

22 December 2022

Mr Andrew Stoler
Panel Member
Anti-Dumping Review Panel
C/ - Legal, Audit & Assurance
Department of Industry and Science

BY EMAIL

Dear Panel Member Stoler,

ADRP Review No. 2022/160 – PVC Flat Electrical Cables exported from the People’s Republic of China

AUSTRALIAN INDUSTRY SUBMISSION – PUBLIC FILE

I. Introduction

Prysmian Australia Pty Ltd (**Prysmian**) refers to the Anti-Dumping Review Panel (**ADRP**) notice of 22 November 2022 commencing a review of a decision by the Minister for Industry and Science to publish a dumping duty notice pursuant to Section 269TG(2) of the *Customs Act 1901* (**the Act**)¹ in respect of PVC Flat Electrical Cables exported from the People’s Republic of China (**the Reviewable Decision**).

This submission is made in accordance with Section 269ZZJ(a) of the Act.

The Reviewable Decision was published on the Anti-Dumping Commission (**the Commission**) website on 1 September 2022 (ADN 2022/019 refers). The application for review of the Reviewable Decision was made on behalf of the Australian importer Electra Cables (Aust) Pty Limited (**Electra**).

The sequence of events that resulted in the application for review of the Reviewable Decision are as follows:

- By application to the Commission on 23 March 2018, Prysmian applied for a dumping and countervailing investigation into imports of certain PVC flat electric cables (**the goods**) from the People’s Republic of China.
- In response, the Commission initiated an anti-dumping and countervailing investigation on 4 June 2018 (**INV 469**).
- On 8 April 2019, the Commission terminated the countervailing investigation as it related to the exports of Guilin International Wire and Cable Group Co., Ltd (**Guilin**), being the Chinese supplier of the goods imported by Electra during the period of investigation (**POI**).

¹ A reference in this submission 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.

- On conclusion of the investigation, in a decision published on 14 May 2019, the Minister for Industry, Science and Technology (**the Minister**) imposed dumping duties on PVC flat cables exported to Australia from China.
- Electra 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 as it applied to the goods and like goods exported to Australia by Guilin. The Federal Court of Australia remitted the matter to the Minister for reconsideration.
- The Department of Industry, Science, Energy and Resources (**DISER**) assisted the Minister in the reconsideration.
- The reconsideration concluded on 1 September 2022, when the Minister imposed dumping duties on the goods exported to Australia by Guilin (the Reviewable Decision in this instance).
- The decision is based on both the recommendations of Report 469 (**REP 469**) and the recommendations contained in the final submission by DISER to the Minister (**DISER Report**).

II. Grounds for review

The Review Panel is satisfied that the following grounds are reasonable grounds for the Reviewable Decision not being the correct or preferable decision:

1. there were errors in the determination of the dumping margin; and
2. the finding that dumping was likely, is not supported by the evidence or law.

Specifically, Electra contends that there was:

- a. an incorrect determination that Electra's importation of the goods from Guilin were not arm's length transactions for the purpose of ascertaining the export price of the goods during the POI;
- b. an incorrect and unreasonable treatment of Electra's foreign exchange gains in the export price determination;
- c. an incorrect determination of an amount for profit under Section 269TAB(2)(c) of the Act; and
- d. an incorrect determination that 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.

Prysmian makes the following observations with respect to these claims and arguments.

III. Electra's importation of the goods not at arms length

Electra claims that the finding in the DISER Report that the relationship between Electra and Guilin is not arms length is affected by both DISER's misunderstanding of the facts, and the law.² This is alleged to be in specific

² Electra application for review, p. 5.

relation to the applicable legal test from the Federal Court judgement in *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (the Wilson case)*:³ Electra states in its application for review:

*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.*⁴

Electra's first contention under this objection seeks only to highlight a mis-quote by DISER during the reconsideration. Its second contention is that:⁵

*...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.** [emphasis added].*

DISER does not state anywhere, nor does it imply in any of its conclusions, that it holds the above-alleged view. DISER relevantly cites the Wilson case in support of its consideration of Electra's reconsideration submissions, and its consequent view that the price between Electra and Guilin appears to be influenced by a commercial or other relationship, as defined under Section 269TAA(1)(b). The DISER Report provides:

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;*
- *an alternative approach as an appropriate basis for the amount of profit to be applied to Guilin's export price in order for the department to determine Electra's export price in accordance with the Customs Act (Electra's arguments in relation to the basis for the amount of profit are dealt with later in this submission from paragraph 80);*
- *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.*

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.*

³ *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel (No. 2)* [2021] FCA 591.

⁴ Electra application for review, p. 10.

⁵ *Ibid*, p. 6.

- *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.⁶*

...

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.⁷ [emphasis added].

The Wilson case was then correctly and preferable cited as applicable.

Separately, DISER assessed the Commissioner’s findings in REP 469, noting that these remained persuasive:

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*
- *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.*

DISER supplemented this with an additional analysis of Guilin’s sales of the goods to Australia during the POI, concluding that the pricing behaviour observed between Guilin and Electra was indicative of a relationship not at arms length and further supported the appearance of influence.⁸ Figure 1 of DISER’s analysis demonstrated this appearance of influence between the parties.⁹ The purpose of the analysis was to:¹⁰

⁶ DISER Report, p. 5, paragraph’s 24-25.

⁷ DISER Report, p. 6, paragraph 30.

⁸ DISER Report, p. 7, paragraph 36.

⁹ Ibid, paragraph 37.

¹⁰ Ibid, p. 7, paragraph 34.

...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.

The Dumping and Subsidy Manual in this regard requires:¹¹

Price appears to be influenced by a commercial or other relationship

In assessing the arms length nature of transactions, the commercial or other relationship between the principal parties is examined. There must be evidence that the price appears to be influenced by the commercial or other relationship. To demonstrate this, the Commission seeks to compare the price paid or payable for the goods where there is a relationship between a buyer and a seller with the price paid or payable for the goods between a buyer and a seller where there is no relationship.

Electra's application for review claims that the analysis and inferences drawn by the DISER Report are misguided, on the basis that Guilin did not make sales to any related party customers other than Electra during the POI, and that DISER mistook Guilin's indirect export sales as being to related parties rather than to unrelated traders.¹² It appears then that DISER's analysis would have captured the following types of sales transactions during the POI:

- direct sales between Guilin and its only related party Electra;
- direct sales between Guilin and unrelated customers; and
- indirect sales between Guilin to unrelated traders.

These sales channels will have permitted DISER to compare the price paid or payable for the goods where there is a relationship between the buyer and a seller, with the price paid or payable for the goods between a buyer and a seller where there is no relationship.

On DISER's analytical assessment, Electra also states that:

...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.

Prysmian submits that an assessment of sales made to unrelated parties not destined for Electra would have only enhanced DISER's analysis of price comparisons in accordance with the Dumping and Subsidy Manual.

Further, on its assessment of the level of profit applied to the sales of goods by Electra under Section 269TAB(2)(c) (discussed further below), DISER relevantly concluded that Electra's profit proposals (most of which were nonsensically and uncommercially negative) were unsuitable given its non-arms length relationship with Guilin:¹³

¹¹ Anti-Dumping Commission, *Dumping and Subsidy Manual*, Chapter 5.3.

¹² Electra application for review, p. 11.

¹³ DISER Report, p. 15, paragraph 92.

With respect to the use of the profit achieved by Electra's **[Confidential information – internal product division]**, the department similarly does not recommend use of this as an alternative measure for the calculation of profit. This is because:

- as detailed above, the department considers that there is a possibility companies are acting in concert to transfer profit to the exporter by manipulating the export price, particularly when considered in conjunction with the appearance of influence between the parties;
- the department is concerned with the significant variance in profit in the **[Confidential information – internal product division]**. In the department's own analysis at Confidential Attachment 8, the department identified a significant variance in the profit of the **[Confidential information – internal product division]**, which the department considers **prevents the rate of profit of the [Confidential information – internal product division] from being an accurate portrayal of the rate of profit for the goods that would have been achieved in an arms length relationship;** [emphasis added].

Finally, Electra claims that the arguments referenced by DISER in the Wilson case were rejected by the views held by the Federal Court, the Full Federal Court, and the Anti-Dumping Review Panel. Helpfully, Electra's subsequent presentation of those views in its review application assist in supporting the DISER findings. Relevantly, Electra's application provides:¹⁴

This claim [The Wilson case Applicant position] was rejected by Kerr J in the first instance, finding that:

*The expression "arms length transaction" is not a defined term for the purposes of PartXVB 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. [emphasis added].*

And further, quoting the majority judgement of the Full Federal Court in upholding the Review Panel's approach:¹⁵

*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... [emphasis added].*

As articulate above, the relevant evidence before the Commission and DISER unequivocally pointed to the appearance of price influence between the parties:

- 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;

¹⁴ Electra application for review, p. 6.

¹⁵ Electra application for review, p. 8.

- Electra could request a time delay as to when price increases took effect, or could influence the percentage of the price increase that was achieved by Guilin;
- there existed 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.¹⁶
- the DISER Figure 1 analysis indicated a relationship not at arms length; and
- there were significant and unreliable variances in product division profit margins.

In its assessment of the non-arms length nature of the relationship between Guilin and Electra, DISER (and subsequently the Minister in accepting DISER's and the Commissioner's recommendations) has correctly and preferably concluded, in accordance with Section 269TAA(1)(b), that the price between the parties appears to be influenced by a commercial or other relationship. In drawing this conclusion, DISER and the Commissioner have placed reliance on the facts of the inquiry and the legislative provisions and relevant precedent that govern how the facts are to be dealt with. Electra's narrow proposition that the Reviewable Decision was arrived at based solely on a narrow interpretation of the Wilson case is inaccurate.

IV. Treatment of Electra's foreign exchange gain in the export price

Electra submits that the DISER Report rejected its request that foreign exchange gains be properly considered as part of the deductive export price calculation.¹⁷ Electra submits that foreign exchange gains and losses are an integral part of its accounting record, and that they should be taken into account in assessing Electra's profitability on its sales of the goods as an importer.¹⁸

Given the facts on record, Prysmian concurs with the DISER Report's findings:¹⁹

...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.

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*

¹⁶ On this point, Electra references the ADRP's comments in Report 2022/122a (at p. 8 of the Electra application) that: *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.* Applied here, the corporate commercial arrangements, whether explicitly or implicitly permitting time delay in price increases by Electra, and what price level Guilian achieves, clearly rules out any appearance that the relationship is at arms length.

¹⁷ Electra application, p. 12.

¹⁸ Ibid, p. 17.

¹⁹ DISER Report, p. 9, paragraph 49-50.

- *Electra's SG&A costs do not include any forex gains / losses in its own annual report.*

Regarding the different types of foreign exchange gains/losses identified in the first instance above, the Commission noted that during the INV 469 POI, Electra was exposed to exchange gains/losses across four *Forex realisation events* (realisation events 1, 2, 3, and 4).²⁰ The Australian Taxation Office defines each of these events as follows:²¹

- Forex realisation event 1: occurs when there is a disposal from one entity to another (that is, a change in the beneficial ownership happens - capital gains tax (CGT event) A1) – of foreign currency, or a right or part of a right to receive foreign currency.
- Forex realisation event 2: occurs when a right, or part of a right, to receive foreign currency ceases. A right to receive foreign currency includes a right to receive an amount of Australian currency that is calculated by reference to an exchange rate. The term 'right' includes a right that is contingent upon something happening.
- Forex realisation event 3: occurs when an obligation, or part of an obligation, to receive foreign currency ceases if the obligation was assumed in return for the creation or acquisition of a right to pay either foreign currency or Australian currency, or is an obligation under an option to sell foreign currency.
- Forex realisation event 4: occurs when an obligation, or part of an obligation, to pay foreign currency ceases. An obligation to pay foreign currency includes an obligation to pay an amount of Australian currency that is calculated by reference to an exchange rate. The term 'obligation' includes an obligation that is contingent upon something happening.

Clearly, Electra is subject to a multitude of foreign exchange monetary outcomes, the Australian accounting treatment of which is governed by the stand-alone Australian Accounting Standards Board Standard 121; *The Effects of Changes in Foreign Exchange Rates*. This multitude of foreign exchange outcomes led the Commissioner to conclude during the original investigation that the forex gains/losses recorded in Electra's financial records could not be considered as either selling, general, or administrative costs.²² DISER concurred with the Commissioner that Australia's generally accepted accounting principles precluded the inclusion of foreign exchange gains / losses in the export price assessment, noting also that the "below the line" disclosure supported this assessment.²³

The issue therefore is not, as Electra submits, whether foreign exchange gains and losses are an integral part of Electra's accounting record and that as a consequence of this, they should be discretely assigned to the goods in the export price assessment, but rather, it is a logical assessment of the complexity of the gains/losses and whether Australia's generally accepted accounting principles would define such gains/losses as the type of expense or revenue that would then fall within the ambit of a prescribed deduction in the assessment of the export price under Section 269TAB(2)(b). Both the Commissioner and, on reconsideration DISER, have concluded that they do not, resulting in the correct and preferable outcome in the Reviewable Decision.

²⁰ DISER Report, p. 8, paragraph 42.

²¹ Refer <https://www.ato.gov.au/business/foreign-exchange-gains-and-losses/forex-realisation-events/>

²² DISER Report, p. 8, paragraph 43.

²³ DISER Report, p. 9-10, paragraph 51.

V. Determination of an amount for profit

Electra claims that the amount of profit included in the export price determination under Section 269TAB(2)(c) would be correctly calculated based on any one of the four methods it presented to DISER during the reconsideration, any one of which would provide a more reasonable and relevant connection to Electra's sales of the goods than what was adopted in the Reviewable Decision.²⁴

Firstly, Prysmian draws to the attention of the Panel Member DISER's comments that:²⁵

*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...*

Prysmian questions Electra's position on how any of the four nominated profit methods could provide a reasonable and relevant connection to the resale of the goods given that three of these are negative, and one positive?

Secondly, in its application for review Electra submits that:²⁶

...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.

On the contrary, the Dumping and Subsidy Manual stipulates:

In determining an export price under section 269TAB(1)(b), the Commission endeavours to obtain a price that is representative of a reliable export price that is unaffected by any association or compensatory arrangement. An export price will be calculated by using a market price that is representative of an arms length sale, and deducting all associated expenses incurred between exportation and resale (including any profit).

Basic economic fundamentals dictate that a reliable arms-length export price is one which includes a positive profit margin. Any suggestion to the contrary is commercial nonsense.

On the matter of Electra's proposal to use its corporate commercial arrangement profit margin in the export price assessment, DISER concluded that the arrangement was not detailed and sufficient enough to calculate specific profitability for the goods. Whilst not privy to the parties of the commercial arrangement, Prysmian refers to the related party arrangements as noted by the Commission in Guilian's INV 469 Exporter Verification Report:²⁷

²⁴ Electra application for review, p. 22.

²⁵ DISER Report, p. 16, paragraph 99.

²⁶ Electra application for review, p. 19.

²⁷ Guilian International Wire and Cable Co. Ltd. Exporter Verification Report, Investigation No. 469, p. 3. Electronic Public Record Folio No. 19.

Guilin International's primary customer in Australia, Electra Cables (Aust) Pty Ltd (Electra), is a related entity. Electra is owned by Elite Cables directly, and Guilin Xin Ao Wire & Cable Co Ltd (Xin Ao) through a holding company Meltglow Pty Ltd.

Any profit margin established with reference to commercial arrangements with related entities such as the above would therefore be nonetheless unrepresentative of profit applicable to a reliable export price, given the established finding above of the appearance of influence between such parties.

Accordingly, Prysmian agrees with the recommendation made by DISER that the profit margin established with reference to Electra's flat multi-core building wire product (when adjusted to exclude the goods) be regarded as the correct and preferable rate of profit in the export price calculation.

VI. Future exports at dumped prices

Electra submits that the DISER Report has not provided any evidence in support of the view that exports in the future may be at dumped prices, despite the fact that it received detailed submissions by Electra detailing that they won't be.²⁸

The DISER report states:²⁹

REP 469 considered that exports of PVC flat electrical cables from China in the future will likely be at dumped and subsidised [prices], and that continued dumping and subsidisation will likely continue to cause material injury to the Australian industry.

The basis of this finding was because:

- the electrical wholesalers, which account for the majority of the purchases of the goods from the Australian industry and the importers, prefer to source PVC flat electrical cable from multiple suppliers and they will continue to look for lower priced alternatives to locally produced goods. Given the price sensitivity of the Australian PVC flat electrical cables market and the magnitude of the price undercutting by the dumped and subsidised imports, imported PVC flat electrical cables will continue to be an attractive source of supply;*
- both Electra and Nan have increased their import volumes of the goods based on updated import data at the time of REP 469 (we note that the department does not have updated information or assessed import volumes for Electra and Nan post the original decision (May 2019), accordingly, the department has not placed significant weight in this element);*
- considering the interchangeability and price sensitivity of the goods and the importers' established routes to market, the Commission considers that dumping will continue if anti-dumping measures are not imposed; and*
- a continuation of price competition from dumped and subsidised imports from China may have a continuing adverse impact on the Australian industry members.*

²⁸ Electra application for review, p. 23-24.

²⁹ DISER Report, p. 20, paragraph 125-126.

DISER's view on the submission provided by Electra was that:³⁰

...the department does not agree with Electra's submission as the improved performance of the Australian industry occurred subsequent to the imposition of measures on Nanyang, Guilin and all other exporters from China in May 2019, and can be attributed (at least in part) to the combined effect of these duties being in place during the period from May 2019 to February 2020 (being the time at which measures on Guilin were removed). The continued improved performance of the Australian industry, subsequent to the removal of measures on Guilin, is also consistent with the greater level of duty imposed on Nanyang and uncooperative and all other exporters of the goods from China.

The DISER Report recommended that the Minister determine that future exports of the goods from Guilin may be at dumped prices, and that continued dumping may cause further material injury to the Australian industry.³¹ Contrary to Electra's claim that no evidence was relied on in reaching this conclusion, DISER relied firstly on REP 469 then subsequently formed its own view on Electra's submission. DISER was clearly not provided by persuasive alternative evidence during the reconsideration, and accordingly made correct and preferable recommendations to the Minister.

Should the Panel Member have any questions concerning this submission, please do not hesitate to contact me on (02) 9600 0306.

Yours sincerely,



Hamavand Shroff
Chief Executive Officer – Australia and New Zealand

³⁰ DISER Report, p. 21, paragraph 132.

³¹ DISER Report, p. 22, paragraph 137.