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22 December 2022

Mr A Stoler
Member
Anti-Dumping Review Panel
GPO Box 2013
Canberra
Australian Capital Territory 2601

By email

Dear Mr Stoler

Review 2022/160: PVC Flat Electrical Cables from China
Interested party submission of Electra Cables (Aust) Pty Limited

As you know, we act for Electra Cables (Aust.) Pty Ltd ("Electra") in this review. Electra makes this submission to the Anti-Dumping Review Panel ("ADRP") under s 269ZZJ of the *Customs Act 1901* ("the Act").

A Introduction

The path to the Minister's decision to impose measures against Guilin International Wire & Cable Co ("Guilin") exported PVC flat electric cables has been long and winding. The goods the Minister considered to have been dumped were exported to Australia during the period 1 January 2017 to 31 December 2017 ("the POI").

The current Minister's predecessor originally made a decision under s 269TG regarding those exports on 8 May 2019. That decision was based on an unlawful deduction of profit from the export price. Electra

initiated judicial review proceedings which ultimately led to the former-Minister conceding the legal error and their decision being set aside on 13 February 2020.

On 5 November 2020, the Department of Industry, Science, Energy and Resources ("DISER") sought submissions to inform their consideration under s 269TG(2). On 9 July 2021, DISER informed interested parties of their preliminary position and invited further submissions in response to those positions.

Finally, the Minister's decision ("the Reviewable Decision") was made on 29 August 2022 and published on 1 September 2022. This was based significantly on the submission DISER made to the Minister during his reconsideration ("the DISER Report").

The Reviewable Decision is to the effect that the Minister was satisfied that the goods exported to Australia in 2017 were dumped by a margin of 2.8%. For the reason discussed in Electra's application and elaborated in this submission, that decision was not correct or preferable.

Under s 269TG(2) the Minister stated satisfaction that the goods were dumped in the period of 1 January 2017 to 31 December 2017, and also that goods that may be exported in the future – after 29 August 2022 – may be dumped. The Minister's satisfaction regarding past dumping hinges only on the incorrect finding that sales between Guilin and Electra were not arm's length, and then on an incorrect determination of the export price for those sales. The Minister's satisfaction regarding future dumping was based on no rationale other than this incorrectly determined dumping in the past.

B Evidentiary requirements of a non-arm's length finding

DISER's opinion that sales between Electra and Guilin should be considered not to be arm's length was rendered via s 269TAA(1)(b). Purportedly, in coming to this view, DISER had regard to *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel* [2021] FCA 391.[1] Electra agrees that this decision is relevant: while the judgement of Kerr J was appealed to the Full Federal Court, their Honours considered that no appealable error has been established in relation to the Kerr J's analysis and conclusion regarding s 269TAA(1)(b). Nonetheless, DISER has failed to grapple with the entirety of Kerr J's explanation regarding the scope of s 269TAA(1)(b).

DISER's position was primarily based on the analysis it undertook in Confidential Attachment – 2 to their submission. We have addressed this in the application.[2] In particular, we note that DISER has incorrectly identified sales to unrelated traders as sales to "related parties", and so its conclusions based on that analysis are without merit.

In forming the view that s 269TAA(1)(b) should be applied to sales between Electra and Guilin, DISER also considered certain findings previously made by the Commission to be "persuasive".[3] It is unclear the degree to which these influenced their recommendation, but we consider it prudent to address those findings in the context of Kerr J's decision. In particular, Kerr J explained:

> *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*

1 Para 30 of the DISER Report.

2 Para 28 of the DISER Report.

3 Page 6 of the DISER Report.

> *result in the transaction not being used for the determination of the normal value under s 269TAC(1).* [4] [underlining supplied]

In stating this, His Honour is providing guidance as to what s 269TAA(1)(b) is concerned with – being variation in prices from what would have been agreed had the sale been negotiated at arm's length. More specifically, His Honour draws a distinction between the "opportunity and capacity to influence the price" and "actually influencing prices". As Kerr J explains:

> *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.*[5] [underlining supplied]

DISER's submission failed to take account of this guidance. The evidence they have considered has either been incorrectly characterised, or does not create an appearance that influence has actually be exerted on the price between Electra and Guilin. Accordingly, there was no reason to consider s 269TAA(1)(b) could apply to sales between Electra and Guilin.

The finding made by the Commission in Report 469 which DISER considered to be "persuasive" were as follows:

REP469 finding cited in DISER Report	Electra's comment
"*Guilin was the exporter of the goods in relation to its own exports and those of its related companies*"	This is not relevant to whether prices between Guilin and Electra were "arm's length". Nor is it novel: it is a requirement to the application of both s 269TAB(1) and (2) that the goods have been "purchased by the importer from the exporter".[6]
"*Electra was a related party of Guilin and the sales by Guilin to its related parties were indirect sales to Electra*"	As per the above extract from Kerr J's judgement, the relationship itself merely indicates that there may be the *capacity* to influence the price, but that is not evidence that prices between Guilin and Electra were *actually* influenced.
"*The Commission found evidence indicating joint shareholding of individuals and other companies at both Guilin and Electra, as well as various intercompany loans between Electra, Guilin and other shareholding companies and broader financial/commercial arrangements between Electra and Guilin*"	These forms of joint shareholdings and loans are common between related parties and corporate groups. They do not directly relate to the price between Electra and Guilin, and do not raise any appearance that the price between Electra and Guilin is unduly influenced.

So, these circumstances in themselves do not imply any appearance that prices between Guilin and Electra were influenced by the relationship between the two. While there may be the appearance of capacity for influence (in the words of Kerr J, although we do not agree with such a conclusion in this instance) that is not the same as the appearance of the exercise of influence.

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4 *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No 2)* [2021] FCA 591 (4 June 2021) ("Wilson"), para [47].

5 Wilson, para 49.

6 Section 269TAB(1)(a)(i) and (b)(i).

DISER considers one other finding in Report 469 to be relevant. In particular, they pointed to the following:

> *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 price appears to be influenced by the relationship between the buyer (Electra) and seller (Guilin).*

DISER has not considered the relevance of this in light of the explanation from Electra's Verification Report. This is somewhat understandable, as the verification occurred in late 2018, long before DISER became directly involved in the investigation. That report notes as follows:

> *Electra explained that the negotiations are taking place over the phone and stated that prices are determined with regards to what is happening in Australian market, such as pricing behaviour of local competitors and copper price movement. Electra also stated that it can negotiate a time delay as to when price increases can take effect or can negotiate the percentage of increase by Guilin International Wire and Cable Group Co., Ltd.*[7]

These instances were offered by Electra as examples *of* price negotiation, which was undertaken for Electra's commercial benefit. The Commission wrongly considered that a buyer seeking a smaller price increase than that proposed by the seller was something other than negotiation. Similarly, seeking a delay in a price increase is a form of negotiation – it is the buyer asking to pay less than requested by the seller, even if for a defined period of time. It is not clear what the Commission considered these interactions to be, but a seller trying to increase prices, whilst the buyer tries to keep the price low as much and for as long as possible is the kind of negotiations and practices that would be expected from arm's length parties. Indeed, it seems as though without reason the Commission ignored Electra's explanation for these requests.

This form of behaviour is exactly what you would expect to see in an arm's length transaction. Yet, the Commission somehow - wrongly - characterised them as showing a lack of negotiation. DISER perpetuated this error. We respectfully submit that they do not provide any form of undue influence on the price between Electra and Guilin and so should not contribute to the application of s 269TAA(1)(b).

In summary, there was no evidence before the Commission, DISER nor the Minister that prices between Guilin and Electra were actually influenced by the relationship between those companies. Indeed, when the evidence provided by Electra is fully considered, it is clear that the parties negotiated prices on an active and self-interested basis. Accordingly, based on the evidence and information before the Minister, we submit that it does not appear that the relationship between Electra and Guilin has influenced the price between the two.

C Errors in the deductive export price determination

Based on the incorrect finding that sales between Guilin and Electra were not arm's length transactions, the Minister determined the export price between these two entities under s 269TAB(1)(b). In doing so, the Minister made two errors. Specifically, he failed to take into account foreign exchange gains and

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[7] *Investigation 469 Alleged Dumping and Subsidisation of PVC Flat Electrical Cables Exported from the People's Republic of China, Verification Visit Report, Importer, Electra Cables (Aust) Pty Limited*, page 8, EPR Document No. 18.

losses incurred by Electra and incorrectly applied a profit deduction when determining the constructed export price under s 269TAB(2).

Before further elaborating those errors, it is important to consider the purpose of s 269TAB(1)(b) and (2). They reflect Australia's obligations under Article 2.3 and 2.4 of the *Anti-Dumping Agreement*. Article 2.3 provides as follows:

> *In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.*

The determination of this "constructed exported price" is subject to certain requirements under Article 2.4, which relevantly provides:

> *In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph.* [underlining supplied]

The purpose of these provisions is to arrive at the price that would have been paid by the related importer had the sale been made on a commercial basis.[8] Further, consistent with the rationale for Article 2.4, a guiding principle in constructing an export price should be to ensure it is fairly comparable with the normal values. We consider s 269TAB(1)(b) and (2) have the same purpose, and that this context is relevant to the interpretation and application of those provisions. The Minister's decisions do not achieve this purpose.

1 Treatment of foreign exchange gains

As explained in Electra's application, we consider the Minister's failure to deduct export gains from the deductive export price was both incorrect and not preferable. The reasons given for the exclusion of the foreign exchange gains were explained by DISER as follows:

- *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.*[9]

The first of these we have addressed in detail in Electra's application. DISER's submission did not reflect the detailed information Electra put to the Commission to address their misunderstanding of the nature of the foreign exchange gains and losses incurred by Electra in the period of investigation. DISER perpetuates the Commission's misunderstanding without apparent reference to Electra's corrections. The Minister's decision was made without apparent consideration of that detail.

As to the second point, it is, with respectful candour, irrelevant to s 269TAB(2)(c).

The methodology the Minister used to construct the export price is set out in *Confidential Attachment 09 – Guilin Export Price* ("Confidential Attachment 9"). The second largest deduction is "Importer SG&A" at

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8 Panel Report, *US – Stainless Steel (Korea),* paras 6.98.

9 DISER Report, page 9.

[**CONFIDENTIAL TEXT DELETED – percentage]** at cell B8.[10] We understand that SG&A refer to "selling, general and administrative expenses". However, Section 269TAB(2)(b) does not relate to or require the deduction of "SG&A" specifically. Elsewhere, where the Act requires "administrative, selling and general costs" to be determined – such as in sections 269TAAD(4)(b) and s 269TAC(2)(c)(ii) – it states so specifically. Instead, s 269TAB(2)(b) states that it is concerned with "*costs…arising in relation to the goods after exportation*".

For SG&A costs to be relevant to s 269TAB(2)(b) they would need to arise in relation to the goods after exportation. The SG&A amount was calculated as a conglomeration of different costs incurred by Electra in calendar year 2017. For reference we note that:

- Confidential Attachment 9 states that the source for the [**CONFIDENTIAL TEXT DELETED – reference to percentage]** is *"Confidential Attachment 26 - Confidential Appendix 8 to REP 469"* ("Confidential Attachment 26");
- Confidential Attachment 26 refers to an "*estimate of SG&A as a % of sales*" and cites an amount of [**CONFIDENTIAL TEXT DELETED – reference to percentage]**;
- We understand that the [**CONFIDENTIAL TEXT DELETED – reference to percentage]** was derived from the tab "Part C.2 Profit(Loss)" attached document **[CONFIDENTIAL ATTACHMENT]**. [**CONFIDENTIAL TEXT DELETED – reference to SG&A calculations and percentage]**.

Note, three of the largest expenses in this pool of costs are "wages", "rent" and "superannuation". The exact nexus between the goods and these expenses varies. We do not challenge their inclusion as prescribed deductions. However, we wish to illustrate that whether or not something is included in SG&A does not answer whether it should be deducted under s 269TAB(2)(a). The legislative requirement is for "costs" arising in relation to the goods to be accounted for in the determination. DISER's reliance on the position of foreign exchange gains/losses being either above or below the line in the income statement or whether it is an item of the "SG&A" is misplaced and incorrect. Section 269TAB(2)(a) should be guided by its own terms.

As illustrated in the application, the majority of the foreign exchange gains and losses related directly to importation of goods by Electra as an importer located in Australia, with Australian Dollar as the accounting currency. The remaining exchange gains and losses are as relevant, if not more relevant, to Electra's business as an importer and reseller of the goods than are the other SG&A costs the Minister has already decided to deduct. Simply put, there is no reason to treat foreign exchange gains and losses differently.

Further, we note that the term "costs" is used elsewhere in the Act, including at ss 269TAC(2)(c), 269TAAD(4) and 269TAA(3)(b). In each instance the "cost" is something to be determined. In each instance, that determination can involve netting of the costs against relevant revenue. For example, in discussing the relevance of "borrowing costs" to the determination of the cost or production under s 269TAC(2)(c)(i) of the Act, the Commission explains:

> *Borrowing costs (net of revenue made upon the investment of the borrowings) when the inventory being sold meets the definition of a qualifying asset (inventory that requires more than 12 months to bring them to a saleable condition)*.[11]

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[10] [CONFIDENTIAL TEXT DELETED – reference to SG&A percentage]

[11] Dumping and Subsidy Manual (December 2021), page 35.

A similar "netting" of foreign currency gains against losses is envisaged by the Commission. The Dumping and Subsidy Manual explains that, in determining costs of production and selling, general and administrative costs under s 269TAC(2)(c)(ii) of the Act, where the Commission *will allocate the net realised foreign exchange gains/losses to the goods on a reasonable basis*.[12]

Accordingly, reflecting the exchange gain in the constructed export price is aligned with both the Commission's policy and the terms of the Act. This is entirely sensible, as adjusting for foreign exchange gains and losses incurred by the importer is an important step in assuring that the constructed export price reflects a commercial price. Failure to make allowances to what is a fundamental component of importing the goods results in a constructed export price that does not reflect the commercial reality faced by Electra.

2 Addition of profit to the work back export price

Section 269TAB(2)(c) describes the prescribed deduction of profit in the following terms:

> *(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.*

The reference to the "*sale by the importer*" is a reference to the "*sale*" referred to in s 269TAB(1)(b)(iii), being the transaction in which "*the goods are subsequently sold by the importer, in the condition in which they were imported, to a person who is not an associate of the importer*". DISER acted from the perspective that there was no profit arising from these transactions. DISER instead recommended that the Minister direct a rate of profit of **[CONFIDENTIAL TEXT DELETED – percentage]**, as recounted in Electra's application. That recommendation, and the Minister's resultant election to deduct profit from Electra's resale price was not the correct or preferable decision.

It should be recognised that s 269TAB(2)(c) does not demand the adoption of a profit in the circumstances that the importer's resale price is not profitable. While it is open to the Minister to direct this, they are under no obligation to do so. When determining to do so, the Minister must consider whether the deduction of some deemed profit is more likely to lead to a constructed export price that reflects an arm's length price, as that it the ultimate purpose of the s 269TAB(2). Electra's application notes that DISER's logic is as follows:

> *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.*[13]

Respectfully, this consideration is irrelevant to the decision to adopt a proxy profit on the importer's resale price. As noted, the purpose of the deductive export price methodology is to determine a "commercial" export price. The determination of an export price under s 269TAB is a preliminary step to determining whether such export price was at a "dumped" level.

In this instance, the adoption of the **[CONFIDENTIAL TEXT DELETED – profit percentage]** % profit deduction *is* the difference between the goods being found to be dumped and the goods not being found to be dumped. If no profit was adopted the goods would be well and truly in no-dumping territory. Indeed, if a profit rate of **[CONFIDENTIAL TEXT DELETED – profit percentage]** % rather than **[CONFIDENTIAL TEXT DELETED – profit percentage]** % was adopted, the resultant margin would be below the *de minimis* rate of **[CONFIDENTIAL TEXT DELETED – percentage]** %. All else being equal,

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12 Dumping and Subsidy Manual (December 2021), page 38.

13 DISER Report, para 100.

the decision to adopt a positive profit results in the dumping finding that was said to necessitate the imposition of the measures.

The reasoning for adopting this higher positive profit is circumspect at best, considered to be "*reflective as possible of the state of the Australian market for the goods free of the influence of dumping"* Put briefly, DISER has recommended the deduction of an amount of profit with the purpose of creating a "possible" dumping free state of market – before discharging the obligation of determining the export price and the level of dumping first. Factoring into consideration a conclusion that the goods are dumped when determining the export price subverts this requirement and biases the outcome. We understand the Commission previously determined another exporter - Nanyang Cable (Tianjin) Co. Ltd ("Nanyang") had dumped. However, that does not justify the adoption of the profit deduction for Guilin's export price. It would seem incredibly unreasonable to adopt a profit deduction that causes inflation of Guilin's dumping margin on the basis that another exporter was found to have dumped.

DISER's references to "*related party pricing influence*" is also odd. They seem to indicate this could "mask" dumping. We believe DISER's concern in this regard is "sales dumping", a concept which was explained in *Re Powerlift (Nissan) Pty Limited and Nissan Motor Co Ltd v Minister of Small Business, Construction and Customs* [1993] FCA 37 as follows:

> *The most normal case of sales dumping will occur where the goods under review have not entered Australia at a price less than the normal value in the country of export, but have thereafter been "dumped" by being sold at a loss by the importer, under an arrangement that the exporter will reimburse the importer for that loss. The significance of s.269TAA(2) is that it permits the Minister, in effect, to assume the existence of a reimbursement agreement, where a loss arises. It does not make it mandatory for the Minister to do so.*[14]

As noted, DISER did not consider that sales between Guilin and Electra were not arm's length by virtue of Electra's resale prices in Australia. That is to say, the resale price in Australia did not result in the Minister holding the opinion that "*the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price*".[15] Rather, the Minister's conclusion was that *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*. Only the former is concerned with "sales" or "masked" dumping.

Section 269TAA describes several circumstances in which a transaction may be rendered non-arm's length. Section 269TAC(2) needs to be flexible enough to allow for the determination of a proxy "arm's length" export price in each of those circumstances. In some instances – such as this – the deduction of a deemed profit will not be suitable for determining a constructed "arms length" price.

The bases cited by DISER as justifying the positive profit deduction are ill-considered and do not take into account the purpose of s 269TAC(2). The resultant export price is not reflective of any export price that would have been paid between importer and exporters at arm's length. It merely drives the dumping finding in circumstances where no dumping finding should have been made. Accordingly, it not the correct or preferable decision.

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[14] At para 138. In candor, his Honor does state "[I]t may be possible to conceive of "sales dumping" where no reimbursement arrangement exists". How that would operate is not entirely clear. We note that DISER has not explained how dumping would be "masked" in the circumstances of Guilin's sales to Electra.

[15] Section 269TAA(2).

D No evidence to support finding that dumping may continue

When the Minister makes a decision under s 269TG(2) of the Act they must be satisfied that like goods exported into Australia were dumped, and that like goods that may be exported to Australia in the future may be dumped. The Minister must be satisfied at the varying degrees of past dumping and future dumping.

The Minister's satisfaction regarding the past dumping is based on the 2.8% dumping margin DISER determined in relation to the goods that had been exported to Australia during the period 1 January 2017 to 31 December 2017.[16] For the reasons discussed in Electra's application and elaborated in this submission, that determination was wrong.

As to future dumping, it is evident the Minister's satisfaction must relate to exports after the decision under s 269TG(2) of the Act.[17] There is no basis, evidence or narrative, for the Minister's satisfaction that like goods that may be exported to Australia after the Minister made his decision after 29 August 2022 may be dumped. It is based purely on a finding of dumping of goods that were exported to Australia approximately five years before he made this decision.

In making a decision under s 269TG(2) the Minister has bound Electra to dumping duties until August 2027. He did so without any consideration as to whether there was a need to do this. The measures are not precautionary, they need to be justified.

Simply put, we submit that the Minister has articulated no basis to consider that exports of the PVC flat electrical cables by Guilin may be dumped in the future. He cannot be properly satisfied that may be the case. Accordingly, the Minister's decision is not the correct or preferable decision.

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On the basis of the foregoing, we respectfully submit that the ADRP recommend the revocation of the reviewable decision and its substitution with a new decision that dumping duties not be applied to Guilin's PVC flat electrical cables from China.

Yours sincerely

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16 Consistent with the understanding of the legislation espoused by Mansfield, Conti & Allsop JJ *in Pilkington (Australia) Ltd v Minister of State for Justice & Customs* [2002] FCAFC 423 ("Pilkington"), in which they note at para 115:

> *Thus, in our view the contention of the respondents is correct. Section 269TACB, and relevantly, in particular, subs 269TACB(1), governs the assessment of the past dumping in pars 269TG(1)(a) and (2)(a)*

17 Again, from Pilkington at para 113:

> *It must be recognised that subs 269TG(2) is dealing with a declaration that s 8 of the Duty Act applies to goods which may be exported to Australia after the publication of the notice - to future goods.*