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26 November 2020

Mr Martin Squire
General Manager
Trade and International Branch
Department of Industry, Science, Energy and Resources
Industry House
10 Binara Street
Canberra
Australian Capital Territory 2601

By email

Dear Mr Squire

Electra Cables (Aust) Pty Ltd
Decision of the Minister concerning Investigation 469

We act for Guilin International Wire and Cable Group Co., Ltd ("Guilin International") and Electra Cables (Aust) Pty Ltd ("Electra").

We refer to your two separate letters to our clients, which were emailed to us on 6 November 2020 ("the Letters"). We note your advice that the Minister is now reconsidering the matter as per the court order in Federal Court proceedings No VID965/2019. That order set aside the Minister's original decision ("Revoked Decision") to impose anti-dumping measures on PVC electrical flat cables exported from China in so far as those measures concerned Guilin International.[1]

Our clients welcome this opportunity to provide their submissions for the Minister's reconsideration. In this joint submission, we address each of the issues with respect to which the Letters seek submissions from our clients, namely:

(a) *whether the Minister should make a direction under paragraph 269TAB(2)(c) when redetermining the export price of the goods, as set out in section 6.5.1.2 of Report 469: PVC Flat Electrical Cables Exported from the People's Republic of China (Report 469); and*

(b) *any changes in circumstances since Report 469 was delivered to the Minister on 8 April 2019 as they relate to whether dumping and material injury will continue.*

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1 *PVC Flat Electrical Cables Exported from the People's Republic of China - Findings in relation to a dumping and subsidisation investigation* (ADN 2019/47, 8 May 2019)

A Export price determination

1 Sales of the goods by Guilin International to Electra were arm's length transactions

It is our primary submission that the Minister should find, in redetermining the export price of the goods, that the export price can be determined under Section 269TAB(1)(a) of the *Customs Act 1901* ("the Act") by reference to the price paid by Electra. Proceeding in this way would render the question of whether a direction should be made under Section 269TAB(2)(c) unnecessary and irrelevant.

As you know, Section 269TAB(1)(a) of the Act states:

> *(1) For the purposes of this Part, the export price of any goods exported to Australia is:*
>
> *(a) 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*
>
> *(ii) the purchase of the goods by the importer was an arms length transaction;*
>
> *the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation*

In the Report 469, the Anti-Dumping Commission ("the Commission") recommended that the price of the goods exported from Guilin International to Electra during the investigation period could not be determined under Section 269TAB(1)(a) of the Act. This was based on the view expressed in Report 469 that the export sales between Guilin International and Electra were not arm's length transactions under Section 269TAA(1)(b) and (c) of the Act.[2]

[2] Report 469, at page 31.

In our view, this finding was flawed and unsafe. We respectfully ask the Minister to reconsider these issues, and to determine that the export transactions between Guilin International and Electra were arm's length transactions for the purposes of Section 269TAB(1)(a).

We provide detailed reasons for our submission as follows.

a Electra's resale of the goods did not take place at a loss

Report 469 explains that a key reason for the finding that the export sales were not considered to be at arm's length was the following:

> *In respect of exports to Australia by Guilin to its related entity Electra, the Commission found that the goods were subsequently sold at a loss by Electra. The Commission notes that the Minister may, for the purposes of subsection 269TAA(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.*[3] [footnote omitted]

We respectfully submit that this assessment was incorrect in several respects.

Report 469's view that Electra's resale of the goods were at a loss under Section 269TAA(2) of the Act came about by reason of two factors:

- a refusal to recognise the foreign exchange gains recorded in Electra's financial statement in the context of assessing the profitability of Electra's resale of the goods as required by Section 269TAA(2) and (3) of the Act; and
- an incorrect matching of resale prices with the cost of the imported goods, being the export price from Guilin International.

Firstly, by excluding foreign exchange gains, Report 469 inflated the *"Importer SG&A"* ratio from **[CONFIDENTIAL TEXT DELETED – percentage]** of Electra's total sales revenue for the investigation period to **[CONFIDENTIAL TEXT DELETED – percentage]**, and failed to account for the foreign exchange gain in any other manner (as a part of the income for the importation and sale of the goods). This directly contributed to Report 469's finding that Electra's resale of the goods was at a loss, and for the consequent rejection of the actual invoice prices of the goods (*"the price paid or payable for the goods by the importer"*) as being their export price. If this foreign exchange gain had been properly taken into account, and if resale prices had been correctly matched with the cost of the imported goods in a timing sense, Electra's resale of the goods would have been shown to be profitable, and not loss-making. This would have removed the key basis for Report 469's recommendation that export price should be worked out under Section 269TAB(1)(b).

Section 6.5.1.2 of Report 469 provides the basis for the refusal to recognise Electra's foreign exchange gain in the assessment of the profitability of Electra's re-sale of the goods. The first is that foreign exchange gain arose from several accounting events. The second is that such gain cannot be regarded as one of the *"selling costs, general costs, or administrative costs"*, because the gain is recorded as

[3] Report 469, at page 31.

"other revenue". These reasons were not disclosed to Electra prior to the publication of Report 469 therefore the Commission did not have the benefit of Electra's opinions and clarifications.

Electra would like to draw the Minister's attention to the fact that the foreign exchange gains were and are an integral part of Electra's business as an importer of the goods, being a business exposed to foreign currency movements, arising from payment of the goods priced in foreign currencies, and from its borrowings being nominated in a foreign currency. There is no reason such gains should not have been properly taken into account in assessing Electra's profitability of its sales of the goods as an importer. We submit that the question of whether the gained amount should be recognised as part of Electra's costs or as part of Electra's income cannot be used as a reason not to account for such amount in that assessment. The question under Section 269TAA(2) and (3) is whether the resale of the goods took place at a loss, and that the loss was unlikely to be recovered within a reasonable time. Proper recognition of the foreign exchange gain is of simple relevance to that assessment. The decision to exclude such gains, which led to the finding that the subsequent resale of the goods took place at a loss, does not accord with generally accepted accounting principles. We respectfully submit that the decision was incorrect and unjustified.

Indeed, the relevance of Electra's foreign exchange gain with respect to its importation and re-sale of the goods is recognised by Report 469 in a different context:

> *In its submission, Electra opines that if forex gains / losses are not accepted as being part of the SG&A, it should then be removed from Electra's profit calculation. The Commission disagrees with the approach proposed by Electra. The Commission notes that in the event that an importer made a forex loss, the Commission would not remove these losses from the importer's profit calculation to increase its profit. Moreover, the Commission considers it necessary to identify and verify all components of forex gains / losses in Electra's financial statements in order to determine if removal of any part of the forex gain from Electra's profit calculation is warranted.*
>
> *In the absence of detailed evidence to enable forex gain / loss achieved in respect of trading activities associated with the goods to be identified and segregated, the Commission considers that the total removal of forex gain / loss from profit (before tax) would contradict generally accepted accounting principles. The Commission disagrees that forex gains should be excluded from Electra's profit calculations. The Commission notes that Australian Accounting Standards Board Standard 121 requires that exchange differences arising on the settlement of monetary items or on translating monetary items at rates different from those at which they were translated on initial recognition during the period or in previous financial statements shall be recognised in profit or loss in the period in which they arise.*

We respectfully submit that Report 469's treatment of Electra's foreign exchange gain was incorrect, self-contradictory and lacking basic consistency. The correct and proper recognition of the foreign exchange gain would indicate that Electra's resale of the goods did not take place at a loss.

Secondly, Report 469 did not correctly match, or attempt to correctly match, Electra's resale prices of the imported goods with the relevant export prices of the goods. In this regard, Report 469 states:

> *In regards to closely matching the goods exported during the investigation period with the relevant prices charged by the importer for selling those goods, the Commission is of the view that in the absence of any traceability of sales by Electra, comparison of Electra's weighted*

average selling prices to fully absorbed costs of imported goods in the same month is the correct and preferable approach. The Commission considers that the lag Electra claims to exist between entry for home consumption and sale of the goods is not quantifiable. There is also no compelling evidence to suggest that any lag in selling the goods would materially impact the selling prices.

We respectfully submit that the above comments are factually and logically incorrect. The "lag" Electra identified is well explained and reasonably estimated. Specifically, we refer to the following information we presented to the Commission:[4]

> *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* ***[CONFIDENTIAL TEXT DELETED – number]****. 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.*
>
> *That is, for each shipment of the GUC exported by Guilin, those goods were not sold until* ***[CONFIDENTIAL TEXT DELETED – number]*** *months later on average from the point of exportation. This time lag takes into account the* ***[CONFIDENTIAL TEXT DELETED – number]*** *weeks required for shipping from China and then the* ***[CONFIDENTIAL TEXT DELETED – number]*** *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* ***[CONFIDENTIAL TEXT DELETED – number]*** *months (rounding up* ***[CONFIDENTIAL TEXT DELETED – number]*** *months for practical purposes) after the goods were exported.*
>
> *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.*

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[4] Electra's submission to the Anti-Dumping Commission dated 7 February 2019, at page 12.

Report 469 does not explain why this basic and reasonable illustration of the time involved for the physical movement of the goods from China until sold to Electra's customer in Australia was not accepted. The two to three weeks period estimated for shipping the goods from China to Australia reflects common trade experience and can easily be checked. The Commission is well resourced and has access to agencies familiar with transportation of goods by sea, such as the Australian Border Force. The Commission could also have verified such an estimate based on the invoice and shipping documents provided by Electra and Guilin International and verified by the Commission. For example, the Commission sampled 14 shipments of Electra's importations of the goods during the POI, and requested full sets of commercial and shipping documents from Electra. [CONFIDENTIAL TEXT DELETED – details of confidential commercial documentation]. The fact that these "lags" exist between the exportation of the goods and the time that the goods could then be *subsequently sold* by the importer cannot be disputed, and can be reasonably measured.

The fact that Electra would then need to take the imported goods into inventory in its various warehouses before breaking-bulk and selling them to its customers is also an undisputed fact. The Commission was in possession of relevant information which demonstrated the existence of the time gap. Such information clearly reflects the commercial and physical reality and was not contradicted by any other relevant information. The "lag" was quantified on a reasonable basis and was not disputed at any point.

Based on the Commission's methodology, the export prices of the goods exported by Guilin International in the first month of the investigation period (being January 2017) were matched to Electra's resale prices of January 2017 to determine the profitability of resale. However the reality is that the goods *exported* during January 2017 most likely had not been imported, and were not capable of being sold by Electra in the same month. Electra's resale prices of PVC flat cables in January 2017 could only realistically reflect the subsequent sales prices of Electra as the importer in relation to the goods that were exported towards the end of 2016, being goods exported before the POI. The question of whether the subsequent resale of the goods by Electra as importer took place at a loss was not correctly assessed by comparing Guilin's export price and Electra's resale price of the same month during the investigation period.

Further in this regard, concerning the correctness of assessing the recoverability of losses, Electra made the following submission during the investigation:[5]

> *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].

[5] Electra' submission to the Anti-Dumping Commission dated 7 February 2019, at page 7

> *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.*

Report 469 responded to Electra's comment as follows:

> *The Commission does not agree that a recoverability test beyond the investigation period is required or desirable. Subsection 269TAA(3)(c) requires examining the likelihood of costs being recovered in a reasonable time. The Commission is of the opinion that the goods are typically fast moving products and are not stored in inventory for long periods. Therefore, the Commission is of the view that a test of recoverability of losses in the 12 months (investigation period) is reasonable and that it has properly assessed Electra's profitability and recoverability of the sales of the GUC.*[6]

The Commission's approach was to match Electra's *monthly* resale prices during the investigation period with Guilin International's *monthly* export price of the same month during the investigation period. This approach failed to take into account the gap between exportation of the goods and their subsequent resale by Electra after importation, and failed to actually determine the correct resale prices of the exported goods. The ignoring of the lag effect between the importer's resale prices and the export prices badly distorted the profit and loss situation. This had the most significant impact in the second half of the investigation period when the copper price surged, resulting in a sharp price increase by Guilin International, when the goods already imported were still being sold by Electra under the existing prices agreed with customers. This effect is reflected in Report 469's own observation:[7]

> *The Commission also noted that Electra's losses increased in the second half of the investigation period, rendering the losses made during the investigation period very unlikely to be recovered in a foreseeable future. This analysis is available at Confidential Attachment 5.*

This loss deterioration is directly linked to the improper comparison of the export price from Guilin International and Electra's resale prices. In light of the sharp increases of copper prices in the second half of the investigation period and the factual explanation given by Electra – that it needed time to fully pass on the cost increases to customers due to both commercial and legal challenges - it is even more logical and reasonable to take into account the gap between exportation and the importer's resale of the goods in assessing whether Electra's resale of the goods took place at a loss, and whether such loss were not recoverable within a reasonable time.

We submit that Report 469 failed to correctly address these critical issues. Its approach did not give meaning to the words "subsequent resale" and did not allow for a proper assessment of the likelihood of recovery of losses in the foreseeable future at all.

b Resale of goods at loss is not necessarily indicative of non-arm's length transactions

Separately, we submit that even if Electra's resale of the goods exported during the investigation period were indeed loss-making, this does not automatically establish the existence of a reimbursement or of compensation or the receipt of any other benefit in respect of whole or any part of the price of the imported goods in the context of Section 269TAA(1)(c) and (2) of the Act. Electra and Guilin

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6 Report 469, at page 35.

7 Report 469, at page 35.

International have both provided their full financial information to the Commission. This was exhaustively verified by the Commission and was accepted as being complete and accurate by the Commission. Report 469 did not identify any evidence of a reimbursement or compensatory arrangement. Subsequent to Report 469 and the initial imposition of anti-dumping duty, Electra and Guilin International provided further financial information to the Commission, for the period of 14 January 2019 to 13 May 2019, as part of Electra's application for duty assessment.[8] That information would again have shown that there was no such reimbursement or compensatory arrangements between Guilin and Electra concerning the price paid for the goods.

In this regard, we consider it relevant to note the Minister's decision in her *Reconsideration of Review No.55A – A4 Copy Paper Exported from China by UPM Asia Pacific*. In that decision, the Minister accepted the recommendation of the Anti-Dumping Review Panel ("ADRP") in a reconsideration following orders made by the Federal Court These orders set aside the decision of the ADRP Report No 55 and the decision of the Minister in relation to anti-dumping measures on exports of A4 copy paper from China by UPM Asia Pacific.[9]

Specifically, the ADRP was required to reconsider the Commission's original decision to regard the export sales from UPM to the importer as non-arm's length under Section 269TAA(1)(c) of the Act. In the reconsideration report, the ADRP notes:[10]

> *140. I had previously concluded in Report 55 that the ADC had considered the relevant evidence in an appropriate manner in making its recommendation to the Minister in REP 341. However, additional information suggests that a fuller consideration of all FXA sales, FXA's SGA as well as the nature of the price competition occurring in the Australian market presents a different perspective as to whether the transactions should be considered non-arms length.*
>
> *141. On balance, I consider it more likely than not that the losses experienced by FXA were due to the highly competitive market in Australia (contributed to by the dumped imports), as well as the particular business operations of FXA. This is evidenced by:*
>
> - *the sales at a loss regardless of source;*
> - *the unlikelihood that all suppliers were reimbursing FXA for these losses; and*
> - *the comparative SGA revealing that FXA incurred substantial expenditure on [CONFIDENTIAL TEXT REDACTED] as well as other SGA elements, and other importers did not necessarily incur similar SGA; this reflects the different business operations conducted by importers of A4 Copy Paper.*
>
> *142. While there is no legal requirement to find positive evidence of a reimbursement or compensatory arrangement to rely on s.269TAA(2), there remains a discretion as to whether the Minister should treat those loss-making transactions as indicating reimbursement. In my*

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8 The duty assessment, file number DA0180, was initiated by the Anti-Dumping Commission on 11 November 2019.

9 NSD 532/2018, orders dated 8 October 2018.

10 ADRP Report 55A at page 42.

> *opinion, this does require consideration, analysis and judgment regarding the reasons submitted on the losses. It should not be or appear to be an automatic outcome.*
>
> *…*
>
> *145. In summary, there is further information before the Review Panel that raises additional reasons for FXA losses. This information is 'relevant information'. In my opinion, there were other reasons at play that explained FXA losses. These were not apparent in the original review. For the reasons outlined above, the transactions between UPM-AP and FXA should be treated as arms length.* [underlining supplied]

In our view, this rationale is also applicable to the situation concerning Guilin International and Electra, and was not considered by Report 469.

As noted above, a significant commercial factor contributing to Electra's financial situation during the investigation period was the volatility in copper price movements and Electra's ability to pass on price increases to customer in a timely manner. As shown in Report 469, the two Australian industry suppliers that cooperated with the investigation, namely Prysmian and Olex, also made a loss selling the goods during the investigation period. This reflected the fierce competition and business mode adopted specifically for the goods concerned by all suppliers in the Australian market during the investigation period. As noted in Report 469:[11]

> *The Commission found that PVC flat electrical cable has significant price sensitivity. All PVC flat electrical cables sold in Australia are manufactured to comply with the Australian Standard. Because of that, there is a significant amount of interchangeability between different brands and very little customer loyalty. Typically, PVC flat electrical cable is sold together with other cable products as the wholesale customers, who account for the vast majority of the purchases, prefer to bundle their orders to avoid receiving multiple deliveries from various suppliers. Both the importers and the Australian industry members state that the price of PVC flat electrical cable is typically what the purchasers refer to when they collect offers for a bundle of products they seek to purchase… [underlining supplied]*

As noted above at **A.1a**, if the original assessment had been done correctly Electra's resale of the goods would not be found to be loss-making, nor that any losses would not have been recoverable within a reasonable time. In any case, the fact that Electra achieved a company-wide profit during the investigation period indicates that Electra's sale of the goods, which formed part of its business as an importer and distributor of electrical cables, were indeed recoverable at the macro level. Accordingly there was no requirement or need for any reimbursement or other compensatory payments with respect to the price of the goods from Guilin International.

Accordingly, we respectfully submit that the Minister should properly exercise her discretion under Section 269TAA(1)(c) and (2) by , and to treat the export transactions between Guilin International and Electra during the investigation period as arms length.

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[11] Report 469, at page 61.

c Transactions between Guilin International and Electra were not improperly influenced

During the investigation Electra challenged the eventual Report 469 finding that Electra's purchases of the goods from Guilin International may also be considered not to be at arm's length, pursuant to Section 269TAA(1)(b). Report 469 acknowledges Electra's submissions but does not properly consider or respond to them.[12] For the Minister's reference, we refer to the following statements from Electra in its submission to the Anti-Dumping Commission dated 7 February 2019:

> *Electra respectfully submits that these observations[13] 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 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"[14] 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*

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12 Report 469, at page 32. The Report attempted to address, and rejected, Electra's submission concerning Section 269TAA(1)(c) and (1A). It did not address Electra's comments in relation to Section 269TAA(1)(b).

13 Being the Commission's comments in the Electra visit report and Guilin International visit report, which have been repeated in the Report, providing reasons as to the application of Section 269TAB(1)(b).

14 Ibid at page 11.

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:

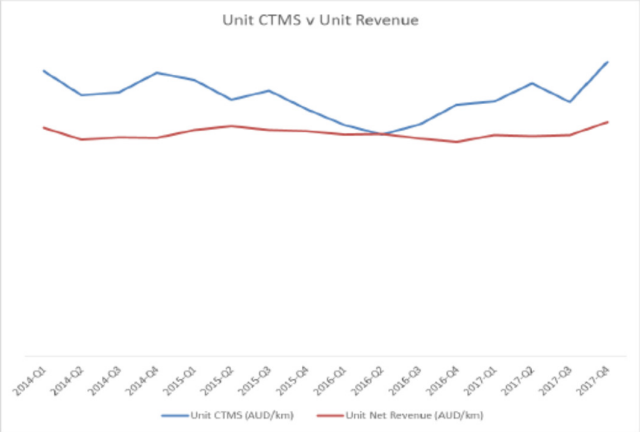


Figure 8: Comparison of Prysmian's unit CTMS and unit selling prices

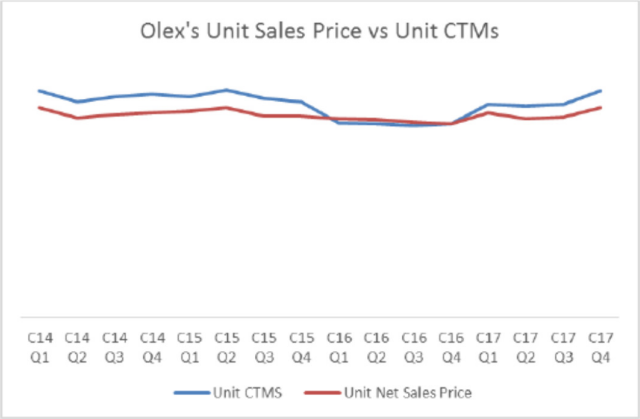


Figure 9: Comparison of Olex's unit CTMS and unit selling prices

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.

As explained in the above submission, the prices negotiated between Electra and Guilin International were fully reflective of the conditions of the electric cable market in Australia and the impact of fluctuating raw material costs. The kind of negotiation that took place and continues to take place between Guilin International and Electra reflects the normal commercial negotiation that would take place between a major exporter supplier of the goods and a large importer customer, regardless of association.

In our view, Report 469 did not identify sufficient evidence to support the view that the price paid by Electra could be considered as having been arrived at in a non-arm's length manner under Section 269TAA(1)(b) of the Act. *"Electra's ability to influence"* (in the words of the Commission) is completely within the normal compass of an arm's-length commercial negotiation, rather than being of a nature that renders the prices agreed between Electra and Guilin International as being not arm's length.

We also refer to Report 469's comment regarding *"joint shareholding of individuals and other companies at both Guilin and Electra, as well as various inter-company loans between Electra, Guilin and other shareholding companies and broader financial / commercial arrangements between Electra and Guilin"*. This comment is vaguely put and unsubstantiated. Electra's association and related party transactions with Guilin International or other related parties are well documented in the respective audited reports. It has not been suggested that any of the "inter-company loans" or "broader financial/commercial arrangements" do not reflect commercial market rates. There is also no indication that any particular "arrangements" between Electra and Guilin International were of nature that might be considered to be unexpected or extraordinary in the context of the dealings between any two legally associated entities. Report 469 does not explain why any of these affiliations or arrangements would render the price paid by Electra non-arm's length, whether in the context of Section 269TAB(1)(b) and 269TAA(1)(b) of the Act, or whether in the context of the word "*unreliable*" in the sense of Article 2.3 of the WTO *Anti-Dumping Agreement*.

Accordingly, we submit that the Minister should not accept Report 469's view that Electra's purchases of the goods from Guilin International were not arm's length transactions on the basis of Section 269TAA(1)(b).

Once again we respectfully ask the Minister to reconsider these issues and to find that there was nothing identified with respect to the determination of the export price of the goods as supplied by Guilin International during the investigation period that cogently established or gave reasonable grounds for a finding that they did not take place on an arm's length basis.

On the basis that Electra's resales of the goods were not made at a loss, and were not otherwise proven to be non-arm's length, the export price should be determined in accordance with Section 269TAB(1)(a) of the Act by reference to the price paid by Electra to Guilin International.

2 Profit, if any, on the importer's sales should be preferred to a Ministerial direction

Even if the export price must be determined under Section 269TAB(1)(b) of the Act, Electra submits that the correct and most appropriate decision is to apply *"the profit, if any, on the sale by the importer"* as provided by the first limb of Section 269TAB(2)(c) of the Act.

We would like to reiterate in this regard that it is Electra's view that its resale of the goods was indeed profitable, on the basis explained in **A.1a** above. This means the actual profit on the sale by Electra is available and should be used, if the export transactions between Guilin International and Electra are still deemed to be non-arm's length despite our submissions in **A.1b**. This would make it unnecessary for the Minister to make any direction under the second limb of Section 269TAB(2)(c).

Further, in its letter to the Commission dated 7 February 2019, Electra submitted:

> *..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.*

Electra then provided detailed reasons as to why the use of the company-wide profit rate of over **[CONFIDENTIAL TEXT DELETED – percentage]** was neither correct nor preferable. In that submission, we highlighted that Section 269TAB(2)(c) provides that it is appropriate for there to be no profit in the calculation of prescribed deductions, if such profit was not achieved by the importer on the sales of the goods exported during the investigation period. Electra pointed out that a zero or near zero

profit would indeed best reflect the market condition and industry practice in relation to the *goods*, in light of the consistent practice of the Australian industry members of selling the goods at a significant loss.

We reproduce the relevant extract of that submission for the Minister's reference:

> (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 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:*[15]

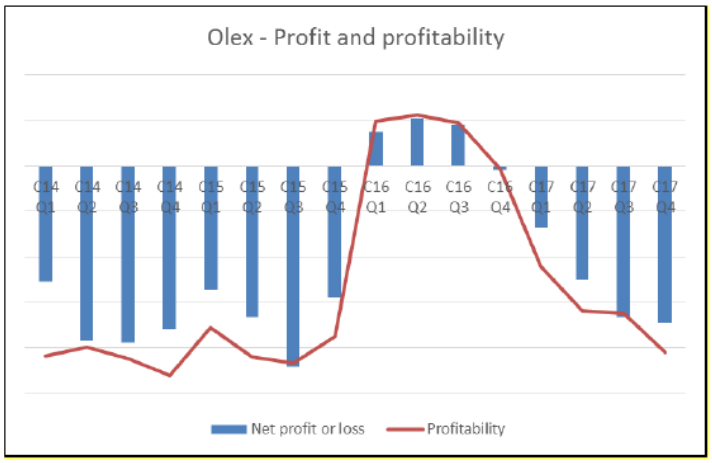


Figure 5: Olex's profit and profitability (**Profitability plotted on secondary axis)*

[15] See Doc 013 at page 18, and Doc 014 at page 18.

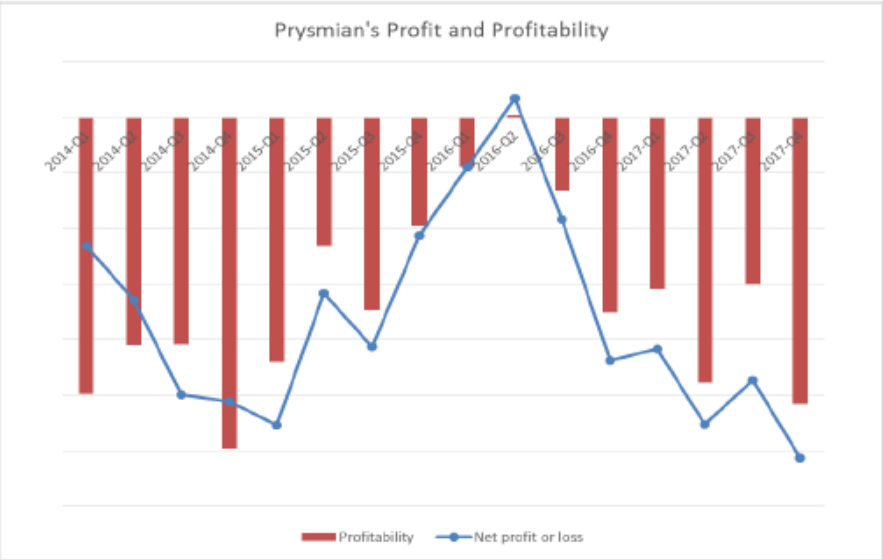


Figure 5: Prysmian's profit and profitability (**Profitability plotted on secondary axis)*

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].

Report 469 responded to Electra's submission as follows:

With respect to Electra's submission in relation to profit, the Commission considers it reasonable to calculate Electra's profit rate for the purposes of determining Electra's export price under subsection 269TAB(1)(b) by reference to Electra's company wide profits. The Commission notes that subsection 269TAB(2)(c) requires that "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."

Therefore, the Commission disagrees that subsection 269TAB(2)(c) requires a zero per cent profit margin should be applied where an accurate profit calculation has not been possible due to the lack of data or traceability of sales. Instead, the Commission is of the view that the Commission has been consistent with the approach it took throughout the investigation in calculating Electra's profit rates by having regard to Electra's company wide profits as it represents the profit realised by Electra from the sale of the general category of goods (considering Electra's principle activity as stated in its audited financial statements is the distribution of cables).

The Commission notes that more specific data that would enable the Commission to calculate a narrower subset of products' profitability is not available.

> *The Commission does not agree with Electra's submission in relation to the magnitude of the profit rate not being reasonable. Firstly, the Commission notes that Electra refers to Australian industry members' prices during the injury assessment period as being at breakeven or loss making. The Commission notes, however, that both Olex and Prysmian made profits from the sale of the goods in 2016. In addition, as explained in section 6.4.1.2 above, the Commission notes that both Australian industry members have significant investments in machinery employed in manufacturing the goods. The Commission does not consider it reasonable to expect the Australian industry members to sell the products willingly at rates which does not cover the production costs or yield a reasonable rate of return from their investments.*

Electra was not given the opportunity to address this analysis during the investigation. In our view, Report 469's reasoning in this regard is deeply flawed. Accordingly, we provide the following comments to assist with the Minister's reconsideration of this relevant issue.

Firstly, by stating that *"profit calculation has not been possible due to the lack of data or traceability of sales"* and that *"more specific data that would enable the Commission to calculate a narrower subset of products' profitability is not available"*, Report 469 attempts to justify its decision on the basis of a *"lack of data"*. This is not true. The Commission has the relevant information to work out the *"profit, if any, on the sale by"* Electra. Indeed the Report did work out such profit, and made a finding that Electra's sales of the goods were at a loss. That was the very reason for the calculation of the deductive export price under Section 269TAB(1)(b).

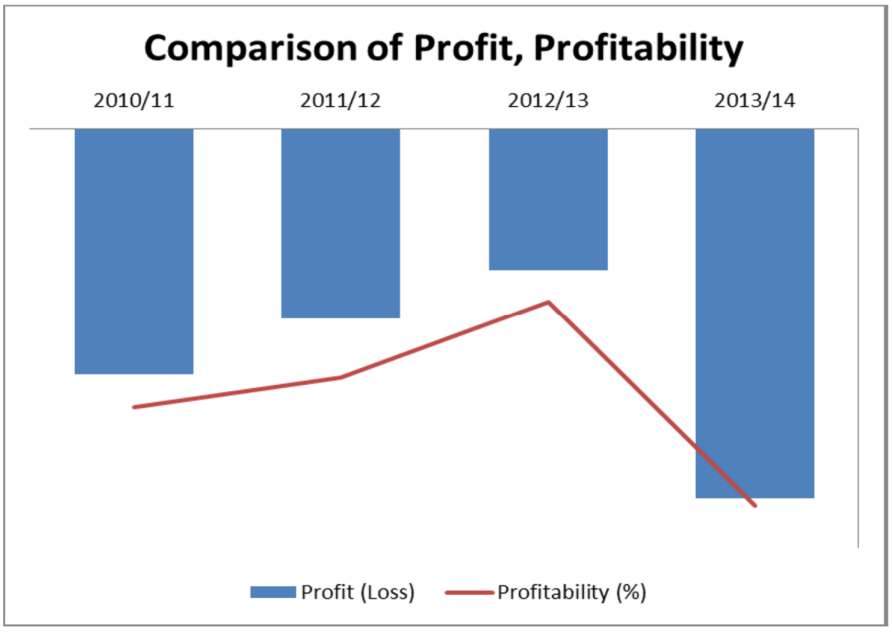
Secondly, Electra's company-wide profit does not and cannot reflect the level of profit in relation to *the goods*. The goods are a particular subset of the cable market. They are fast-moving "commodity" cables. Electra's sales of these goods accounted for less than **[CONFIDENTIAL TEXT DELETED – percentage]** of its company-wide net sales revenue during the investigation period. Adopting a profitability assumption from the full range of the goods does not correctly approximate the profitability that might be acceptable and expected with respect to *the goods* themselves.

Thirdly, we respectfully submit that Report 469 incorrectly relied on a concept of the *"general category of goods"*, in working out a profitability to ascribe to them. This does not find any support under Section 269TAB(2)(c). The legislation clearly requires the Minister to identify the profit, if any, on the sales of *the goods* that are under investigation which were exported to Australia during the investigation period. Where the legislation intends the search for profit to be widened to a broader category of products, to address the absence of profit in relation to the goods themselves, a method is expressly stated. This can be seen in Regulation 45 of the *Customs (International Obligations) Regulation 2015* in relation to the calculation of normal value. Section 269TAB(2)(c) provides a mechanism to construct an export price, as intended to address any concerns about a non-arm's length transaction between exporter and importer. Where the resale price by the importer has already addressed that concern – because it is a resale by the importer to unaffiliated parties - then that arm's length and actual resale price of the goods becomes the basis of the export price under Section 269TAB(1)(b). The prescribed deductions provided under Section 269TAB(2) then convert such resale prices to an export level, taking out all of the costs and profit achieved after exportation.

We submit that the determination under Section 269TAB(2) is not an opportunity to redetermine how much the goods should have been resold for, and at what profit level, unless such information is not available from the importer. Such information was available and was provided by Electra. If the information provided by Electra shows that it was not making any profit on its sales of the goods, then no profit should be added. An export price constructed by inserting a profit rate that was not achieved

by Electra, or by any importers or domestic suppliers for the sales of the goods, is completely removed from the actual arm's length resale price of the goods, as envisaged by Section 269TAB(1)(b).

Regarding Report 469's comment that it "*does not consider it reasonable to expect the Australian industry members to sell the products willingly at rates which [do] not cover the production costs or yield a reasonable rate of return from their investments",* we respectfully ask the Minister to dismiss this consideration as unsupported by the facts available. Based on the Anti-Dumping Commission's own record, Electra's competitors in the Australian market have willingly and consistently sold *the goods* at a loss. We refer to the following data, obtained from the report published by the Commission in Investigation 271 and in Report 469:



Graph 9 – Comparison of Profit, Profitability

Graph 9 indicates that Olex's profits and profitability in respect of domestic PVC flat electric cable sales have been negative since 2010/11, but were improving during a period of relatively stable sales volumes between 2010/11 and 2012/13. Viewed alongside Graph 8, there is a close correlation between Olex's gross margin performance and its profit and profitability performance; the substantial increase in sales volume in 2013/14 appears to have been achieved through reducing the gross margin and therefore at the expense of profit and profitability.[16]

[16] See Termination Report No 271, at page 44. Olex represented the Australian industry in that investigation.

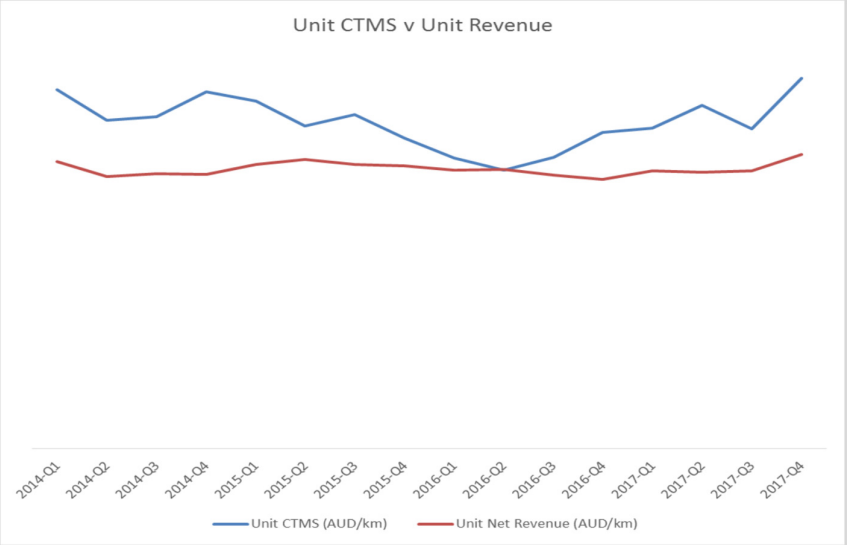


Figure 8: Comparison of Prysmian's unit CTMS and unit selling prices

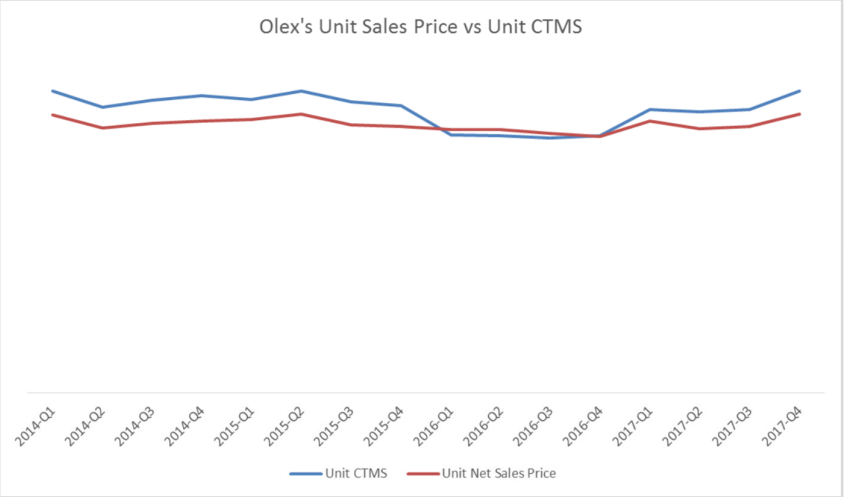


Figure 9: Comparison of Olex's unit CTMS and unit selling prices

The fact is that Electra's competitors from the Australian industry collectively only achieved a profit for the sale of the goods in one quarter[17] over a period of eight years. This might be considered "unreasonable". However this is *the fact* with respect to the goods under investigation. Further, the low profit/no profit profile for *the goods* does not necessarily mean that the industry did not or could not cover its investment and production cost overall – through the profit on its sales of other products.

Indeed, in another part of Report 469, it is noted the Australian industry members do make a profit overall:

> *The Commission also considered various industries' data and reports. The Commission noted profit and sales data from the Australian Bureau of Statistics and found during the injury*

[17] Profit was only shown in one quarter for both Prysmian and Olex, even though Olex itself had profit in three quarter out of 8 years.

> *assessment period, the actual profit level (before income tax) for the Australian manufacturing industry to be between 3.4 and 7.5 per cent. More specifically, the Commission reviewed industry reports published by IBISWorld in November 2017 and December 2018, which provided an estimated average of the costs and profit associated with all firms in the electric cable manufacturing industry. The estimated profit margin quoted for the Australian Electric Cable and Wire Manufacturing industry was 6.5 per cent for 2017-18 and 6.8 per cent for 2018-19.*[18]

Accordingly, we respectfully request the Minister to disregard Report 469's view that a low or zero profit for the sale of the goods is "unreasonable" for the purpose of Section 269TAB(2)(c). If it best reflects the *"profit, if any, on sale by importer"*, then it "fits" the statutory direction and must be adopted.

Once again, we respectfully submit that the Minister should find that the correct and preferable approach in calculating the profit component of the export price under Section 269TAB(2)(c) is for the Minister to refer to the *actual* profit, if any, on the sale by Electra. As mentioned above, we consider that it is neither required nor desirable for the Minister to make a direction under the second limb of that subsection, given that the relevant information was indeed available from Electra, and was reflective of the real level of profit earned by suppliers of the goods in the Australian market during the investigation period.

3 Any direction should be proportionate, reasonable and commercial

In case the Minister remains of the view that a direction as to the rate of profit under Section 269TAB(2)(c) of the Act is required, we submit that such direction must nonetheless be made consistently with the legislative context. That context is to establish the export price of arm's length transactions and, most importantly, for *the goods* exported during the investigation period. As such, the profit rate so directed must be proportionate, reasonable, and reflective of the commercial realities associated with *the goods under consideration* during the investigation period. As such, the commercial circumstances associated with the goods as mentioned in A2 above are still the most relevant considerations. They suggest that Electra's company-wide profit, which is mostly unrelated to the goods, and which includes the foreign exchange gains that Report 469 refused to account for as part of the profitability/recoverability assessment under Section 269TAA(1)(c) and (2) of the Act, is unreasonable, disproportionate, and not reflective of the profit rate associated with the goods.

Accordingly, Electra submits that the Minister should direct that the rate of profit under Section 269TAB(2)(c) is to be based on Electra's actual profit rate for reselling the goods during the investigation period, which would be either:

- 0% - based on the calculation of Report 469, which disregarded Electra's foreign exchange gains, resulting in a net loss position for Electra's resale of the goods during the investigation period; or
- [CONFIDENTIAL TEXT DELETED – percentage] - taken into account foreign exchange gains, and properly matching Guilin International's exports during the investigation period with Electra's monthly resale prices two months after the date of exportation.

[18] Report 469, at page 67.

In the alternative, according to Report 469, the most appropriate method would have been the profit rate of *"a narrower subset of products"*:

> *The Commission notes that more specific data that would enable the Commission to calculate a narrower subset of products' profitability is not available.*

In this regard, we submit that Electra was not made aware of the relevance or desirability of information relating to a narrower subset of products before the publication of Report 469. If such an inquiry was made of Electra during the investigation, Electra could have provided profit data about a subset of goods which was narrower than the set of goods (all goods) used for the company-wide profit rate. There are different types of cables which Electra could have provided profit data for which are similar to the goods under consideration.

For example, Electra could have provided profit data for all flat building wire sold during 2017. This would cover a broader range of flat cable products. The category of all flat building wire would have been a narrower subset of goods than is comprised in the company wide profit rate. For this set of products Electra had an operating profit of [CONFIDENTIAL TEXT DELETED – percentage]. If Electra includes the foreign exchange gain, as the Commission did in the calculation of the company wide profit amount, a profit of [CONFIDENTIAL TEXT DELETED – percentage] was achieved.

Alternatively, Electra sells a cable which is the same as the goods under consideration, except that it has a 1.5mm^2 conductor cross sectional area (instead of 2.5mm^2). Both are flat cables with three cores, used for building purposes. The only different is the size of the conductor. Electra could have provided the profit data for this 1.5mm^2 cable, if it had been aware that the Commission considered that it did not have sufficient data already. For the 1.5mm^2 cable referred to, Electra had an operating profit of [CONFIDENTIAL TEXT DELETED – percentage]. If Electra includes the foreign exchange gain, as the Commission did in the calculation of the company wide profit amount, a profit of [CONFIDENTIAL TEXT DELETED – percentage] was achieved. Importantly, we would also like to draw the Minister's attention to the fact that Report 469 considered Prysmian's own 1.5mm^2 *three core*[19] flat cable as a proper substitute benchmark to determine the reasonable amount of profit to be expected from the goods in the context of determining non-injurious price:[20]

> *In assessing whether 1.5mm^2 cable is in the same general category of goods and is an appropriate surrogate product on which the profit rate in the NIP calculations can be based, the Commission also had regard to the production description and purpose of the 1.5mm^2 PVC flat cable. The Commission understands that the 1.5mm^2 PVC flat cable is also a common building wire which is mostly used in wiring for lighting, while the 2.5mm^2 PVC flat cable (the goods under consideration) is generally used for lighting, powering electrical appliances and power points. For these reasons, and on this occasion, the Commission considers the 1.5mm^2 PVC flat cable to be the best approximation of the goods in determining an appropriate profit level for a product which would be unaffected by the presence of dumped and subsidised goods.*

Accordingly, Report 469 implies that the logical and more correct approach was for the Minister to direct that the rate of profit be based on Electra's sales of the 1.5mm^2 three core PVC flat electric cable,

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19 Report 469 suggests that Electra objected the proposal for such "sister" cable to be identified as a benchmark for the profit of the goods. This is incorrect. Electra's objection related to "a four core, 1.5 mm product", as it was guided by the explanation in SEF 469, which described the products identified by Prysmian as a "1.5 mm2 three core and earth PVC flat electrical cable".

20 Report 469, at page 68.

as an alternative to using Electra's actual profit from the sales of the goods. This option was not properly investigated and considered by the Commission before it stated, in Report 469, that there was insufficient data for such purpose.

If Electra had been given an opportunity before the release of Report 469 to provide "more specific data" to the Commission, the profit data for either of the 1.5mm^2 cable or for all flat building wire would have once again demonstrated that the profit associated with the "narrower subset" shows a substantially lower profit rate than the company-wide profit rate that was ultimately used by the Commission.

Electra now provides the relevant data concerning the rate of profit for this "narrower subset", for both all building wire and for the 1.5mm^2 product, for the Minister's reference in this reconsideration. Please see Attachment 1 – Electra product profitability. **[CONFIDENTIAL ATTACHMENT]**

Lastly, Electra can advise that as a separate matter and subsequent to the Original Decision, Electra **[CONFIDENTIAL TEXT DELETED – information about corporate commercial arrangement]**[21] which **[CONFIDENTIAL TEXT DELETED – explanation of arrangement practicalities]**.[22] **[CONFIDENTIAL TEXT DELETED – explanation about impact of arrangement]**. Despite this, Electra considers it not unreasonable for the Minister to refer to **[CONFIDENTIAL TEXT DELETED – arrangement detail]**, and to direct that the rate of profit be **[CONFIDENTIAL TEXT DELETED – profit direction]**, the **[CONFIDENTIAL TEXT DELETED – reason for profit direction]**, for the purpose of Section 269TAB(2)(c).

B Whether dumping and material injury will continue

Electra and Guilin International can advise that there have been changes in circumstances since 8 April 2019, being the date Report 469 was delivered, that warrant the Minister's reconsideration of the issue of whether dumping and material injury will continue after the investigation period.

As shown in Report 469, there was a massive difference in the dumping margin of the exports sold by the lowest priced supplier in the Australian market, being Nanyang Cable (Tianjin) Co. Ltd ("Nanyang") and its Australian subsidiary Nan Electrical Cable Australia Pty Ltd ("Nan Australia", collectively, "Nan Cable"), at 33.2%, as compared to those sold by Guilin International, at 6.6% (which continues to be disputed, as described in this letter). Report 469 also found that the goods supplied by Nan Cable were consistently the lowest priced in the investigation period, and undercut the prices of both Electra and the Australian industry members. By comparison, the goods supplied by Electra only undercut the Australian industry prices in the second half of the investigation period, notwithstanding Electra's evidence that it was also experiencing undercutting by the Australian industry members.[23]

Electra agrees that Nan Cable's low pricing campaign was a key reason for the fiercer than usual price competition for the goods during the investigation period, and was a critical contributing factor to the Australian industry's claimed injury.

This circumstance has changed. Shortly after the delivery of Report 469, on 10 May 2019, Nan Australia notified its customers that it would cease trading from 30 June 2019, stating that *"market conditions*

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21 **[CONFIDENTIAL TEXT DELETED – confidential commercial arrangement]**

22 **[CONFIDENTIAL TEXT DELETED – confidential commercial arrangement]**

23 Report 469, at page 57.

make it extremely challenging to meet the requirements needed to sustain [its] business". Electra expects that this is due to Nan Australia's sustained loss making position both for the goods and its overall business, as noted by Report 469,[24] and to the high dumping and subsidy duties determined for Nanyang.

The facts establish that Nan Australia was the most disruptive low priced competitor on the market. Based on Electra's own experience, the trading discontinuation of Nan Australia since 30 June 2019 has significantly changed the market conditions in Australia for all sellers. Electra can advise that **[CONFIDENTIAL TEXT DELETED – market intelligence re pricing practices and commercial arrangement]**.

Electra observes that the prices of the other Australian industry members have also recovered in more recent times. Accordingly, it is Guilin International and Electra's view that the original decision changed the economic conditions of the Australian market for the goods for all long term major suppliers, including Electra and the Australian industry members such as Prysmian and Olex. The injury that was experienced by the Australian industry was due to the aggressive pricing of Nan Cable. That factor no longer exists.

To further illustrate the change of circumstances in the Australian market for the goods under consideration Electra provides the following price information based on its own pricing and its market intelligence concerning the pricing of the Australian industry members.

[CONFIDENTIAL TEXT DELETED – market intelligence re pricing practices and commercial arrangement]:

[CONFIDENTIAL MARKET INTELLIGENCE TABLE]

Electra's market intelligence shows its prices have also been largely comparable with those offered by other major Australian industry suppliers. As an example, Electra provides a pricing comparison for the customer **[CONFIDENTIAL TEXT DELETED – customer name]** for February 2020 to October 2020:[25]

Ultimately, the purpose of providing this data is to further demonstrate that the market conditions and dynamics of competition in the Australian market have significantly shifted since Report 469. As shown in other charts reproduced in this letter, the Australian industry's sales prices for the goods have been relatively flat throughout recent history. Now, based on Electra's own information, the prices for the goods have substantially increased **[CONFIDENTIAL TEXT DELETED – market intelligence on price level]**.

The only reason for Report 469's finding of a dumping margin of 6.6% during the investigation period was the Report's rejection of Guilin International's export price, and its use of a **[CONFIDENTIAL TEXT DELETED – number]**% profit rate to calculate a deductive export price. Electra and Guilin International respectfully ask the Minister to accept that the "dumping" finding was wrongly made.

At all times Guilin International and Electra have been committed and determined to undertake all necessary actions not to be accused of dumping the goods in Australia. As you may be aware, two other dumping complaints were made against Guilin International, in earlier times, and in each case the

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[24] Report 469, at page 27.

[25] Prices are per 100m.

Commission determined that there was no dumping. In this investigation, it was also proven that Guilin International increased its prices to Australia as quickly as it could, in order to respond to the volatility in the copper price that occurred during the investigation period.

Further, Guilin International and Electra continue in their efforts to prove that the goods exported by Guilin International are not dumped, including by way of applying for refund of interim dumping duties through duty assessment procedures, and of course through its court actions and this letter.

We have also demonstrated above that Electra **[CONFIDENTIAL TEXT DELETED – pricing patterns]**.

Electra is also committed to ensuring a reasonable level of earnings for its importation and sales of Guilin International's electric cables in Australia. The Commission has consistently found, in all three previous investigations, including Report 469, that Guilin International has priced its Australian sales of the goods at a profitable level, whilst also achieving a profitable position as a company overall. The companies are focused on long term supply to the Australian market in a sustainable, profitable, and competitive manner.

As long term suppliers of high quality cable products to Australia, Guilin International and Electra strongly believe that they add great value to their customers businesses and greatly contribute to the healthy competitive landscape of the Australian market. Guilin International and Electra have no interest in, and actively seek to avoid, the dumping of the goods in Australia, and have no wish to injure the Australian industry suppliers through such practices.

We respectfully ask the Minister to fully take into account the changed circumstances since Report 469 was published, as we have outlined above, particularly Nan Australia's discontinued operation. The dumping finding in Report 469 was misplaced. And, in any event, dumping and material injury to the Australian industry is not likely to continue in so far as the goods exported by Guilin International and sold by Electra are concerned.

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Once again, our clients appreciate this opportunity to address the questions raised in the Letters. We will stand ready to provide further information as considered relevant and helpful for the Minister's reconsideration of these matters.

Yours sincerely

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