumstances of the exports by Guilin International to Electra during the POI:

- (a) Section 269TAB(1)(b)(i) - the GUC exported by Guilin International during the POI have been clearly identified, Guilin International is not the importer of those goods, and Electra is the importer of most of those goods;
- (b) Section 269TAB(1)(b)(ii) - the Commission is of the preliminary view that the purchases of the GUC by Electra were not arm's length transactions;
- (c) Section 269TAB(1)(b)(iii) - the GUC were subsequently sold by Electra, in the condition in which they were imported, to customers who are not associates of Electra.

Section 269TAB(1)(b) necessitates that the deductive export price be determined for the specific goods that are exported, imported and then sold. The Section assumes and requires a direct connection between the price of the specific goods exported and their resale price. Accordingly, the export price must be worked out by examining the price at which *those goods* – being the GUC exported by Guilin during the POI – were subsequently sold by Electra to its customers, less the prescribed deductions.

Electra and Guilin International advised the Commission that the period between the exportation of the GUC from China to their arrival at the designated Australian port is on average two to three weeks. Further, once the goods arrive in Australia, the goods must be transported to and enter Electra's inventory, in one of its **[CONFIDENTIAL TEXT DELETED – number]** warehouses; be broken down into order sizes ("break bulk"); and then subsequently be ordered and sold to customers from that inventory. In this regard, as Electra explained and the Commission agreed, the best way to identify the price at which the GUC were sold by Electra is to take into account the importation and inventory period, of about one month on average between *importation* and resale by Electra:

As explained in Section 3.2.4 above, in its questionnaire response, Electra stated that it was unable to trace the selected importations to individual sales to its customers. Therefore, for the purposes of calculating the profitability of sales, the verification team had regard to the weighted average net selling prices of the goods in the relevant state one month after that consignment's date of entry for home consumption.¹¹

That is, for each shipment of the GUC exported by Guilin, those goods were not sold until 1.5 to 2 months later on average from the point of *exportation*. This time lag takes into account the two to three weeks required for shipping from China and then the one month period for the transport, inventory and sales processes necessarily engaged in by Electra. Accordingly, Section 269TAB(1)(b) requires the price of the GUC to be determined based on Electra's weighted average sales prices *two months* (rounding up 1.5 to 2 months for practical purposes) after the goods were exported.

¹¹ *ibid*

In the preliminary deductive export price calculation, the Commission has used Electra's monthly weighted average price for the *same* month as the month of exportation by Guilin International. Given the time gap explained above, the method adopted in the Electra Report causes there to be a breach of the requirement under Section 269TAB(1)(b).

Accordingly, Electra asks the Commission to properly determine the deductive export prices, based on Electra's sales prices of the GUC in a period which is on average two months after the date of exportation of the GUC during the POI. In this regard, Electra notes that it has already provided its detailed sales listings for January to March 2018 to the Commission, being the quarter after the POI.¹²

2 Incorrect application of profit under Section 269TAB(2)(c)

Section 269TAB(2)(c) provides that profit may form part of the prescribed deductions for the purpose of ascertaining a deductive export price under Section 269TAB(1)(b):

A reference in paragraph (1)(b) to prescribed deductions in relation to a sale of goods that have been exported to Australia shall be read as a reference to:

- (a) any duties of Customs or sales tax paid or payable on the goods; and*
- (b) any costs, charges or expenses arising in relation to the goods after exportation; and*
- (c) the profit, if any, on the sale by the importer or, where the Minister so directs, an amount calculated in accordance with such rate as the Minister specifies in the direction as the rate that, for the purposes of paragraph (1)(b), is to be regarded as the rate of profit on the sale by the importer.*

As discussed in A above, the Electra visit report determined that Electra's sales of the GUC exported from Guilin International took place at a loss. We disagree with this determination – the sales were in fact profitable – and refer you to our previous submissions in that regard. However, for the purposes of argument, if Electra indeed did not make any profit on its sales of the GUC, then the deduction as prescribed under Section 269TAB(2)(c) would not apply, in that *“the profit, if any, on the sale by the importer”* would be zero.

To the contrary, the Electra visit report determined a profit rate of **[CONFIDENTIAL TEXT DELETED – percentage]**, using Electra's company wide net profit in 2017 on the purported basis that this profit related to *“sales of the general category of the goods”*. This approach is erroneous for a number of reasons.

- (a) Firstly, Section 269TAB(1)(b) and (2) focus on the *“sale of goods that have been exported to Australia”*. This refers to the sale of the GUC by the importer. Therefore it is incorrect to use the profit rate of Electra's company-wide sales, or *“sales of the general category of the goods”*. Those sales relate to a much broader and diverse range of products than the GUC.
- (b) Secondly, Section 269TAB(2)(c) envisages a situation where the profit component of the prescribed deduction could be zero – as shown by the use of *“if any”*. Accordingly, and to be consistent and compatible with the Commission's view that Electra's sales of the GUC were not

¹² Email from Moulis Legal to the Commission dated 23 November 2018. These are attached again in this submission, at Attachment 1. **[CONFIDENTIAL ATTACHMENT]**

profitable and that the losses were not recoverable, the profit to be used, "if any", should be zero.

- (c) Thirdly, the [CONFIDENTIAL TEXT DELETED – number] profit rate is not a reasonable amount of profit to be expected for the sales of *the GUC*, and not a reasonable reflection of the Australian market for *the GUC*. For instance, the subject goods appear to be priced at break-even or even loss making levels by the Australian industry members, as evidenced by their repeated applications for anti-dumping protection. It might even be concluded that they regard the GUC as a loss leader product. This market norm is observed in Olex and Prysmian's pricing behaviours, which show that the GUC have been consistently priced at heavily loss making levels, regardless of Electra's prices:¹³

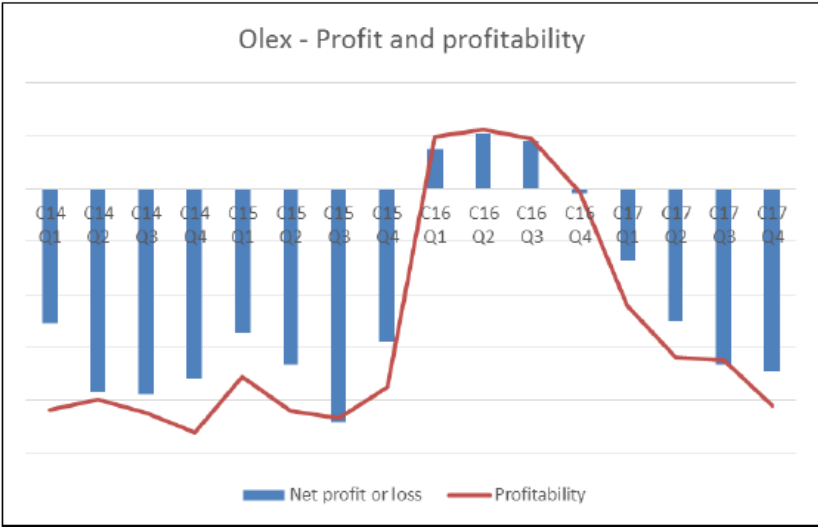


Figure 5: Olex's profit and profitability (*Profitability plotted on secondary axis)

¹³ See Doc 013 at page 18, and Doc 014 at page 18.

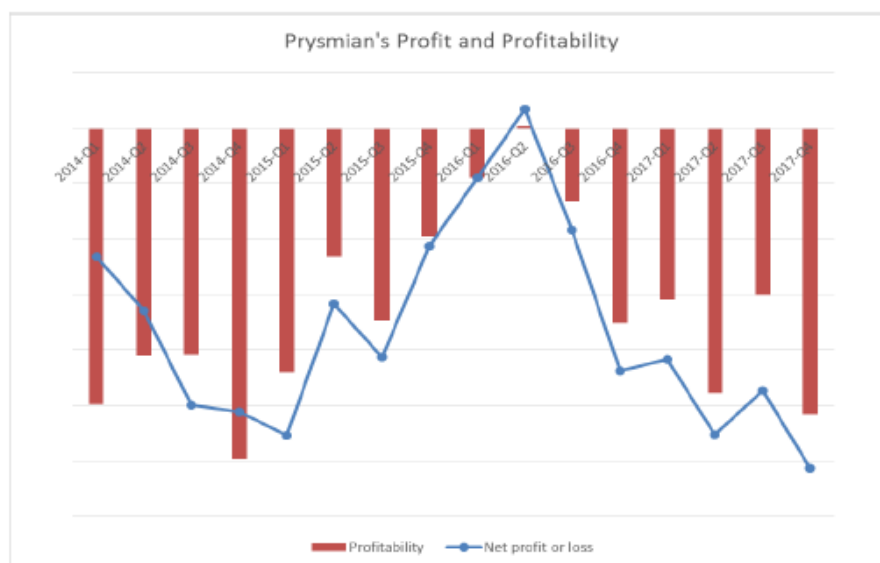


Figure 5: Prysmian's profit and profitability (*Profitability plotted on secondary axis)

By contrast, Electra has been doing its absolute best to achieve profitable sales, and has been achieving profitable sales, even if that profit has been at a very low level. Electra has always tried to recover its costs for the sales of the GUC, whilst maintaining its competitiveness against the other major suppliers. As shown in the Commission's profitability assessment of Electra's sales in this investigation (even based on the Commission's incorrect cost basis) and in the previous investigation, the loss making level determined from the sampled sales has been [CONFIDENTIAL TEXT DELETED – comment about scale], in the region of less than [CONFIDENTIAL TEXT DELETED – percentage].

In our submission it is incorrect and unreasonable to use a high level of profit for the purpose of Section 269TAB(2)(c), when it is not a reasonable or realistic level for any member of the industry with respect to *the GUC*.

In this regard, it is also worth noting that Electra's sales prices of the GUC, and their low or no profitability, are highly influenced by Electra's competitors in the Australian market. As the Commission noted in the PAD, Electra's prices were undercut by the other Australian industry members for the majority of the POI.¹⁴ This reflects Electra's own market intelligence, which shows that Electra's prices for the GUC were constantly being undercut by its competitors:¹⁵

¹⁴ See Doc 021 at page 16.

¹⁵ Please see Attachments 2 to 10. [CONFIDENTIAL ATTACHMENTS]

	Electra	Prysmian	Nexans	Advance
Comparison 1 - February 2017				
Comparison 2 - February 2017				
Comparison 3 - March 2017				
Comparison 4 - March 2017				
Comparison 5 - April 2017				
Comparison 6 - June 2017				
Comparison 7 - June 2017				
Comparison 8 - June 2017				
Comparison 9 - July 2017				
Comparison 10 - October 2017				
Comparison 11 - October 2017				
Comparison 12 - November 2017				

CONFIDENTIAL TABLE DELETED

[CONFIDENTIAL GRAPHIC DELETED – graphic showing visual representation of pricing comparison table]

As an additional example, Electra understands that in October 2017, Bunnings was selling Prysmian’s cable at \$84 per 100m. Presumably this indicates that Prysmian’s price to Bunnings was much lower, thereby substantially undercutting Electra’s prices to distributors, at above [CONFIDENTIAL TEXT DELETED – price].

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PowerPass PRICE \$84 EACH	PowerPass PRICE \$54 EACH

For comparison purposes, Electra was selling the goods to its customer [CONFIDENTIAL TEXT DELETED – customer name] at [CONFIDENTIAL TEXT DELETED – price] in the same month, please see Attachment 8. [CONFIDENTIAL ATTACHMENT]

The price comparison, and Olex and Prysmian’s profit levels, clearly demonstrate that the major Australian industry members expect nothing more than to break-even or even to make losses on their sales of the subject goods. This is not acceptable to Electra, nor can it be acceptable to any business that seeks to maximise its business profits. However in circumstances in which the Australian industry has been loss making with respect to the GUC, and has not been undercut by Guilin International’s prices, it is both unrealistic and unfair to slap a [CONFIDENTIAL TEXT DELETED – percentage] profit requirement on Electra.

In this regard, Electra takes note of Prysmian’s submission that its “sister product” of a four core, 1.5 mm product should be considered as a reference point for determining the appropriate profit margin to work out a non-injurious price for the GUC. The Commission should examine the comparability of the GUC and this proposed “sister” cable, in terms of their relative sales volume and level of trade. From Electra’s experience, this so called “sister cable” is a specialised product, and is likely to be sold in much smaller volumes, as compared to the commodity nature of the GUC. The profit of this four core product is therefore likely not to be a reasonable reflection of the level of profit that can be expected from the sales of the GUC.

- (d) Lastly, as Electra has already identified, if the Commission insists that Electra’s foreign exchange gains and losses should not be considered as part of Electra’s costs relating to the

GUC, then such amounts must be consistently removed from the Commission's calculation of the amount of profit for the purpose of determining a deductive export price.

3 Incorrect exclusion of post-exportation foreign exchange gains and losses

This relates to the Commission's exclusion of foreign exchange gain and loss in the calculation of Electra's cost to import and sell of the GUC, which resulted in an inflation of the cost to import and sell. In short, these arose in relation to the goods after exportation under Section 269TAB(2)(c), and therefore should form part of the deductive export price calculation.

This has been addressed in Part A.1 above.

We respectfully urge the Commission to address the errors in its determination concerning Electra and Guilin International as identified in this submission. We note that once these errors are corrected, it will become readily apparent to the Commission that:

- Electra sold the GUC imported from Guilin International during the POI at a profit; and
- Guilin International's exports of the GUC during the POI were not dumped.

Once this has been determined, the investigation should be terminated as against Guilin International immediately.

Yours sincerely



Charles Zhan
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Macky Markar
Senior Lawyer