Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 6 July 2021 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application to the ADRP for review of a Ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

Further application information
You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 9, 10, 11 and/or 12 of this application form (s 269ZZG(1)). See the ADRP website for more information.

Withdrawal
You may withdraw your application at any time, by completing the withdrawal form on the ADRP website.

Contact
If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

[1] By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name:	**Electra Cables (Aust) Pty Limited ("Electra")**
Address:	**1/13 Cooper St, Smithfield, NSW 2164**
Type of entity (trade union, corporation, government etc.): **Electra is a private owned corporation registered in Australia.**	

2. Contact person for applicant

Full name:	**Charles Zhan**
Position:	**Partner, Moulis Legal**
Email address:	**Charles.zhan@moulislegal.com**
Telephone number:	**+61 2 6163 1000**

3. Set out the basis on which the applicant considers it is an interested party:

Electra is an importer into Australia of the goods to which the decision relates, namely PVC flat electrical cables which were exported to Australia by Guilin International Wire and Cable Group Co., Ltd. Electra is thus an "interested party" for the purposes of the Act and this application according to Section 269T of the Customs Act 1901

4. Is the applicant represented?

Yes ☒ **No** ☐

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☒Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed**.

6. Provide a full description of the goods which were the subject of the reviewable decision:

The reviewable decision was published via Anti-Dumping Notice No. 2022/019. In particular, the notice reads:

> ***This notice is made with respect to the goods exported to Australia from China by Guilin International Wire & Cable [Group] Co Ltd from China.***
>
> ***The goods subject of the investigation are:***
>
> > ***Flat, electric cables, comprising two copper conductor cores and an 'earth' (copper) core with a nominal conductor cross sectional area of between, and including, 2.5 mm2 and 3 mm2, insulated and sheathed with polyvinyl chloride (PVC) materials, and suitable for connection to mains electricity power installations at voltages exceeding 80 volts (V) but not exceeding 1,000 V, and complying with Australian/New Zealand Standard (AS/NZS) AS/NZS 5000.2 (the Australian Standard), and whether or not fitted with connectors.***

7. Provide the tariff classifications/statistical codes of the imported goods:

The goods are classified to tariff subheading 8544.49.20 (statistical code 41) in Schedule 3 to the *Customs Tariff Act 1995*.

8. **Anti-Dumping Notice details:**

Anti-Dumping Notice (ADN) number: **2022/019**	
Date ADN was published:	**1 September 2022, see *Attachment A – Section 269TG(2) notice ADN2022/019***

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be highlighted in yellow, and the document marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

9. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

See Attachment B, in respect of which confidential and non-confidential versions have been provided at Attachment C.

10. **Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:**

See Attachment B, in respect of which confidential and non-confidential versions have been provided at Attachment C.

11. **Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:**

See Attachment B, in respect of which confidential and non-confidential versions have been provided at Attachment C.

12. Set out the reasons why the proposed decision provided in response to question 10 is materially different from the reviewable decision:

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

See Attachment B, in respect of which confidential and non-confidential versions have been provided at Attachment C

13. Please list all attachments provided in support of this application:

The following attachments have been provided:

Attachment A – ADN 2022/019

Attachment B – grounds for review - confidential

Attachment C – grounds for review - non-confidential

Attachment D – letter of authority from Electra

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: 

Name: **Charles Zhan**

Position: **Partner**

Organisation: **Moulis Legal**

Date: **4 October 2022**

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative:

Full name of representative:
Organisation:
Address:
Email address:
Telephone number:

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

See Attachment D – letter of authority from Electra

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:

(Applicant's authorised officer)

Name:

Position:

Organisation:

Date: / /

Australian Government

Department of Industry, Science, Energy and Resources

Customs Act 1901 – Part XVB

ANTI-DUMPING NOTICE NO. 2022/019

PVC FLAT ELECTRICAL CABLES EXPORTED TO AUSTRALIA FROM THE PEOPLE'S REPUBLIC OF CHINA

Public notice under section 269TG(2) of the *Customs Act 1901* (Cth)

The Commissioner of the Anti-Dumping Commission (**the Commissioner**) completed an investigation, which commenced on 4 June 2018, into the alleged dumping of certain polyvinyl chloride (**PVC**) flat electrical cables (the goods) exported to Australia from the People's Republic of China (**China**).

Electra Cables (Aust) Pty Ltd applied for judicial review of the decision on 3 September 2019. On 13 February 2020, the Federal Court of Australia made orders setting aside the decision in so far as it applied in respect of the goods and like goods exported to Australia by Guilin International Wire & Cable Co Ltd from China. The Federal Court of Australia remitted the matter for reconsideration.

This notice is made with respect to the goods exported to Australia from China by Guilin International Wire & Cable Co Ltd from China.

The goods subject of the investigation are:

> *Flat, electrical cables, comprising two copper conductor cores and an 'earth' (copper) core with a nominal conductor cross sectional area of between, and including, 2.5mm2 and 3mm2, insulated and sheathed with polyvinyl chloride (PVC) materials, and suitable for connection to mains electricity power installations at voltages exceeding 80 volts (V) but not exceeding 1,000 V, and complying with Australian/New Zealand Standard (AS/NZS) AS/NZS 5000.2 (the Australian Standard), and whether or not fitted with connectors.*

Further information on the goods:

The following products were excluded from the investigation:

- single core cables (cables with a single active core);
- aerial cables as defined by the Australian Standard;
- twin active flat cables (flat cables comprising two active cores but no earth core);
- circular cables as defined by the Australian Standard;
- cables insulated and/or sheathed with non-PVC material, including but not limited to cross-linked polyethylene (XPLE) materials, including a combination of PVC and non-PVC material;
- cables comprising cores made of aluminium conductors; and
- flexible cables (cords) as defined by AS/NZS 3191 and/or AS/NZS 60227.

The goods are generally, but not exclusively, classified to tariff classification 8544.49.20 (statistical code 41) in Schedule 3 to the Customs Tariff Act 1995.

This tariff classification and statistical code may include goods that are both subject and not subject to this investigation. The listing of this tariff classification and statistical code is for convenience or reference only and does not form part of the description of the goods. Please refer to the description of the goods for authoritative detail regarding goods that are the subject of this investigation.

The Commissioner reported his findings and recommendations to the former Minister for Industry, Science and Technology in Anti-Dumping Commission Report No. 469 – PVC Flat Electrical Cables Exported from the People's Republic of China (REP 469). REP 469 outlines the investigation carried out and recommended, inter alia, the publication of a dumping duty notice in respect of the goods exported from China by Guilin International Wire & Cable Co. Ltd.

Additionally, following the remittance of the decision, the Department of Industry, Science, Energy and Resources (**Department**) prepared a further submission providing additional findings and recommendations. Both the report and submission are available at: www.adcommission.gov.au. Particulars of the dumping margin established, and an explanation of the methods used to compare export prices and normal values to establish the dumping margin is set out in the below Table.

Exporter/Manufacturer	Dumping Margin	Method to establish dumping margin
Guilin International Wire & Cable Co. Ltd and its related party entities: • Guilin Feilong Wire and Cable Ltd • Guilin Xianlong Wire and Cable Ltd • Guilin Fortune Import and Export Trading Co. Ltd • Guilin Yuanhai Import and Export Trading Co. Ltd • Interest link Co. Ltd • Guangxi Machinery Import and Export Co. Ltd	2.8%	Weighted average of export prices was compared with the weighted average of corresponding normal values over the investigation period pursuant to subsection 269TACB(2)(a) of the *Customs Act 1901* (Cth) (**the Act**). The normal values were established under subsection 269TAC(2)(c) of the Act. The export prices were established under section 269TAB of the Act.

** Countervailing duties were not imposed on Guilin International Wire & Cable Co. Ltd, see Anti-Dumping Notice No. 2019/46 available at www.adcommission.gov.au.*

I, ED HUSIC, the Minister for Industry and Science (**the Minister**), have considered, and accepted, the recommendations of the Commissioner and the Department, the reasons for the recommendations, the material findings of fact on which the recommendations are based, and the evidence relied on to support those findings as set out in the submission by the Department and REP 469 and, except in so far as the submission by the Department has come to a different conclusion in relation to certain findings in REP 469.

I am satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and that the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods, and because of that, material injury to an Australian industry producing like goods has been caused.

Therefore, under subsection 269TG(2) of the Act, I DECLARE that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to Guilin International Wire & Cable Co. Ltd and its related party entities:

- Guilin Feilong Wire and Cable Ltd
- Guilin Xianlong Wire and Cable Ltd
- Guilin Fortune Import and Export Trading Co. Ltd
- Guilin Yuanhai Import and Export Trading Co. Ltd
- Interest link Co. Ltd
- Guangxi Machinery Import and Export Co. Ltd.

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports in the Australian market in the form of price undercutting, and the consequent impacts on the Australian industry.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel. This can be done in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export price, non-injurious price, and normal value of the goods will not be published in this notice as they may reveal confidential information. Documents included on the public record may be examined at www.adcommission.gov.au.

Clarification about how measures are applied to 'goods on the water' is available in ACDN No. 2012/34, available at www.adcommission.gov.au.

REP 469 and other documents included in the public record, including the Department's submission, may be examined on the public record, which is available at www.adcommission.gov.au.

Enquiries about this notice may be directed to antidumping@industry.gov.au.

Dated this 29 day of AUGUST 2022

ED HUSIC
Minister for Industry and Science

Application for review

PVC flat electric cable exported from Guilin International Wire and Cable Group ("Guilin Group")

Electra Cables (Aust) Pty Limited ("Electra")

4 October 2022

A Introduction

By way of an application to the Anti-Dumping Commission ("the Commission") dated 23 March 2018 Prysmian Australia Pty Ltd ("Prysmian") applied for a dumping and countervailing investigation into imports of certain PVC flat electric cables ("the goods"/"PVC flat cables") from the People's Republic of China.

In response to that application, the Commission initiated the subject anti-dumping and countervailing investigation on 4 June 2018 ("Investigation 469").

On 8 April 2019, the Commission terminated the countervailing investigation in so far as it related to the exports of Guilin International Wire and Cable Group Co., Ltd ("Guilin International"), being the supplier of the goods imported by Electra Cables (Aust.) Pty Ltd ('the applicant"/"Electra") during the period of investigation ("the POI").

At the conclusion of the investigation, in a decision published on 14 May 2019, the Minister for Industry, Science and Technology ("the Minister") decided to impose dumping duties on the PVC flat cables exported to Australia from China.[1] Specifically, the Minister decided to publish notices under Sections 269TG(1) and (2) of the *Customs Act 1901* ("the Act") declaring that Section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* ("the Tariff Act") applied in relation to PVC flat cables exported from China.[2] We refer this as the "First Decision".

Electra Cables (Aust) Pty Ltd applied for judicial review of the decision on 3 September 2019. On 13 February 2020, the Federal Court of Australia made orders setting aside the decision in so far as it applied in respect of the goods and like goods exported to Australia by Guilin International Wire & Cable Co Ltd from China. The Federal Court of Australia remitted the matter to the Minister for reconsideration.

The Minister was assisted in their reconsideration by the Department of Industry, Science, Energy and Resources ("DISER"). That reconsideration concluded on 1 September 2022, when the Minister decided to impose dumping duties on the PVC flat cables exported to Australia from the Guilin Group. This is the decision the subject of this review. We refer this as the "Reviewable Decision".

These notices had the effect of imposing dumping duties on the importation into Australia of Guilin International's exports of PVC flat cables from China. Specifically, the Minister decided to publish notices under Sections 269TG(2) of the Act declaring that Section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* applied in relation to PVC flat cables exported from the Guilin Group. The decision is based on both the recommendations of Report 469 and the recommendation contained in the submission by DISER to the Minister ("DISER Report"). The Minister's notice states that the Minister has considered and accepted:

> *the recommendations of the Commissioner and the Department, the reasons for the recommendations, the material findings of fact on which the recommendations are based, and the evidence relied on to support those findings as set out in the submission by the Department and REP 469 and* [sic]*, except in so far as the submission by the Department has come to a different conclusion in relation to certain findings in REP 469.*[3]

We understand this to mean that the Minister's decision is based on both Report 469 and the DISER Report. However, where the findings and recommendation in the DISER Report differs from Report 469,

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1 Based on the recommendations contained in Anti-Dumping Commission Report No. 469, dated 8 April 2019 ("Report 469").

2 A reference in this Application to "the Act", or to a "Section", "Subsection" or "Subparagraph" is a reference to a Section, Subsection or Subparagraph of the Act, unless otherwise specified.

3 EPR469/045, see Attachment A of this Application.

the DISER Report prevails and form the basis of the Miniter's decision, and not the Report 469. This is supported by the more clear statement in Minister's notice under Section 8(5) of the Tariff Act, which reads:[4]

> *I have considered the submission of the Department of Industry, Science, Energy and Resources and the Commissioner's findings and recommendations in Anti-Dumping Commission Report No. 469 - PVC Flat Electrical Cables Exported from the People's Republic of China (REP 469) in relation to this matter. In making this decision I adopt the findings of the submission of the Department of Industry, Science, Energy and Resources as my own reasons.*

Electra seeks review by the Anti-Dumping Review Panel ("the Review Panel"), under Sections 269ZZA(1)(a) and 269ZZC, of the decision (or decisions) made by the Minister to impose dumping measures against Guilin International's exports of PVC flat cables to Australia, as outlined in this application.

B First ground – errors in determination of dumping margin

9 Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

The Minister's decision to determine a dumping margin for the goods exported by Guilin Group at 2.8% and to impose dumping duty at the same rate is based on the dumping margin determined by the DISER Report.

Electra considers that the dumping margin determination is affected by a number of errors, namely:

- incorrect determination that Electra's importation of the goods from Guilin Group were not arm's length transactions for the purpose of ascertaining export price of the goods during the POI; and
- incorrect calculation of "deductive export price";

We explain the basis of the claims in detail as follows.

a Incorrect determination regarding arms length transaction

In both the First Decision and the Reviewable Decision, the Minister determined that the goods exported by the Guilin Group during the POI are not treated as an arms length transaction, and as such, export price should not be ascertained under Section 269TAB(1)(a) of the Act. The basis for such finding differs between Report 469 and the DISER Report.

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[4] EPR469/044, https://www.industry.gov.au/sites/default/files/adc/public-record/469_-_044_-_pvc_cables_-_s8_notice.pdf

Report 469 come to such conclusion under Section 269TAA(1)(b) and (1)(c), whereas the DISER Report recommended the Minister to come to such view based only on Section 269TAA(1)(b) of the Act. The DISER Report states:[5]

> *39. Accordingly, on the whole of the evidence, the department considers that the available evidence relating to the price between Guilin and Electra indicates that the price appears to be influenced by a commercial or other relationship between buyer (Electra) and seller (Guilin), despite the presence of other factors. Accordingly, the department considers that section 269TAA(1)(b) of the Customs Act applies, and requires that those sales shall not be treated as arms length transactions.*
>
> *…*
>
> *Application of subsection 269TAA(2) and Subsection 269TAA(1)(c)*
>
> *53. The department has considered the reasons and evidence provided by the Commissioner in REP 469 in support of the Commissioner's recommendation that the Minister be of the opinion that the buyer (Electra) will be reimbursed by the seller (Guilin) subsequent to the sale in respect of the whole or any part of the price.*
>
> *54. Having considered the available evidence, the department recommends that the Minister not form the opinion that the buyer (Electra), or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise received a benefit for, or in respect of, the whole or any part of the price. The reasoning for this recommendation is set out below.*

As such the Reviewable Decision is based on the finding contained in the DISER Report.

In reaching is finding under Section 269TAA(1)(b), DISER Report relied on what it considered to be the applicable legal test from the Federal Court judgment in *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel* ("the Wilson case"). The DISER Report states:

> *28. In particular, the department considers that the following findings made by the Commissioner in REP 469 remain persuasive:*
>
> - *Guilin was the exporter of the goods in relation to its own exports and those of its related companies;*
> - *Electra was a related party of Guilin and the sales by Guilin to its related parties were indirect sales to Electra;*
> - *there were no formal records of negotiations taking place between Guilin and Electra, and that because Electra can request a time delay as to when price increases can take effect, or can influence the percentage of the price increase that will be achieved by Guilin this indicates that the price appears to be influenced by the relationship between the buyer (Electra) and the seller (Guilin); and*

[5] DISER Report, page 7.

- *the Commission found evidence indicating 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.*

29. *With respect to the submissions made by Electra in the Electra submission, while the department notes that conditions of the electric cable market in Australia and the size of Electra may impact the negotiations between Electra and Guilin International, the relevant test for the purposes of subsection 269TAA(1)(b) is that a purchase or sale of goods shall not be treated as an arms length transaction if 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.*

30. *Relevantly, as provided in paragraph 43 of Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel [2021] FCA 591 (emphasis added):*

> *Section 269TAA(1)(b) does not require the Commissioner to be satisfied that, as a matter of fact, the export price was influenced by the relationship between the exporter and importer. A transaction may appear to be influenced by the relationship between the parties even if there is not enough evidence to satisfy the Commissioner, on the balance of probabilities, that the transaction was in fact influenced by the relationship. The reference to 'appears' in s 269TAA(1) imports a lower standard than would be necessary if the Commissioner was required to be satisfied that, in fact, price was not influenced by the parties' relationship. The Commissioner must treat a transaction as falling within s 269TAA(1)(b) if it merely 'appears' that the price is influenced by the relationship. Consequently, a statement that the Commissioner was not satisfied that the price was (in fact) influenced by the relationship between the parties would not address the statutory criterion.*

31. *Relevantly, the findings of the Commission in REP 469 continue to be pertinent and the department has not received evidence to displace this finding that it appears that the transaction was influenced by the relationship.*

32. *Further, the department considers that the nature of the agreements between Electra and Guilin do not displace the appearance of influence, or support the proposition that the arrangements are not considered to be unexpected or extraordinary in the context of the dealings between any two legally associated entities, as alleged in Electra's submissions.*

Electra submits that the finding in the DISER Report is affected by both by its misunderstanding of facts and law.

Firstly, the extract referred in the DISR Report is <u>not</u> paragraph 43 of the Wilsons Decision and is not a direct quote of the reasons given by Honour Justice Kerr. The paragraph quoted is paragraph 43 of *ADRP Decision No. 122 and 123: Power Transformers exported from the People's Republic of China* ("ADRP Decision") which was reproduced by the Court in paragraph 33 of the Wilsons Decision.[6]

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6 *Wilson Transformer Company Pty Ltd v Anti-dumping Review Panel (No 2)* [2021] FCA 591.

Secondly, the DISER Report misunderstood the legal issues and the Court's finding in the Wilson case. The Wilson case does not support the DISER's view that Section 269TAA(1)(b) somehow requires the Commission to find transactions between related parties as non-arms length unless there is evidence to the contrary. This is the position pursued by the Applicant of the case, being Wilson Transformer Company Pty Ltd ("Wilson"), that was rejected by both the Federal Court, the Full Federal Court, and twice by the ADRP.[7]

In particular, the Applicant challenged the ADRP's finding that:

> *47. In my opinion, the influence with which s 269TAA(1) is concerned is influence as to price. It is concerned with the appearance of variation from the price that would have been agreed had the sale been negotiated at arms length. Any other effect does not provide a reason why the price agreed between the parties should not be adopted as the export price under s 269TAA(1) or result in the transaction not being used for the determination of the normal value under s 269TAC(1).*
>
> *…*
>
> *49. I accept that relationships between the exporters and importers provides an opportunity for the price to be influenced and that this might well lead the Commissioner to scrutinise the transactions more carefully than transactions between unrelated parties. It must be borne in mind, however, that the opportunity and the capacity to influence the price, is not the same thing as actually influencing the price. It does not follow that the appearance of influence, such as that which might exist between related exporters and importers, creates the appearance that the influence has been exercised.*

This claim was rejected by Kerr J in the first instance, finding that:[8]

> *67 The expression "arms length transaction" is not a defined term for the purposes of Part XVB of the Customs Act. I reject, in the absence of any foundation in the statute to the contrary, and none is asserted, how it might be contended that the export price of goods relative to the normal price of those goods might be said to be unreliable because of an association or compensatory arrangement between the exporter and the importer or a third party in circumstances where there is nothing before a decision maker to suggest that the price was other than would be at least that as would be reached in an arms length transaction. It is to be recalled that save as to the contended for operation of s 296TAA(1)(b) there is no challenge to the Commissioner's finding (or the Panel's on review) that the sales fell within the undefined meaning of an arms length transaction.*
>
> *68 To paraphrase Freud, sometimes a cigar is just a cigar: equally sometimes a price will be just a price.*
>
> *69 In assessing whether there is an appearance of a relationship between related parties having influenced the relevant prices at which transformers had been sold I am unpersuaded that as a matter of law, based on the construction of the provision*

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7 ADRP Report 2022/122a, at para 4.

8 *Wilson Transformer Company Pty Ltd v Anti-dumping Review Panel* (No 2) [2021] FCA 591.

contended for, the Panel must ignore whether or not a price that was actually arrived at by those associated parties is the same as, or less than or greater, than would have been arrived at by an arms-length transaction.

70 *A construction of s 269TAA(1)(b) as would require such considerations to be excluded as legally irrelevant in assessing whether there is an appearance of influence in the statutory context in which that provision is located should be rejected.*

On appeal, the majority judgment of the Full Court upheld the Review Panel's approach to findings with respect to the Commission's determination under Section 269TAA of the Act:[9]

56. *The Panel did not err in approaching the question whether s 269TAA(1)(b) applied on the basis of whether the whole of the evidence was relevant in ascertaining whether or not there was an appearance of influence on price arising from the commercial or related relationship between related parties. That is a legally permissible approach to assessing the effect on price of the relevant parties' relationship. There was no legal error in the Panel looking at all the relevant evidence and circumstances, including the particular practices and policies and the manner in which pricing was determined by the relevant parties, in determining whether or not the relationship between the exporter and the importer appeared to influence the price. The material or information which is potentially relevant to this assessment need not include a comparison between the price of unrelated parties' sales. The reference in [47] of the Panel's reasons to s.269TAA(1) being concerned with "the appearance of variation from the price that would have been agreed had the sale been negotiated at arms length" when read fairly, does not mean the Panel proceeded on the basis that, for there to be the requisite appearance of influence on price of a commercial or other relationship it was necessary for the decision-maker to determine, by way of a counterfactual, the price that would have been agreed between unrelated parties. Any other reading cannot be reconciled with the fact that the Panel was well aware that there was no evidence before it relating to prices between unrelated entities (see, for example, the final sentence of [51] and the Panel's reference in [52] to the Commissioner's inquiries involving documents being obtained from related parties).*

57. *For the purposes of s 269TAA(1)(b), the assessment must be directed to the relevant statutory question, namely whether there is an appearance of the price having been influenced by the commercial or other relationships between the buyer (or an associate) and the seller (or an associate). That is the approach taken by the Panel. That is the approach taken by the Panel. No appealable error has been established in relation to the primary judge's analysis and conclusion rejecting ground 1 of the judicial review application.*

…

59 *… Shortly thereafter, however, senior counsel said that it was the appellant's submission "that evidence that a buyer and seller are part of a multinational group would give rise to an inference that prices are influenced by that relationship" The appellant's position was that, having regard to the TPS report, the Panel should have*

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9 *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel* [2022] FCAFC 4, [56].

found that evidence as establishing the requisite appearance of price influence and then considered whether there was other evidence which displaced that inference. In our view the Panel did not err in adopting an approach which involved consideration of all the relevant evidence bearing upon the issue of appearance, rather than adopting the appellant's segmented or sequential approach.

We note that the ADRP further upheld this position in its reconsideration of the matter in Report 2022/122a, where it also offered the following additional opinion regarding the determination under Section 269TAA(1)(b):[10]

69. I refer to a further example that, in my view, illustrates why it is appropriate to look at all the relevant evidence and circumstances in deciding whether there appears to be an influence on price for the purposes of s.269TAA(1)(b). There are numerous examples where an exporter will appoint an unrelated importer to be its distributor in Australia. Usually, such arrangements lead to a lower price being charged by the exporter to the importer in recognition of the distributor's role in the market as compared to a transaction with say an end user. Section 269TAA(1)(b) says a 'price appears influenced' by an 'other relationship'. In that example, notwithstanding the existence of the relationship between the exporter and importer, after a consideration of all of the relevant evidence, including normal market practice, it might be determined that there is no appearance of influence on price for the purposes of 269TAA(1)(b) of the Act.

70. In my opinion, the legislation is not intending to capture or prevent 'normal' market relationships and arrangements that 'influence' price from being used as an export price. As referred to earlier, this is consistent with the intent of the provision as outlined in the Explanatory Memorandum. The approach advocated by Wilson suggests that the evidence provided in the TPS and Frontier Reports demonstrates that the corporate guidelines of a multinational group is sufficient evidence of the appearance of influence on the price by a relationship and that such transactions cannot therefore be treated as arms length. I do not agree that this is what is intended by this provision, nor that the evidence outlined is compelling in this regard.

71. Furthermore, it would seem inconsistent for related party transactions to be treated as non-arms length purely on the basis that corporate guidelines exist. The question that I consider more important in assessing whether the 'price appears to be influenced' is what do the corporate guidelines require in relation to pricing. This assessment allows a decision to be made as to whether the price appears to have been influenced and s.269TAA(1)(b) enlivened.

Accordingly, we respectfully submit that the DISER Report failed to apply the correct legal test in determining arms length transaction as required by Section 269TAA(1)(b) of the Act.

Further, contrary to DISER Report's comment, Electra and Guilin Group did provide relevant information that "*displace the appearance of influence, or support the proposition that the arrangements are not considered to be unexpected or extraordinary in the context of the dealings between any two legally associated entities*". DISER Report itself contains a summary of such information, which goes to rebut

[10] ADRP Report 2022/122a.

the view that there was a lack of negotiation between Electra and Guilin, or the suspicion that the transactions between the parties are not commercial based:

> *24. Electra provided extensive submissions. In summary, the submissions contended:*
>
> - *the prices negotiated between Electra and Guilin were fully reflective of the conditions of the electric cable market in Australia and the impact of fluctuating raw material costs;*
>
> *…*
>
> - *the prices negotiated between Electra and Guilin reflected a normal commercial negotiation between a major exporter supplier and a large importer customer; and*
> - *that Electra's ability to influence is completely within the normal compass of an arms length commercial negotiation.*
>
> *25. Additionally, Electra's submissions also alleged that REP 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-arms length manner under subsection 269TAA(1)(b) of the Customs Act and that:*
>
> - *It had not been suggested that any of the "inter-company loans" or "broader financial/commercial arrangements" do not reflect commercial market rates.*
> - *There is no indication that any particular "arrangements" between Electra and Guilin were of a nature that might be considered to be unexpected or extraordinary in the context of the dealings between any two legally associated entities.*

For the Review Panel's convenience, we provide the confidential version of the Electra's submission to DISER dated 26 November 2020 at Confidential Exhibit 1. Electra's comment on this issue can be found at pages 10 to 12.[11] Electra made further submission to DISER on 5 August 2021 in response to DISER's preliminary finding and an invitation for comment, contained in a letter emailed to Electra on 11 July 2021 ("DISER Second Letter"). In particular, Electra advised that:[12]

> *We submit that the Department's reasoning in its additional analysis of this issue in the Letters does not adequately support an inference that the transactions between Guilin International and Electra are not at arm's length. To the contrary, as the Letters correctly point out,* ***[CONFIDENTIAL TEXT DELETED – price comparison]*** *between* ***[CONFIDENTIAL TEXT DELETED – customer segments]*** *was* ***[CONFIDENTIAL TEXT DELETED – explanation of factor affecting price]****. That is the* ***[CONFIDENTIAL TEXT DELETED – price level]*** *to Electra corresponded with* ***[CONFIDENTIAL TEXT DELETED – factor affecting price]****, whereas* ***[CONFIDENTIAL TEXT DELETED – price level]*** *to* ***[CONFIDENTIAL TEXT DELETED – customer segment]*** *corresponded with* ***[CONFIDENTIAL TEXT DELETED – factor affecting***

[11] EPR469-038, at pages 10-12.

[12] EPR469-041, at page 3.

> ***price]***. *In any case, we note that it is not suggested that Guilin International's sales of the GUC to Electra were artificially low, due to the relationship between the parties. Thus, if anything, the* ***[CONFIDENTIAL TEXT DELETED – price level]*** *to* ***[CONFIDENTIAL TEXT DELETED – customer segment]*** *would tend to support the proposition that the prices between Guilin International and Electra were arrived at on an arm's length basis.*
>
> *Further, as the Letters correctly acknowledge, Guilin International's prices to Electra were highly influenced by raw material cost fluctuation and Australian market conditions.*[13] *Electra's sales of the GUC during the investigation period were made to* ***[CONFIDENTIAL TEXT DELETED – customer type]*** *at* ***[CONFIDENTIAL TEXT DELETED – price level]***. *Electra's sales of the GUC were* ***[CONFIDENTIAL TEXT DELETED – price level]***. *We submit that this in turn lends support to the view that the prices charged by Guilin International to Electra were also at a level that reflected the market conditions; were* ***[CONFIDENTIAL TEXT DELETED – pricing behaviour]*** *with the prices determined between* ***[CONFIDENTIAL TEXT DELETED – customer segment]***; *and were not influenced by* ***[CONFIDENTIAL TEXT DELETED – commercial consideration]***. *As consistently advised by Electra, the* ***[CONFIDENTIAL TEXT DELETED – price levels]*** *at which Electra was required to compete in the market are the norm for the GUC, which are high-volume commodity cables. Suppliers sell a full range of cables with greater profitability derived from specialty, high-end and other lower volume cables. Thus, Electra's pricing practice and profitability experience was consistent with that of the other major suppliers in the Australian market.*[14] *This should serve as another useful indication that the prices agreed between Guilin International and Electra reflected arm's length transaction prices and, in fact, were not influenced by the relationship between the parties.*
>
> *We respectfully request the Department to take into account the relevant information and circumstances as we have explained them, so as to recommend to the Minister that the sales of the GUC between Guilin International and Electra during the investigation period took place on an arm's length basis.*

For the Review Panel's convenience, we provide the confidential version of the Electra's submission to DISER dated 5 August 2021 at Confidential Exhibit 2.

Electra submits that the factual considerations as cited in paragraph 28 of the DISER Report have been addressed and rebutted by Electra through its various submissions both before the Commission and DISER. The DISER Report's finding that the transactions should be treated as not arms length under Section 269TAA(1)(b) appear to be based on no more than the incorrect view that such an outcome should be reached by default for transactions between related parties – due to its misinterpretation of the Wilson case.

Lastly, DISER Report undertook an additional analysis to further support its arms length finding, as follows:[15]

> *33. Following this finding, the department performed additional analysis of Guilin's sales of the goods to Australia during the investigation period to supplement the consideration (Confidential Attachment – 2).* ***[Confidential information redacted – details of***

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13 DISER Second Letter, page 2.

14 Referring to Electra first submission to DISER dated 26 November 2020, at pages 10 and 11

15 DISER Report, paras 33 to 38.

intermediate parties redacted] *The analysis was conducted on the basis of all sales, both direct and indirect, from Guilin to Electra.*

34. *The purpose of the analysis is to help identify whether it appears that the price between Guilin and Electra is influenced by the relationship between the parties by comparing the export price between Guilin and its related parties, the export price between Guilin and unrelated parties, and the export price between Guilin and Electra, in accordance with the guidance provided in the Dumping and Subsidy Manual.* [footnote omitted]

35. ***[Confidential information – Method and findings of Department's analysis of Guilin's pricing to related parties, unrelated parties and Electra]***

…

36. ***[Confidential information – Department's conclusion about Guilin's pricing behaviour with respect to Electra and other parties]****. The department considers this indicative of a relationship that is not at arms length and that this further supports the appearance of influence.*

37. *The department, while accepting of other factors that may be contributing to the apparent price discrepancy, such as the fact that Electra* ***[Confidential information – business relationship with Guilin]*** *and purchases in significant quantities which may also be influencing the sales price, Figure 1 demonstrates that the price to Electra appears to be influenced by the relationship between the parties.*

38. *The department considers that* ***[Confidential Figure 1]*** *demonstrates that Electra's pricing appears to more closely reflect pricing conditions between* ***[Confidential information – price comparison between customer segments].***

39. *Accordingly, on the whole of the evidence, the department considers that the available evidence relating to the price between Guilin and Electra indicates that the price appears to be influenced by a commercial or other relationship between buyer (Electra) and seller (Guilin), despite the presence of other factors. Accordingly, the department considers that section 269TAA(1)(b) of the Customs Act applies, and requires that those sales shall not be treated as arms length transactions. [underlining supplied]*

This analysis and the inference drew by the DISER Report is misguided. This is because, Guilin International did not have any related party customers other than Electra with respect to its Australian sales during the POI. The DISER Report mistook Guilin Group's indirect export sales to unrelated traders as sales to "related parties". The fact that these parties are unrelated to Guilin Group is supported by Guilin Group's Corporate Structure provided as Attachment 2 to its response to exporter questionnaire, and were well verified by the Commission in Investigation 469.

Further, to the extent that Guilin Group's exports were made to unrelated parties and were not destined to Electra, neither Report 469 nor DISER Report provide any basis for consider such sales as non-arms length transactions.

b Incorrect and unreasonable treatment of Electra's foreign exchange gains in export price determination

As noted, the reviewable decision calculated a deductive export price based only on the (in our submission, incorrect) application of Section 269TAA(1)(b) of the Act. In calculating the deductive export price the DISER Report rejected Electra's request that foreign exchange gains be properly taken into account as part of the deductive export price calculation, on the following reasoning:

> 49. *With respect to the other submissions, Electra's arguments do not suggest why the evidence the Commissioner relied upon was incorrect, or provide compelling reasons as to why Electra's position is preferable. The department considers nothing provided by Electra displaces the findings insofar as they relate to subsection 269TAB(1)(b) and that the Commissioner was correct to recommend that the Electra's forex gains / losses not be included in the calculations as set out in REP 469.*
>
> 50. *In particular, the following findings of the Commissioner remain persuasive:*
>
> - *Electra's forex gains / losses arose in the context of valuation gain / loss of sales, valuation of bank deposits, third party and related party loans and receivables denominated in foreign currencies which may change in accordance with exchange rate fluctuations; and*
>
> - *Electra's SG&A costs do not include any forex gains / losses in its own annual report.*
>
> 51. *The department recommends a finding that forex should not be included in SG&A costs on the basis that the approach taken by the Commissioner is based on generally accepted accounting principles in Australia. Furthermore, while Electra's annual report does show its forex gains / losses, they appear "below the line" (i.e. not an SG&A expense). As a result, the department is of the view that forex is not an SG&A expense.*

However, DISER Report's view is contradicted by its own summary of the clear record of information presented by Electra which goes to explain why the foreign exchange gain is a relevant consideration for the purpose of export price determination. The DISER Report helpfully summarises Electra's claim concerning the treatment of foreign exchange gain and loss as follows:

> 44. *Electra made arguments in its submissions concerning the treatment of forex gains / losses during the course of the investigation that were considered by the Commissioner in REP 469. Electra's submissions in response to the 6 November letter, and the department's preliminary recommended position, made further arguments disputing the approach taken in relation to Electra's foreign exchange gains.*
>
> 45. *The department considered the following arguments in particular:*
>
> - *the calculation of the SG&A costs meant that the ratio was inflated, and the calculations failed to account for the exchange gain in any other manner;*
>
> - *the Commissioner's approach to considering whether Electra's sales were at a loss for the purpose of concluding whether or not the sales between Guilin and Electra were non-arms length under subsection 269TAA(1)(c) of the Customs Act;*

- *that forex gains / losses should be recognised as part of the "costs, charges or expenses arising in relation to the goods after exportation", being an element of the cost of importing the goods from China;*

- *whether Electra's forex gains / losses should be included as part of Electra's company-wide rate of profit for the purposes of applying an amount for profit under subsection 269TAB(2)(c) of the Customs Act;*

- *whether forex gains / losses should be included as a deduction when calculating Guilin's export price under subsection 269TAB(1) of the Customs Act; and*

- *that the Commissioner did not include forex gains / losses in the calculation of importer SG&A because the foreign exchange gain arose from several accounting events and because the gain is recorded as "other revenue" in Electra's accounts. Electra asserts that foreign exchange gains 'are an integral part of Electra's business as an importer… exposed to foreign currency movements…' and that '[t]here is no reasons such gains should not have been properly taken into account'.*

46. *Furthermore, Electra points out, in response to the department's preliminary recommended position, that the treatment of foreign exchange still has bearing on the calculation of Guilin's export price under subsection 269TAB(1)(b) of the Customs Act. Electra's argues that:*

    As Electra has consistently submitted, the foreign exchange gains should be properly recognised as part of the "costs, charges or expenses arising in relation to the goods after exportation", being an element of the cost of importing the goods from China.

For the Review Panel's consideration we refer to the following explanation provided in Electra's submission to DISER dated 26 November 2020:[16]

> *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 "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*

[16] Electra submission dated 26 November 2020, pages 3 and 4.

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:[17]

> *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.

Contrary to DISER Report's assertion, Electra did provide very detailed response to every single comment and question raised by the Commission regarding foreign exchange gains. Most notably, in a series of email correspondence between Electra and the Commission during Investigation 469, which ended with Electra's explanation as follows:[18]

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

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17 Report 469, page 36.

18 Email from Moulis Legal to Commission dated 12 December 2018.

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 loses) 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 INFORMATION DELETED – amount] *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* [CONFIDENTIAL INFORMATION DELETED – amount]. *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 loses) 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 INFORMATION DELETED – value]. *Naturally, this is directly arising from the importation of the goods. Further, over* [CONFIDENTIAL INFORMATION DELETED – percent] *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 INFORMATION DELETED – amount].

- *it also has* [CONFIDENTIAL INFORMATION DELETED – amount] *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 INFORMATION DELETED – entities]. *The* [CONFIDENTIAL INFORMATION DELETED – entity] *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 INFORMATION DELETED – entity] *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

INFORMATION DELETED – 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 INFORMATION DELETED – details of business operation]. *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 INFORMATION DELETED – entities] *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 certain related party companies, namely* [CONFIDENTIAL INFORMATION DELETED – entities] *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.

The Commission replied to Electra's email by stating that it would provide a detailed response in due course. The Commission did not provide such a response and did not raise any further questions.[19]

Report 469 and now the DISER Report ignored the detailed explanation given by Electra in relation to the foreign exchange gains, and continues to defend its decision relying on inconsistent and irrelevant reasons and in an off-hand manner. We respectfully ask the Review Panel to make the following findings:

- That Electra's foreign exchange gains were clearly 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 nominated in foreign currency.

- There is no reason such gains should not have been properly taken into account in assessing Electra's profitability in relation to its sale of the goods as an importer. The question of whether the amount should be recognised as part of Electra's cost or as part of Electra's income is of little relevance.

- The view that foreign exchange gains should not be recognised as part of the deductive export price calculation based on the location of foreign exchange gain in the financial statement, rather than its nature and relevance to Electra's import and sales of the GUC is incorrect and unreasonable;

c Incorrect determination of an amount for profit under Section 269TAB(2)(c)

The DISER Report made a different recommendation for the Minister to determine an amount for profit under Section 269TAB(2)(c) of the Act for the purpose of deductive export price calculation. 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.*

In summary, DISER Report rejected Electra's submission that the amount for profit could be determined based on the following:

> *81. Electra's submissions nominated several alternative bases for the calculation of profit:*

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19 Email from Commission to Moulis Legal dated 13 December 2018, please see Confidential Exhibit 3

- [Confidential information – rate of profit related to corporate commercial arrangement];
- *Electra's actual rate of profit on the goods;*
- *Electra's 2017 flat building wire profit; or*
- *Electra's 2017 profit on 1.5mm2 wire.*

Instead, the DISER Report recommended the Minster determine the amount for profit to be 4.3%, based on the profitability for Electra's flat, multi-core building wire, *excluding* the goods. Notably, the DISER Report offered the following comment in support of this option:

> *98. In consideration of profit determination, the department understands that:*
>
> - *the Commissioner found that the Australian industry prices were supressed during the investigation period; and*
> - *further information presented by Electra shows industry prices have risen since the imposition of measures in response to dumping of the goods.*
>
> *99. This supports a view that the low or negative profits regularly achieved on sales of the goods by the Australian industry during the investigation period are not representative of a market free of dumping, and that the profit achieved by Electra on the goods may be influenced by its relationship with Guilin. The department notes that although Electra has nominated a number of different options for alternative calculation of profit, it has also only nominated alternative profit amounts that are negative (with the exception of the* **[Confidential information redacted - commercial corporate arrangement]** *approach), and not any of the many products that it sold at a profit. The department's view is that none of the alternative approaches are persuasive, for the reasons discussed above.*
>
> *100. The department considers it appropriate to apply a positive amount of profit in the export price calculation as reflective as possible of the state of the Australian market for the goods free of the influence of dumping and related party pricing influence.*
>
> *101. The additional sales data provided in Electra's submissions has allowed the department to identify an appropriate selection of Electra's products that are in the same general category of products of goods, on which to base the amount for profit to be applied.*
>
> *102. The department considers that this selection of products is less affected by the influence of the pricing between the related parties, due to the exclusion of the goods (for which it has been determined an influence is present), more representative of the profit that would be achieved by Electra absent the influence of the relationship, and avoids inclusion of other products sold by Electra that are not similar to the goods, which were identified with the assistance of Electra.*
>
> *103. The department considers that Electra's sales of flat building cables with multi-core construction and a flat shape other than the goods, is the most suitable and appropriate selection available for this purpose. These products are closely related to the goods,*

> *featuring similar construction and end uses. The goods themselves are not included in the profit calculation because doing so would heavily skew the resultant profit amount due to the volume of the goods and the significant negative profit amount.*

These statements highlight that DISER Report's decision was influenced by its view that:

- The amount for profit should reflect the level of profit in a "*market free of dumping";*
- The actual profit level of Electra is "*affected by the influence of pricing between related parties*";
- The amount for profit must be a "positive" profit, regardless of its relevance to the goods sold by Electra;

Electra submits that the DISER Report's view that a determination under Section 269TAB(2)(c) should be performed by applying "*a positive amount of profit in the export price calculation as reflective as possible of the state of the Australian market for the goods free of the influence of dumping and related party pricing influence"* has no legal basis. In fact, it subverts the legislative structure, assuming that the goods are dumped, before an export price has even been determined.[20]

Further, in addition to the issue relating to the DISER Report's determination under Section 269TAA(1)(b), we note that the DISER Report has never established that the prices charged by Electra was in fact "affected" by influence of pricing. DISER Report's finding under Section TAA(1)(b) is limited to its view that the relationship between Guilin Group and Electra could give rise to an "appearance of influence". DISER Report has not provided any evidence as to what influence affected that Electra's profit level for either the goods or any other products for profit determination purpose, other than to note that Electra's sales were unprofitable.

Indeed, DISER Report acknowledges that:

> 88. *Although Electra's negative amount of profit for the goods is comparable to the low or negative profits achieved by the Australian industry during the injury analysis period, the previous Minister found that there was significant dumping in the market by Nanyang Cable (Tianjin) Co. Ltd. The Commissioner also did not conclude that the Australian industry members deliberately sold at a loss or minimal profit. This results in any rate of profit on the goods being at best circumspect, without careful analysis.* [underlining supplied]

The fact that Electra's competitors achieved comparable level of low profit to Electra is direct evidence that the low/no profit by Electra's resale of the goods is reflective of the market conditions, rather than a sign of "influence" from related party pricing. Whether or not such profit level is also influenced by dumping by a third party, or any "deliberation" of the Australian industry members, which are unrelated to Electra, is entirely irrelevant to the determination of an arms length export price.

The DISER Report then goes on to state:

> 89. *For example, a very low amount of profit achieved on Australian sales by an importer that is a related party to an exporter, could be indicative that the companies are acting in*

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[20] Noting that Section 269TACB, the section which governs the determination of dumping, requires that export prices be determined under s 269TAB *before* the Minister determine whether dumping has occurred.

concert to transfer profit to the exporter by manipulating the export price. This strategy would mask dumping, and is a possible mischief that subsection 269TAB(2)(c) of the Customs Act is aimed at preventing.

90. *Examination of Electra's profitability data for other cable products identifies that the loss incurred on sales of the goods is significantly greater than other similar products. This is a factor supporting the risk of price manipulation by the parties to mask dumping. Therefore, using the rate of profit on the goods, of itself, is not reliable.*

Such reasons are entirely speculative, not evidence based and is self-contradictory. There is no basis whatsoever that "a very low amount of profit" could be indicative of profit transfer from importer to exporter. In any case, the DISER Report expressly found that:

53. *The department has considered the reasons and evidence provided by the Commissioner in REP 469 in support of the Commissioner's recommendation that the Minister be of the opinion that the buyer (Electra) will be reimbursed by the seller (Guilin) subsequent to the sale in respect of the whole or any part of the price.*

54. *Having considered the available evidence, the department recommends that the Minister not form the opinion that the buyer (Electra), or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise received a benefit for, or in respect of, the whole or any part of the price. The reasoning for this recommendation is set out below.*

…

71. *… having considered the whole of the evidence and the submissions provided, the department recommends that the Minister decline to treat the sales of those goods at a loss as indicating that Electra 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.*

72. *In particular it is noted that Electra achieved a company-wide profit in 2017 and the Commission's finding that the prices of the goods supplied by Guilin to Electra were determined with regard to Australian market dynamics and copper price movements. The fact that Guilin's sale prices to Electra* ***[Confidential information – pricing information]*** *is consistent with the Commission's finding.*

73. *In the department's view, Electra's efforts to* ***[Confidential information – business behaviour]*** *mitigated, but did not prevent, the losses being incurred. In these circumstances, the department considers is that it is unlikely that Electra is being reimbursed, compensated or otherwise receiving a benefit for, or in respect of, the whole or a part of the price.*

Lastly, Electra notes that the DISER Report acknowledged that one of profit option proposed by Electra was indeed a positive profit, [CONFIDENTIAL INFORMATION DELETED – a corporate commercial arrangement], but refused to accept such option without proper basis:

83. ***[Confidential information redacted – department's summary of paragraph follows]*** *In its submissions Electra advised of a corporate commercial arrangement to which it is a*

party and which the Minister could reasonably consider as a benchmark when considering what amount of profit to apply for the purpose of Section 269TAB(2)(c).

84. *[Confidential information redacted – department's summary of paragraph follows] Electra suggested applying a profit amount of approximately 2 per cent would not be unreasonable.*

85. *When evaluating this option, the department considers the following is relevant:*

- *the department's preference is to use actual data and real world transactions as they are relevant to the company and time period. In the department's view this is a more appropriate form of assessment and allows for a rate of profit to be determined that is suitable for determining a party's export price under section 269TAB(2); and*

- *[Confidential information redacted – information about corporate commercial arrangement redacted from this paragraph]. The department is not in a position to confirm the details of the arrangement. Given the department's preference for actual data and the lack of information available, the department recommends that the Minister use information on hand to make its determination rather than relying on the information concerning the corporate commercial arrangement asserted by Electra.*

86. *[Confidential information redacted – specific details of corporate commercial arrangement]. Accordingly, the department does not recommend using the profit amount suggested by Electra, based on its corporate commercial arrangement, for the rate of profit.*

Electra submits that [CONFIDENTIAL INFORMATION DELETED – specific details of corporate commercial arrangement] are clearly "real world" arrangements and of direct relevance to the question of determining arms length export price. Electra provided all necessary details regarding the [CONFIDENTIAL INFORMATION DELETED – arrangement] in its submission to DISER dated 26 November 2020, as follows:[21]

> *Lastly, Electra can advise that as a separate matter and subsequent to the Original Decision, [CONFIDENTIAL TEXT DELETED – information about corporate commercial arrangement][22] which [CONFIDENTIAL TEXT DELETED – explanation of arrangement practicalities].[23] [CONFIDENTIAL TEXT DELETED – explanation of impact of arrangement]. Despite this, Electra considers it not unreasonable for the Minister to [CONFIDENTIAL TEXT DELETED – arrangement detail], and to direct that the rate of profit be [CONFIDENTIAL TEXT DELETED – profit direction], [CONFIDENTIAL TEXT DELETED – reason for profit direction], for the purpose of Section 269TAB(2)(c).*

The details provided by Electra include a [CONFIDENTIAL TEXT DELETED – information about corporate commercial arrangement] and would have also allowed DISER to verify Electra's submission. DISER had never raised any question regarding such arrangement with Electra. If DISER

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21 At page 20 of the said submission.

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

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

considered that any verification was required, it should have contacted Electra to [CONFIDENTIAL TEXT DELETED – information about corporate commercial arrangement].

In conclusion, we respectfully submit that the DISER Report's determination concerning the amount for profit as required by Section 269TAB(2) of the Act is incorrect and unreasonable.

10 Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:

Electra submits that the correct or preferable decision is for the export price to be calculated under Section 269TAB(1)(a) of the Act, on the basis that the goods exported by Guilin International during the POI and purchased by Electra were transacted at arm's length.

In the alternative, even if the export price should still be worked out under Section 269TAB(1)(b) of the Act, Electra submits that such export price should be determined on the following basis:

- The amount of Electra's foreign exchange gains/loss expenses should be included either as an indirect cost as part of the prescribed deduction relating to *"any costs, charges or expenses arising in relation to the goods after exportation"* under Section 269TAB(2)(b).

- The amount of profit , if any, on the sale of the goods by Electra under Section 269TAB(2)(c) must be correctly calculated. Based on Electra's estimation, any one of the four methods it presented to DISER – all of which provide a more reasonable and relevant connection to the determination required by Section 269TAB(2)(c) of the Act concerning Electra's resale of the goods.

Based on Electra's estimate, either of the two streams of correct or preferable decisions identified above would substantially decrease the dumping margin for the goods exported by Guilin International, to a *de minimis* or negative level. On that basis Electra requests the ADRP to recommend to the Minister that the anti-dumping measure as applied to Guilin Group's exports be revoked.

11 Grounds in support of decision

Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

Please refer to our detailed explanation of the reasons that we have presented to show that the review decision was incorrect and not preferable, and the corresponding correct or preferable decisions, in our response to question 9.

12 Material difference between the decisions

Set out the reasons why the proposed decision provided in response to question 10 is materially different from the reviewable decision:

The proposed correct or preferable decision would require the Minister to correctly carry out the legislative requirements regarding the determination of export price and dumping margin. In our view the Reviewable Decision does not comply with these requirements, in a number of aspects.

The correct or preferable decision claimed by the applicant would show that the dumping margin calculated in the reviewable decision is incorrect and materially overstated. In the applicant's view the correct or preferable decision would lead to a revocation of the measure due to negligible dumping margin, or at least a materially lower margin and ultimately lower dumping duty than determined by the reviewable decision.

Such outcomes are materially different from the reviewable decision to impose a dumping duty in relation to Guilin Group's exportation of the goods at 2.8%.

C Second ground – finding that dumping "likely" not supported by evidence or law

9 Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

Before the Minister may decide to publish a notice under Section 269TG(2) of the Act, Section 269TG(2)(a) requires that the Minister must be satisfied both that:

- the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value; and
- the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods.

In recommending the Minister to impose dumping duty under Section 269TG(2) of the Act, the DISER Report states that:

> *137. We also recommend that the Minister determine that exports of the goods from China in the future may be at dumped and/or subsidised prices and that continued dumping and/or subsidisation may cause further material injury to the Australian industry and that future exports of the goods by Guilin may be at dumped prices and that continued dumping may cause further material injury to the Australian industry.*

The DISER Report has not provided any evidence in support of the view that exports in the future may be at dumped prices. This is despite the DISER Report's acknowledgement that, it received detailed submission from Electra in this regard:

> *128. Electra raised arguments relating to whether dumpling and material injury will continue. The key argument raised was 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, and that circumstances have now changed since Nan Australia has ceased trading.*

129. *The department also gave particular consideration to the following aspects of Electra's submissions:*

- *[Confidential information – Electra's pricing information after the investigation period] and Electra's prices are largely comparable to other major Australian industry suppliers;*
- *the significant shift in market condition and further [Confidential information – pricing behaviour] suggest that there is no evidence that the export prices of like goods that may be exported to Australia by Guilin in the future may be less than the normal value of the goods, and therefore dumped;*
- *prices of the other Australian industry members have also recovered in more recent times;*
- *the existing measure, which applies to all exports from China except for exports from Guilin, is effective and adequate in addressing the Australian industry's injury claims and concerns; and*
- *the Minister cannot be satisfied that pre-conditions for imposing anti-dumping measures with respect to Guilin's exports under section 269TG(2) are met, when he is also presented information that shows the Australian industry's conditions have recovered without such measure being in place, or is not dependent on such a measure being put in place.*

The relevant information is contained in pages 20 to 22 of Electra's submission to DISER dated 26 November 2020 (Confidential Exhibit 1 to this application).

10 Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:

The correct and preferable decision is that the Minister should not be satisfied that all of the conditions under Section 269TG(2) were met. The conclusion that the export price of Guilin Group's exports of the goods in the future may be dumped, and is unsupported by fact.

11 Grounds in support of decision

Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

Please refer to our explanation of the reasons that we consider the Reviewable Decision was incorrect and not preferable, as set out above in 9.

12 Material difference between the decisions

Set out the reasons why the proposed decision provided in response to question 10 is materially different from the reviewable decision:

The correct and preferable decision means the anti-dumping duty notice is revoked, which is materially different the reviewable decision to impose dumping duty against Guilin International's exports of the goods.

D Conclusion and request

The Minister's decision to which this application refers is a reviewable decision under s 269ZZA of the Act.

Electra is an interested party in relation to the reviewable decisions.

Electra's application is in the approved form and has otherwise been lodged as required by the Act.

We submit that the application is a sufficient statement setting out Electra's reasons for believing that the reviewable decisions are not the correct or preferable decisions, and that there are reasonable grounds for that belief for the purposes of acceptance of this application for review.

This application contains confidential and commercially sensitive information. An additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information, is included as an Attachment to the application.

The correct and preferable decision that should result from the grounds that are raised in the application are dealt with and detailed above

Lodged for and on behalf of Electra by:

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26 November 2020

Mr Martin Squire
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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:

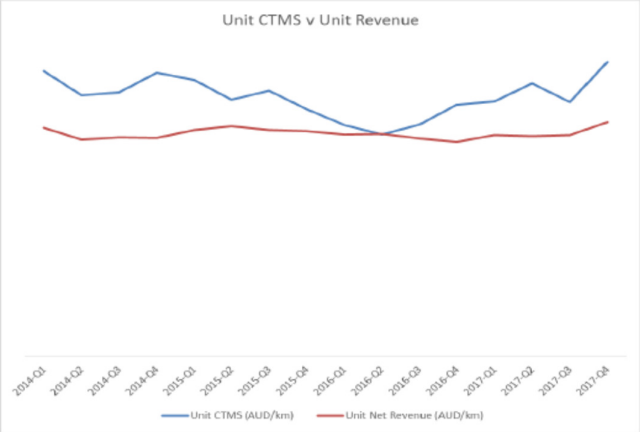


Figure 8: Comparison of Prysmian's unit CTMS and unit selling prices

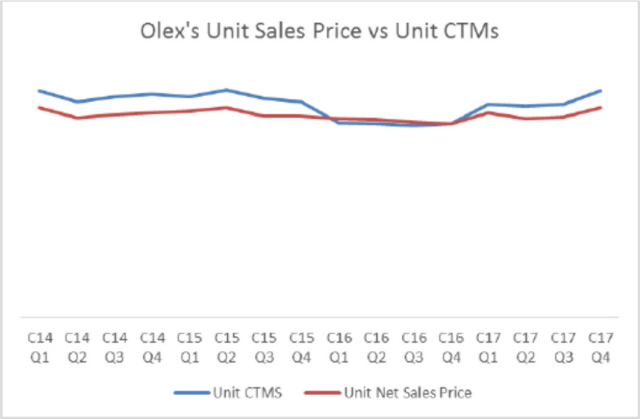


Figure 9: Comparison of Olex's unit CTMS and unit selling prices

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]

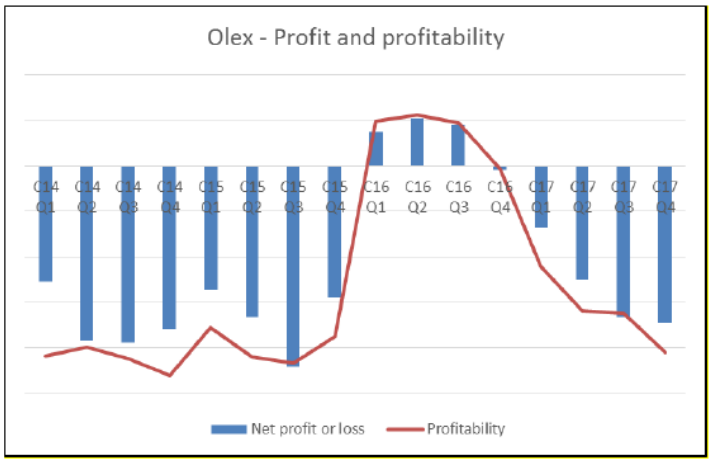


Figure 5: Olex's profit and profitability (**Profitability plotted on secondary axis)*

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

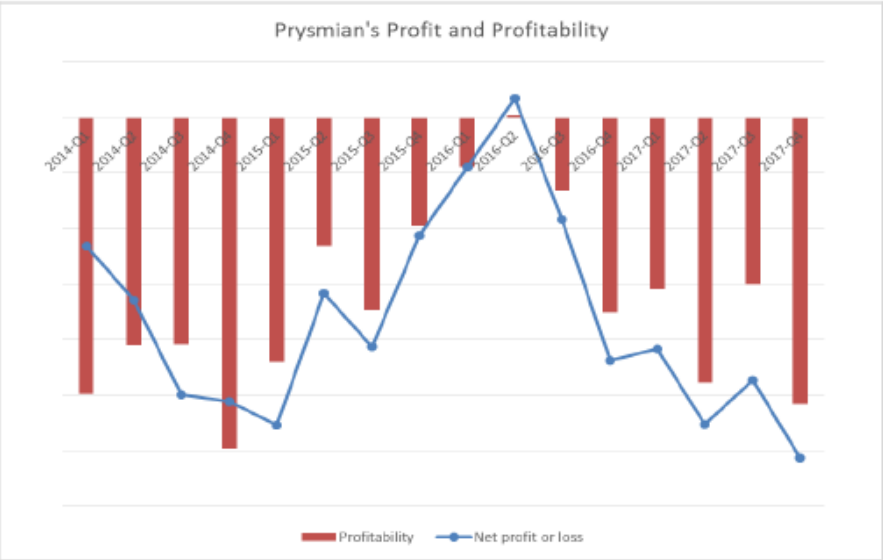


Figure 5: Prysmian's profit and profitability (**Profitability plotted on secondary axis)*

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).

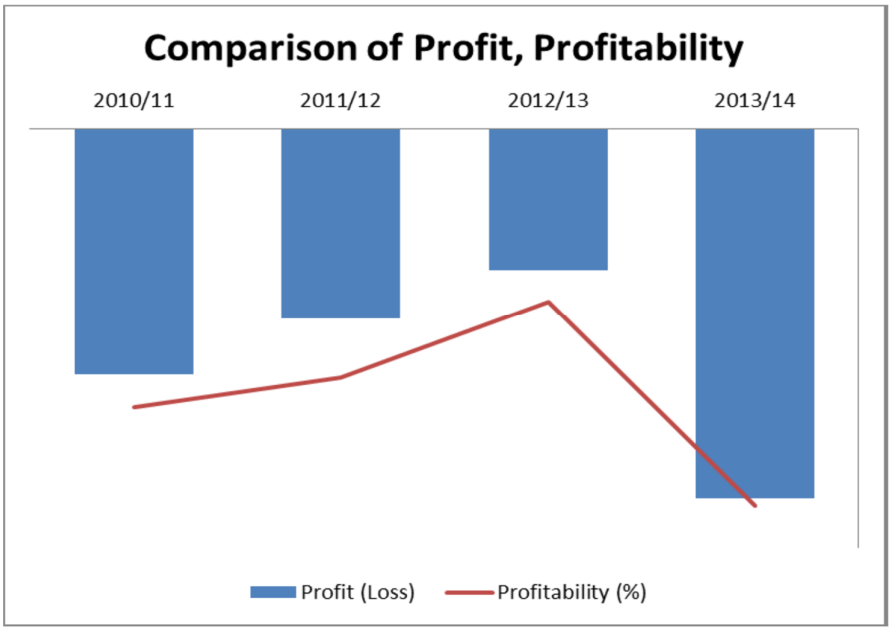
Secondly, Electra's company-wide profit does not and cannot reflect the level of profit in relation to *the goods*. The goods are a particular subset of the cable market. They are fast-moving "commodity" cables. Electra's sales of these goods accounted for less than **[CONFIDENTIAL TEXT DELETED – percentage]** 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.

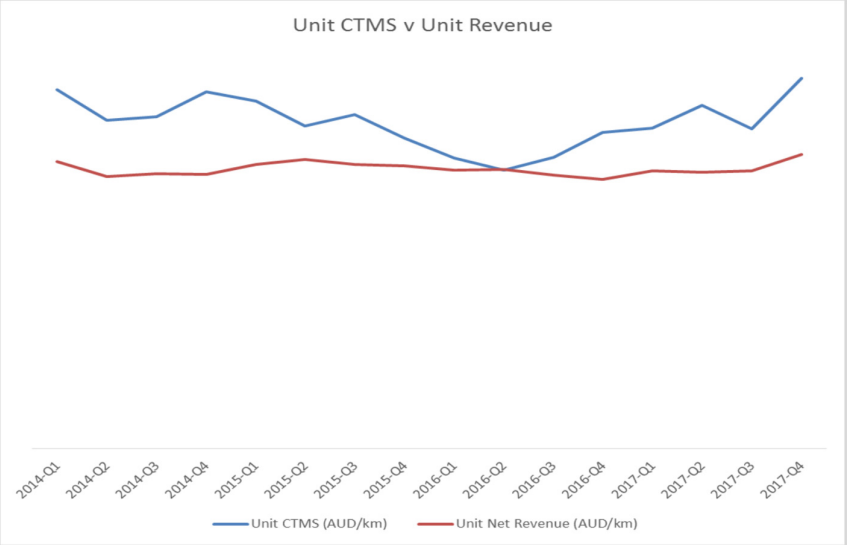


Figure 8: Comparison of Prysmian's unit CTMS and unit selling prices

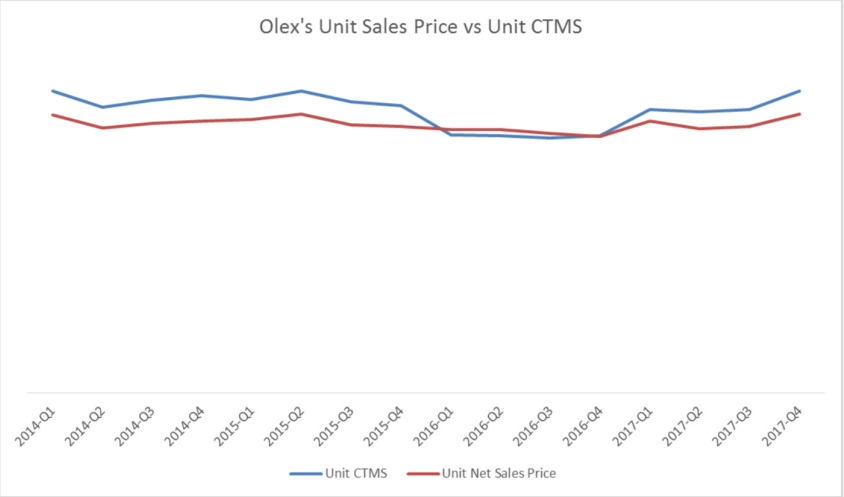


Figure 9: Comparison of Olex's unit CTMS and unit selling prices

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.

*****

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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05 August 2021

Mr Karl Brennan
Acting General Manager
Trade and International Branch
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10 Binara Street
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By email

Dear Mr Brennan

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

As you know we act for Guilin International Wire and Cable Group Co., Ltd ("Guilin International") and Electra Cables (Aust) Pty Ltd ("Electra") in this matter.

We refer to your letters to our clients respectively, which were emailed to us on 12 July 2021 ("the Letters"). The Letters detail the *"preliminary recommended position"* of the Department of Industry, Science, Energy and Resources ("the Department") with respect to the reconsideration of the revoked decision concerning PVC flat electrical cables ("the GUC") exported from China by Guilin International.

The Letters invited submissions from Guilin International and Electra with respect to the preliminary recommended position. Our clients appreciate this opportunity and provide their comments as follows.

FOR PUBLIC RECORD

A Electra response to information request

We note the preliminary recommendation that is recorded in the Letters, which is to amend the approach to determine the rate of profit to be directed under Section 269TAB(2)(c) of the *Customs Act 1901* ("the Act"). To carry out that preliminary recommendation, the Department has requested that Electra provide further information: [1]

- *identifying all cables sold/distributed by Electra including descriptions of each product and Electra's internal product codes (for matching to financial data). All different flat building cable types sold by Electra both within and outside of the* ***[CONFIDENTIAL TEXT DELETED – product grouping]*** *that was provided on 26 November 2020 needs to be included,*

- *identifying which subcategory within Electra's financial system/product portfolio that each cable product is attached to i.e. identify the products under* ***[CONFIDENTIAL TEXT DELETED – product grouping]*** *subcategories* ***[CONFIDENTIAL TEXT DELETED – product sub-categories]*** *on Tab 2 of the Confidential Attachment to the 26 November 2020 submission, and for all other of Electra's internal divisions,*

- *to enable us to verify and reconcile the above information, all relevant financial data relating to the sale of these products including detailed sales data (preferably in an Excel spreadsheet), and screen prints of Electra's general ledger linking it to the audited financial statements for the investigation period (January 2017 to December 2017). Please highlight the total sales figures of each product, linking it to your audited financial statement, to assist us to understand the information.*

Electra provides the requested information at **Attachment 1 Electra response to information request**. Specifically, please refer to tabs "All cables - descriptions", "All cables - subcategories" and "**[CONFIDENTIAL TEXT DELETED – product grouping]** - sales" **[CONFIDENTIAL ATTACHMENT]**. Further, Electra provides the general ledger screen prints at **Attachment 2 Electra general ledger**, tab "System screen prints" **[CONFIDENTIAL ATTACHMENT]**. For clarity, Electra's general ledger is detailed based **[CONFIDENTIAL TEXT DELETED – accounting system details]**. Electra has provided screen prints of **[CONFIDENTIAL TEXT DELETED – specified accounts]**, which match to the 2017 Trial Balance. Please see tab "Trial Balance 2017" in the same attachment. This is then matched to the audited financial statement – see tab "Link to Financial Report 2017" in the same attachment.

B Guilin International's sales to Electra were at arm's length

Firstly, our clients agree and welcome the Department's preliminary recommendation that:

> *…the Minister should not treat the sale of the goods under consideration at a loss by Electra as indicating that they will, directly or indirectly, be reimbursed or otherwise receive a benefit for, or in respect of, the whole or a part of the price.*

We understand that this means that Guilin International's export sales of the GUC to Electra during the investigation are not considered to be non-arm's length transactions under Section 269TAA(1)(c) of the Act.

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1 Letter to Electra at page 3.

On the other hand, our clients respectfully disagree with the Department's preliminary recommendation that the transactions between Guilin International and Electra are to be considered as not at arm's length *"by reason of the relationship between the parties appearing to influence the price in accordance with s.269TAA(1)(b) of the Act"*.[2] The reasons offered for this view are the following:

> *In addition to the analysis and reasons provided by the former Commissioner in Report 469, the department has further analysed Guilin's sales prices to* ***[CONFIDENTIAL TEXT DELETED – customer segments]****. The price analysis indicates* ***[CONFIDENTIAL TEXT DELETED – price comparison between customer segments]****.*
>
> *Notwithstanding contrary factors that are present,* ***[CONFIDENTIAL TEXT DELETED factor affecting price]****, and* ***[CONFIDENTIAL TEXT DELETED – factor affecting price]****, the whole of the information available presents the appearance that the price has been influenced by the relationship.*[3]

We respectfully refer the Department to our detailed comments on this issue in our letter to the Department dated 26 November 2020 ("the First Submission"), with specific reference to Part A.1.c of that submission. We respectfully ask the Department to consider those responses and comments. In our view, Report 469's analysis and findings with respect to this issue are incorrect and not well reasoned.

We submit that the Department's reasoning in its additional analysis of this issue in the Letters does not adequately support an inference that the transactions between Guilin International and Electra are not at arm's length. To the contrary, as the Letters correctly point out, **[CONFIDENTIAL TEXT DELETED – price comparison]** between **[CONFIDENTIAL TEXT DELETED – customer segments]** was **[CONFIDENTIAL TEXT DELETED – explanation of factor affecting price]**. That is the **[CONFIDENTIAL TEXT DELETED – price level]** to Electra corresponded with **[CONFIDENTIAL TEXT DELETED – factor affecting price]**, whereas **[CONFIDENTIAL TEXT DELETED – price level]**to **[CONFIDENTIAL TEXT DELETED – customer segment]** corresponded with **[CONFIDENTIAL TEXT DELETED – factor affecting price]**. In any case, we note that it is not suggested that Guilin International's sales of the GUC to Electra were artificially low, due to the relationship between the parties. Thus, if anything, the **[CONFIDENTIAL TEXT DELETED – price level]** to **[CONFIDENTIAL TEXT DELETED – customer segment]** would tend to support the proposition that the prices between Guilin International and Electra were arrived at on an arm's length basis.

Further, as the Letters correctly acknowledge, Guilin International's prices to Electra were highly influenced by raw material cost fluctuation and Australian market conditions.[4] Electra's sales of the GUC during the investigation period were made to **[CONFIDENTIAL TEXT DELETED – customer type]** at **[CONFIDENTIAL TEXT DELETED – price level]**. Electra's sales of the GUC were **[CONFIDENTIAL TEXT DELETED – price level]**. We submit that this in turn lends support to the view that the prices charged by Guilin International to Electra were also at a level that reflected the market conditions; were **[CONFIDENTIAL TEXT DELETED – pricing behaviour]** with the prices determined between **[CONFIDENTIAL TEXT DELETED – customer segment]**; and were not influenced by **[CONFIDENTIAL TEXT DELETED – commercial consideration]**. As consistently advised by Electra, the

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2 Letter to Electra at page 2.

3 Ibid.

4 Ibid.

[CONFIDENTIAL TEXT DELETED – price levels] at which Electra was required to compete in the market are the norm for the GUC, which are high-volume commodity cables. Suppliers sell a full range of cables with greater profitability derived from specialty, high-end and other lower volume cables. Thus, Electra's pricing practice and profitability experience was consistent with that of the other major suppliers in the Australian market.[5] This should serve as another useful indication that the prices agreed between Guilin International and Electra reflected arm's length transaction prices and, *in fact*, were not influenced by the relationship between the parties.

We respectfully request the Department to take into account the relevant information and circumstances as we have explained them, so as to recommend to the Minister that the sales of the GUC between Guilin International and Electra during the investigation period took place on an arm's length basis.

C Unaddressed errors in the deductive export price calculation methodology

It flows from the above that we remain of the view that the correct and preferable decision is that the export price should be determined under Section 269TAB(1)(a) of the Act. Without detracting from that position, we would like to draw the Department's attention to an error in the calculation of the export price under Section 269TAB(1)(b) of the Act that has been submitted to us in the Letter for Electra. Although we raised this matter in the First Submission, it appears not to have been addressed in the preliminary recommendation.

In the First Submission, Electra objected to Report 469's view that Electra's sales of the GUC were at a loss. In that context, Electra pointed out two errors in Report 469's analysis, namely:

- *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.*[6]

Electra welcomes the Department's proposed change in the export price methodology that addresses the second issue mentioned above.[7] However, the first issue, pertaining to the treatment of the relevant foreign exchange gains, remains unaddressed.

As a reminder, Electra explained in the First Submission that:

> *…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*

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5 See First Submission at pages 10 and 11

6 26 November Submission at page 3.

7 Letter to Electra at page 3.

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 lossmaking…

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 "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.

Electra acknowledges that the Department's preliminary recommendation no longer proposes to find the transactions between Guilin International and Electra to be non-arm's length under Section 269TAA(1)(c). This removes the applicability of Sections 269TAA(2) and (3). However, the proper treatment of Electra's foreign exchange gains continues to be relevant, insofar as the export price is calculated on a deductive basis under Section 269TAB(2) of the Act. As Electra has consistently submitted, the foreign exchange gains should be properly recognised as part of the *"costs, charges or expenses arising in relation to the goods after exportation",* being an element of the cost of importing the goods from China. Doing so would have the effect of reducing Electra's selling general and administrative expenses with respect to the importation of the goods from **[CONFIDENTIAL TEXT DELETED – percentage]** to **[CONFIDENTIAL TEXT DELETED – percentage]**. This has a direct impact on the export price calculated under Section 269TAB(1)(b), and the resulting dumping margin.

Our client respectfully reiterates its strong belief that the GUC exported from Guilin International to Australia during the investigation period were not "dumped". Guilin International and Electra **[CONFIDENTIAL TEXT DELETED – commercial market behaviour]**. They are responsible and reliable long term suppliers of electric cable to the Australian market, and are committed to fair competition.

D Profit deduction is unwarranted

We appreciate that the Department has resiled from the position in Report 469 that Electra's "company-wide sales" should form part of the "prescribed deductions" used to determine the export price under

Section 269TAB(2)(c) of the Act. Electra supports this view. It has consistently argued that the company wide profit was not representative of anything achieved by any participant in the Australian market on sales of the GUC and like goods.

On the other hand, we are disappointed that the preliminary recommendation still considers that a profit deduction must be adopted under s 269TAB(2)(c). This is a fundamental issue in this matter, because the use of an inflated profit margin contributes directly to the finding of whether dumping occurred during the investigation period. In our view, a deduction of profit is not justified in the circumstances of this case, and is unreasonable. It does not reflect the actuality of the electric cable market in Australia, and is discriminatory against Electra. We elaborated this point in our First Submission, noting that:[8]

> *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).*
>
> *…*
>
> *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.*

Further, Electra submitted that:

> *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.*[9]

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8 First Submission, at pages 16 and 18

9 *Ibis*, at page 18.

Once again, we respectfully submit that the use of the discretion under Section 269TAB(2)(c) needs to be weighed carefully. As in this case, the adoption of an incorrect profit-deduction can create a finding of actionable dumping, which has significant and long-term implications for importers and exporters, and the Australian market overall. This is particularly the case at the present, when market prices are at historically high levels amidst a highly disrupted supply chain arising from the global pandemic.

Accordingly, we are disappointed to note that the preliminary recommendation appears to operate on the assumption that a profit deduction must be adopted, irrespective of the merits of the individual case. There appears to be no explanation as to why this is the preferable outcome. In contrast, Electra has consistently presented information to establish that the circumstances of the Australian market for the GUC during the investigation period, and the long established commercial pricing practices of the competing suppliers, made it practically impossible for any suppliers to earn a material profit, if at all, from the sales of these commodity products. In our view, these facts clearly support Electra's view that there is no justification to insist on the deduction of any profit rate, let alone a substantive profit rate, under Section 269TAB(2)(c).

Once again, we respectfully submit that, in the special circumstances of this case, the correct outcome is not to deduct profit. This outcome is supported by Commission's own factual findings, as we now recount:

1. The Australian industry consistently and habitually sells the goods under consideration at a loss, irrespective of the existence or non-existence of dumping. Report 469 clearly shows that in the period of January 2014 – December 2017, Prysmian could only manage to break-even for one quarter (second quarter 2016) and that Olex eked out a small margin in only three quarters.[10] Even if the data from the investigation period is discounted, it is clear that profitable sales of the GUC in the Australian market have been the exception, and not the rule.

2. The historic unprofitability was not caused by dumping. The only prior investigation, relating to the period July 2013 to June 2014, was terminated.[11] The Minister is unable to assume (and cannot assume, because the assumption would be incorrect) that dumping occurred prior to the period of investigation.[12]

3. As the Department points out in its preliminary recommended decision, prices in the Australian market are primarily set by market dynamics and copper price movements. The above noted trends are a result of those variables.

4. The goods under consideration are part of a range of electric cable products sold by the Australian industry. Notwithstanding the persistent non-profitability of their sales of the GUC, the Australian industry still remains profitable at an entity level. The estimated profit margin for the Australian electric cable and wire manufacturing industry was 6.5% in 2017-18 and 6.8% in 2018-19.[13] We note that this is similar to the "company-wide sales" margin the Commission argued should apply only to Electra's GUC in Report No. 469. This indicates that the non-profitability of the GUC was in fact the market and commercial norm in the Australian market,

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10 Figures 8 and 9 of Report 469.

11 Investigation 271.

12 Section 269T(2AE).

13 See, Report 469 at page 67.

> and was not brought about by historic dumping (because there was none) nor as a result of any "non-arm's length" transactions.

Electra's actual profitability during the investigation **[CONFIDENTIAL TEXT DELETED – explanation about profitability level]**. Non-profitable sales of the GUC are not unusual or abnormal. They do not prevent the Australian industry or other participants in the Australian market from making a profit overall. More importantly, the low profitability or lack of profitability concerning the specific type of cable – being the GUC – is not in itself a result of any non-arm's length arrangements between exporter/s and importer/s. Rather, it is simply the commercial reality that has been created by the product type, the competitive characteristics of the market and the business profile of the suppliers who sell into that market. Given this, we respectfully submit that there is no basis to create an artificial profit for the importer's resale of the goods under consideration for the purpose of s 269TAB(2)(c). Doing otherwise fails to reflect the reality of the Australian market and is liable to create the perception of dumping where no dumping exists in fact.

Further, Electra respectfully refers the Department to the reasonable profit range its First Submission:

> *Lastly, Electra can advise that as a separate matter and subsequent to the Original Decision, Electra* ***[CONFIDENTIAL TEXT DELETED – information about corporate commercial arrangement]***[14] *which* ***[CONFIDENTIAL TEXT DELETED – explanation of arrangement practicalities]***[15] ***[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).*

All available information indicates that a realistic and reasonable profit rate expected from an importer reseller of the GUC on the Australian market during the investigation period, *if any*, should be at the lowest end of any spectrum. We recall that the overarching purpose of the price determination mechanisms prescribed by Section 269TAB(1)(b) and (2) is to construct a reliable export price, not affected by non-arm's length factors. It is not required, nor desirable, for such construction to be carried out with any other purpose, such as the need to account for potential dumping or to prevent an importer selling the GUC at a fiercely competitive level. In this regard the comments of Nicholas J in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* are directly on point and highly instructive:

> *Further, I do not agree with [the Australian industry applicant] that the purpose of Part XVB of the Act is "to protect Australian industry". The purpose of Part XVB is far more complicated. It is apparent from the scheme of Part XVB that the legislature has sought to strike a balance, as the relevant international agreements no doubt seek to do, between various interests including not only those of Australian industries but also other WTO members and their own domestic industries, Australian consumers (in the broadest sense of that word) who may have an interest*

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

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

> *in acquiring imported goods at the lowest available prices and Australian exporters that supply their goods to other countries that are also members of the WTO.*[16]

We ask the Department to pay heed to this important opinion of the Federal Court. Electra is entitled to be treated objectively and fairly in the exercise of its economic rights, and the broader interests of all stakeholders should be taken into account in line with the comments of Nicholas J we have cited.

The profit rate as preliminarily proposed in the Letters exceeds **[CONFIDENTIAL TEXT DELETED – corporate commercial arrangement]** for Electra's company-wide operation overall. With respect, Electra submits that the insistence of a profit deduction, and at a high level of **[CONFIDENTIAL TEXT DELETED – percentage]**, is inconsistent with a proper, genuine and realistic consideration of the facts available.[17]

E Errors in profit rate calculation

If, despite the forgoing, the Department still considers it correct to determine the export price under Section 269TAB(1)(b) and to maintain its current profit deduction methodology, there are certain issues with the proposed approach that we are compelled to bring to the Department's attention.

The preliminary recommendation states that the profit rate to be directed under Section 269TAB(2)(c) should be based on:

> *Electra's other flat building cables (excluding the goods under consideration), [which] are a category of goods expected to be narrower than the entirety of Electra's business, more closely related to the goods under consideration, and likely to be more reflective of the long term profit rate expected to be achieved on the goods under consideration absent dumping.*

We would like to draw the Department's attention to the following issues arising from the proposed method.

Firstly, there is a factual inaccuracy in the proposed use of data pertaining to Electra's sales of *"other flat building cables (excluding the goods under consideration)"*. Electra advises that the proposed calculation has mistakenly included products which are not *"flat building cables"*. Flat building cables have **[CONFIDENTIAL TEXT DELETED – product description]**. These are the cables identified under the subheadings **[CONFIDENTIAL TEXT DELETED – Electra product subheadings]**. These cables have a different construction to the other cables included in the "**[CONFIDENTIAL TEXT DELETED – product category]**" worksheet, namely **[CONFIDENTIAL TEXT DELETED – product subheadings]** , which are **[CONFIDENTIAL TEXT DELETED –product description]**and "Other" cables.[18] If the profit was to be determined on the basis of *flat building cables* only and exclusive of the GUC then the resultant profit rate should read **[CONFIDENTIAL TEXT DELETED – percentage]**.

Secondly, there is no explanation as to why the newly selected profit would be *"likely to be"* reflective of a long-term profit rate expected to be achieved on sales of the GUC *"absent dumping"*.

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16 See, *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 at [148].

17 See, *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107.

18 The "Other" cables grouping is made up of **[CONFIDENTIAL TEXT DELETED – product descriptions].**

As the Department is aware, the construction of export price is for the purpose of determining a reliable export price during the investigation period, unaffected by non-arm's length concerns. Such purpose would have been achieved by reconstructing an export price based on Electra's resale prices to unaffiliated third parties, exclusive of any import cost, selling expenses, and any profit earned by Electra. Such reconstructed export price would be suitable to remove any reliability concerns arising from the affiliations between Electra and its exporter, and provide a reliable basis for determining *if* dumping had occurred.

Thirdly, as already discussed, the long-term trends established for the Australian industry during the injury analysis period indicate that the type of goods which are like the GUC are rarely sold at a profit, and certainly not with a margin at the **[CONFIDENTIAL TEXT DELETED – percentage]** level. Given this context, there is no basis to suggest that a profit of **[CONFIDENTIAL TEXT DELETED – percentage]** could be "expected" to be achieved on an importer's resale of the GUC in the long-term. Indeed we submit that there is no justification for the Minister to nominate a "long term" profit. The only relevant profit to be determined under Section 269TAB(2)(c) is the profit related to the resale of the GUC during the investigation period, for the purpose of reconstructing what would have been an arm's length export price. Again, this calls for a decision that takes into account the specific commercial circumstances and realities with respect to the GUC and the Australian market for the GUC in the investigation period, based on the facts. Considerations designed to achieve an export price that is "absent of dumping" or to create profit in a market that more normally operates at break-even or unprofitable price levels, are irrelevant and incorrect.

In conclusion, we disagree with the preliminary recommendation that Electra's resale of the GUC should be excluded from the profit rate calculation. We are concerned if this was meant to convey that the GUC were excluded on the assumption that they were dumped. Such a position would be irrational. The profit determination under Section 269TAB(2)(c) is part and parcel of the determination of an export price itself, which must occur before a finding of dumping can be made under s 269TACB. The Minister cannot determine a profit deduction on the assumption that the goods under consideration are dumped. Such a proposition would invert the legislative scheme entirely. We respectfully submit that the exclusion of Electra's resale of the GUC from the determination of the profit rate for the resale of the GUC divorces the resultant profit rate entirely from the GUC for which an export price is meant to be determined.

For the above reasons, we suggest that the profit rate proposed in the preliminary recommendation is incorrect and so too is the resultant dumping margin.

F Reimposition of anti dumping measure is not warranted

In the First Submission, we drew the Department's attention to the fact that since the anti-dumping and countervailing measure was put in place against the GUC exported by Nanyang and "uncooperative and all other exporters" from China, the Australian market has materially changed. Significantly, the most disruptive low-priced supplier in the market, Nan Australia, whose export supplier was Nanyang, has ceased operation, and overall market prices in Australia have surged. With respect to the latter, the Department has commented:

> *…however this situation has occurred largely in the presence of dumping measures intended to remedy the dumping and the material injury.*

We wish to point out that the increased prices and improved performances as shown by Electra's market intelligence pertained to the period from February to October 2020. In this period, there were no dumping measures in place with respect to Electra's supplier, Guilin International. In our view, this suggests that the existing measure, which applies to all exports from China except for exports from Guilin International, is effective and adequate in addressing the Australian industry's injury claims and concerns. This is a relevant factor for the Minister's reconsideration of the present matter.

We recall that the original decision to impose dumping measures was set aside with respect to the GUC exported to Australia by Guilin International as of 8 May 2019. It is only that aspect of the decision that was remitted for reconsideration by the Minister. As such, we submit that it is entirely appropriate, and indeed the correct approach, for the Minister to decide, under Section 269TG(2) of the Act, whether a dumping measure against the goods exported by Guilin International should still be made. This necessarily requires the Minister to carefully consider all elements of that decision - the existence of dumping, the likelihood of dumping in the future, and any material injury caused by dumping.

As part of this reconsideration process, Electra and Guilin International have provided further information highlighting these facts:

- Guilin International and Electra are committed to **[CONFIDENTIAL TEXT DELETED – corporate commercial behaviours]**.[19]

- Even though the anti-dumping measures are not applicable to the goods exported from Guilin International, the goods **[CONFIDENTIAL TEXT DELETED – price level]**in the Australian market, and consistent with the pricing trend of the Australian industry suppliers.[20]

- The significant shift in market condition and **[CONFIDENTIAL TEXT DELETED –pricing behaviour]** suggest that there is no evidence that the export prices of like goods that may be exported to Australia by Guilin in the future – being the period after the investigation period – may be less than the normal value of the goods, and therefore dumped.[21]

We also respectfully draw the Department's attention to the fact that, even for the original investigation period, Report 469's analysis recognises that both dumping and injury, if any, occurred in a temporarily inconsistent manner during the investigation period:

- *The weighted average price of the goods sold by Electra mostly undercut the Australian industry prices in the second half of the investigation period. The Commission observes that this occurred during a period of rising copper costs.*[22]

- *The Commission also noted that Electra's losses increased in the second half of the investigation period.*[23]

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19 See First Submission, at pages 20 and 22

20 See First Submission, at pages 20 to 22

21 See, Section 269TG(2)(a)

22 Report 469, at page 57

23 Ibid, at page 35

- *…the Commission considers that the increase in copper prices in the second half of the investigation period contributed to the financial injury experienced by the Australian industry members.*[24]

These observations show that both the dumping (as determined using Electra's resale price as the basis for the export price) and any price undercutting occurred in an exceptional period of market volatility, and was short-lived. Taking a holistic view, Electra's pricing of the GUC in the Australian market **[CONFIDENTIAL TEXT DELETED – comment about pricing behaviour]**.

Accordingly, we respectfully submit that as part of this reconsideration, the Department should recommend to the Minister that he consider both the investigation period as a whole and the post-investigation period information which is available for the purposes of this reconsideration. In our view the Minister should come to the view that there is no conclusive evidence to show that the GUC exported by Guilin International were dumped, or that they may be dumped in the future, or that any material injury to the Australian industry was caused by such dumping.

The circumstances relating to Guilin International and Electra can be further contrasted with the Commission's observation that *"Nan's pricing was consistently below Prysmian and Olex during the investigation period"*, and that *"Nan…was consistently offering the cheapest prices in the market"*. Report 469 states that *"Prysmian and Olex claimed that competitive market offers for imported goods from China undercut their prices and prevented them from passing on the increases in their material costs"*.[25] What has transpired since Nan Australia ceased operations is **[CONFIDENTIAL TEXT DELETED – comment about pricing behaviour in the Australian market]**. This is so without the need for any anti-dumping measure on the GUC as exported by Guilin International. In our view, these facts indicate that the health of the Australian industry is not associated with dumping duties being placed on Guilin International's exports. As such, an anti-dumping measure against exports by Guilin International is neither justified nor warranted.

Without detracting from our primary submission that the Minister should not be satisfied that the requirements under Section 269TG(2) are met for the purpose of imposing anti-dumping duties against the goods exported from Guilin International, we also note that the Minister has no obligation to impose measures even if those requirements are met.[26]

Further, it might be helpful for the Minister's reconsideration of the present matter to also consider Australia's legal obligation under Article 11.1 of the WTO Anti-Dumping Agreement that *"an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury"*. Further, Article 11.2 provides:

> *The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have*

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24 Ibid, at page 60.

25 Report 469 at page 51.

26 It is well recognized that the Minister has "*discretionary power with respect to whether or not a duty is applied and the extent to which a duty is applied*" under Section 269TG(2). See, for example, *Review into Anti-Dumping Arrangements* (*The Brumby Anti-Dumping Review),* and *Explanatory Memorandum, Customs Amendment (Anti-dumping Improvements) Bill (No. 2) 2011.*

> *the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.*

To be clear, we are not suggesting that an Article 11.2 review applies to the present matter. There is no measure to be reviewed. However, we submit that Articles 11.1 and 11.2 of the ADA provide useful counterfactuals for the reconsideration of the evidence pertaining to the investigation period in Report 469, and the evidence pertaining to the period since the measure was *removed* (in this case, set aside by court orders). That is, assuming *arguendo* that the criteria under Article 11 were applicable, it would indicate that a dumping duty against Guilin International's exports is not necessary to offset dumping, and that there is no evidence that injury would be likely to continue or recur *after* the duty was removed.

The reality is that, the alleged injury, if any, appear to have discontinued after the duty were removed as against Guilin International. The fact that there is currently no measure to be reviewed under such rules and principles should not matter. This is because the Minister's reconsideration of the current matter is not limited to the information contained in Report 469. Indeed, we submit that the Minister cannot be satisfied that pre-conditions for imposing anti-dumping measures with respect to Guilin International's exports under Section 269TG(2) are met, when he is also presented information that shows the Australian industry's conditions have recovered without such measure being in place, or is not dependent on such a measure being put in place. The logical response is that such measure, when reconsidered with the benefit of the available contemporary information, is unwarranted.

Our clients respectfully request the Department to recommend to the Minister that, in light of the more contemporary information made available in the reconsideration process, it is reasonable and preferable not to impose dumping duty with respect to the goods exported by Guilin International.

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Our clients appreciate this opportunity to comment on the preliminary recommended position, and stand ready to advise further as is relevant and helpful for the Department and the Minister's reconsideration of these matters.

Yours sincerely

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