FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Olex Australia Pty Ltd [2017] FCA 222

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judge: | **BEACH J** |
|  |  |
| Date of judgment: | 9 March 2017 |
|  |  |
| Catchwords: | **COMPETITION** – controlling supply – market sharing – price fixing – whether there was an arrangement or understanding which contained a cartel provision – whether parties reached the necessary commitment that gave rise to an arrangement or understanding – whether there was a proscribed purpose to control supply, allocate the market and/or fix prices – whether there was an exclusionary provision for the purposes of s 4D of the *Competition and Consumer Act 2010* (Cth) – whether the respondents were “in competition with each other” – consideration of no case submission – circumstantial evidence – exclusive dealing “anti-overlap” defence – collective acquisition defence – no contravention of the prohibition on cartel conduct – application dismissed**COMPETITION** – bid rigging – whether there was an arrangement or understanding which contained a bid rigging provision – whether there was a change in the pleaded case in relation to the characterisation of the bidding provision – whether the relevant purpose is in relation to a successful “bid” or successful “party” – resale price maintenance “anti-overlap” defence – no contravention of the prohibition on cartel conduct – application dismissed  |
|  |  |
| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 4, 4C, 4D, 4F, 44ZZRB, 44ZZRD, 44ZZRJ, 44ZZRK, 44ZZRR, 44ZZRS, 44ZZRV, 45, 47, 96*Evidence Act 1995* (Cth) s 140(2)  |
|  |  |
| Cases cited: | *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452*ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460*Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344; [2010] FCA 17*Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (No 8)* (1999) 92 FCR 375*Australian Competition and Consumer Commission v Flight Centre Travel Group Pty Ltd* (2016) 339 ALR 242; [2016] HCA 49*Australian Competition and Consumer Commission v IMB Group Pty Ltd (in liq)* [2002] FCA 402*Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183*Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321*Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212*BGC Residential Pty Ltd v Fairwater Pty Ltd* [2012] WASCA 268*Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd* (1986) 162 CLR 395*Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152*Jones v Dunkel* (1959) 101 CLR 298*Jones v Great Western Railway Co* (1931) 144 LT 194*News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410*News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563*Norcast S.ár.L v Bradken Ltd (No 2)* (2013) 219 FCR 14*Paul Dainty Corporation Pty Ltd v National Tennis Centre Trust* (1990) 22 FCR 495*R v Associated Northern Collieries* (1911) 14 CLR 387*Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481*Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53*Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262*Seven Network Limited v News Limited* (2009) 182 FCR 160*Siegwerk Australia Pty Ltd (In liq) v Nuplex Industries (Aust) Pty Ltd* (2016) 334 ALR 443; [2016] FCA 158*South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611; [2000] FCA 1541*Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286*Trade Practices Commission v Bata Shoe Company of Australia Pty Ltd (No 2)* (1980) 44 FLR 149*Trade Practices Commission v Email Ltd* (1980) 43 FLR 383*Trade Practices Commission v Penfolds Wines Pty Ltd* (1991) 104 ALR 601 |
|  |  |
| Dates of hearing: | 24, 25, 26, 27, 30 November 2015, 1, 2, 3, 4, 7, 9, 10, 11 December 2015, 11, 12 February 2016 |
|  |  |
| Date of last submissions: | 4 March 2016 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 800  |
|  |  |
| Counsel for the Applicant: | Mr P W Collinson QC with Mr A J McClelland QC, Mr A D Barraclough and Ms C E M Exell |
|  |  |
| Solicitor for the Applicant: | Webb Henderson |
|  |  |
| Counsel for the First and Second Respondents: | Mr M H O’Bryan QC with Mr N P De Young |
|  |  |
| Solicitor for the First and Second Respondents: | Herbert Smith Freehills |
|  |  |
| Counsel for the Third and Fourth Respondents: | Mr A J L Bannon SC with Mr J B Spinak |
|  |  |
| Solicitor for the Third and Fourth Respondents: | Johnson Winter & Slattery |
|  |  |
| Counsel for the Fifth and Sixth Respondents: | Mr C A Moore SC with Dr J A Watson |
|  |  |
| Solicitor for the Fifth and Sixth Respondents: | Herbert Smith Freehills |
|  |  |
| Counsel for the Seventh Respondent: | Mr C M Archibald |
|  |  |
| Solicitor for the Seventh Respondent: | Horton Rhodes |
|  |  |
| Counsel for the Eighth Respondent: | Mr N J O’Bryan SC with Mr A M Bell |
|  |  |
| Solicitor for the Eighth Respondent: | Maddocks |
|  |  |
| Counsel for the Ninth Respondent: | Mr M I Borsky |
|  |  |
| Solicitor for the Ninth Respondent: | Corrs Chambers Westgarth |
|  |  |
| Counsel for the Tenth and Eleventh Respondents: | Mr M S Goldblatt |
|  |  |
| Solicitor for the Tenth and Eleventh Respondents: | Rodgers Barnes & Green |
|  |  |
| Counsel for the Twelfth Respondent: | The Twelfth Respondent did not appear |

ORDERS

|  |  |
| --- | --- |
|  | VID 725 of 2014 |
|   |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | OLEX AUSTRALIA PTY LTD (ACN 087 542 863)First RespondentTONY STEWART DUNSTANSecond RespondentPRYSMIAN POWER CABLES & SYSTEMS AUSTRALIA PTY LTD (ACN 096 594 080) (and others named in the Schedule)Third Respondent |

|  |  |
| --- | --- |
| JUDGE: | BEACH J |
| DATE OF ORDER: | 9 MARCH 2017 |

THE COURT ORDERS THAT:

1. The applicant’s originating application be dismissed.
2. The applicant pay the respondents’ costs of and incidental to this proceeding including all reserved costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1. Olex Australia Pty Ltd (Olex), the first respondent, and Prysmian Power Cables & Systems Australia Pty Ltd (Prysmian), the third respondent, are manufacturers of electrical cable who supply electrical cable to wholesalers that re-supply electrical cable. Olex and Prysmian also supply directly to contractors that install electrical cable and end-users that acquire cable for their own use. As at the date of trial, Prysmian and Olex were the largest domestic manufacturers of electrical cable.
2. Rexel Electrical Supplies Pty Ltd and Australian Regional Wholesalers Pty Ltd, the fifth and sixth respondents (collectively, Rexel) with a common parent (Rexel Holdings Australia Pty Ltd), Lawrence & Hanson Group Pty Ltd (L&H), the eighth respondent, and Metal Manufactures Ltd trading as MM Electrical Merchandising (MMEM) were at the time of trial large Australian wholesalers of electrical cable (the Wholesalers); MMEM is not a party to the present proceeding. The Wholesalers acquired electrical cable from Olex, Prysmian and other suppliers, and on-sold that cable to contractors and end-users. Gemcell Pty Ltd (Gemcell) is a company whose shareholders were wholesalers. Gemcell negotiated trading terms with suppliers on behalf of wholesalers; Gemcell is not a party to the present proceeding.
3. The Wholesalers and Gemcell were members of a so-called “Industry Association”, the Electrical Wholesalers Association of Australia Ltd (EWAA), the twelfth respondent. The EWAA was not represented before me and has taken no active role in the proceeding. The Constitution of the EWAA required that its members be wholesalers involved in the Australian electrical wholesale industry, have a minimum of 100 dedicated electrical wholesale outlets in Australia, and have an annual group turnover of not less than $500 million. Collectively, the members of the EWAA made the majority of wholesalers’ sales of electrical cable in Australia.
4. At this point, it is convenient to make reference to some other entities. Electra Cables (Aust) Pty Ltd (Electra) and General Cable Australia Pty Ltd (General Cable) were each cable importers. Further, in addition to the Wholesalers, there were other domestic wholesalers of electrical cable including CNW Pty Ltd (CNW), Middendorp Electric Co Pty Ltd (trading as Middy’s) (Middy’s), P&R Electrical Wholesalers Pty Ltd (P&R) and Starclip Enterprises Pty Ltd (trading as Myelec and LED Kewdale) (Starclip). CNW was part of the BGW Group and was a shareholder of Gemcell.
5. The ACCC’s principal case is that in February 2011, the directors of the EWAA met and identified a number of objectives that the EWAA should seek to achieve. It is said that a key objective was to reduce the amount of direct dealing or direct supply of electrical cable by, inter alia, Olex and Prysmian to contractors and end-users, rather than selling to wholesalers who would then on-supply to contractors and end-users.
6. The ACCC says that at that time Olex and Prysmian were facing increasing competition from importers of electrical cable. It is said that between 2008 and 2010, the amount of imported electrical cable that was sold to wholesalers in Australia increased by about 40%. Apparently this caused manufacturers such as Olex and Prysmian to lose significant market share in terms of their supply to wholesalers.
7. The ACCC says that on 8 March 2011, representatives of Olex and Prysmian attended a meeting of the directors of the EWAA where a possible restructure of the cable industry to help address these issues was discussed. Further, between March and June 2011 a series of detailed proposals were developed for how such a restructure might be achieved.
8. The ACCC says that the essence of this restructure was to move to a state of affairs whereby Olex and Prysmian would substantially curtail sales of electrical cable to anyone other than wholesalers, in return for the members of the EWAA supporting such manufacturers.
9. The foundation of the ACCC’s principal case concerns the events of 23 June 2011. On 23 June 2011, representatives of Olex and Prysmian attended a meeting of the EWAA (the 23 June 2011 meeting); the characterisation of whether this was a meeting of the members of the EWAA, the directors of the EWAA or a hybrid informal meeting can be put to one side for the moment. The ACCC alleges that during the 23 June 2011 meeting, Olex and Prysmian on the one hand, and the Wholesalers on the other hand, made or arrived at an arrangement or understanding (for convenience I will refer to this as the relevant arrangement or understanding) containing provisions (the relevant provisions) to the effect that:
	1. Olex and Prysmian would increase their cutting services fees to $85 per cut for electrical cable and the Wholesalers would not object to those fees (cutting fee provision);
	2. Olex and Prysmian would introduce fees of $250 for orders of electrical cable less than $2,500 in value and the Wholesalers would not object to those fees (MOV provision); and
	3. the Wholesalers would maintain or increase the volume and/or value of electrical cable that they acquired from Olex and Prysmian (support provision); the support provision was amended by the ACCC during the trial as I will explain later.
10. The ACCC alleges that each of those provisions was an exclusionary provision for the purpose of s 4D of the *Competition and Consumer Act 2010* (Cth) (the Act) and a cartel provision for the purpose of s 44ZZRD(1) and that by making and giving effect to the relevant arrangement or understanding, Olex, Prysmian and the Wholesalers contravened the Act. The ACCC also puts an alternative case that the relevant arrangement or understanding was made between just Olex and the Wholesalers. I will return to the ACCC’s pleaded case and its evolution later.
11. The ACCC says that the relevant provisions in themselves had either the or a substantial purpose of creating a disincentive for contractors and end-users to purchase cable directly from Olex and Prysmian. Further, it is said that the relevant provisions were steps taken to achieve the wider strategy described above, which had a purpose that was proscribed by ss 4D and 44ZZRD of the Act.
12. In summary, I would reject the ACCC’s principal case. Before descending into the detail, I would make the following observations.
13. First, the ACCC’s case has been circumstantial and by the end of the trial was sought to be constructed from a plethora of documents dispersed over 35 volumes of a court book. Those documents were sourced from different entities and authors. Many of the documents necessarily had to be considered in their precise context and cross-admissibility questions loomed large. The respondents, with some justification, contended that many of the documents could not connect the various respondents with each other in such a way as to give rise to the contraventions alleged. I would note at this point that the ACCC did not plead or run any attempt case.
14. Second, all witnesses called at trial gave evidence which was largely adverse to the ACCC’s case. Indeed, in relation to one of the ACCC’s witnesses who had been given immunity, Terrence Davis, it was the ACCC that, surprisingly in one sense, submitted that I should not treat his evidence as reliable.
15. Third, in my view there was little if any probative evidence that Prysmian was a party to the relevant arrangement or understanding. This partly explains one evolution that occurred in the ACCC’s pleaded case, which was to put an alternative case that the relevant arrangement or understanding was made between just Olex and the Wholesalers. Of course, such an alternative case had problematic commerciality dimensions.
16. Fourth, Graeme Moncrieff, the then Chief Executive Officer of Olex, gave evidence adverse to the ACCC’s purpose case. Although at times his evidence was non-responsive and his manner occasionally pugnacious, I largely found him to be a credible witness. The content of his evidence and that credit foundation is sufficient to find against the ACCC’s principal case, whether its primary case involved *both* Olex and Prysmian as parties to the relevant arrangement or understanding or the alternative case which did not involve Prysmian as a party.
17. Fifth, Guy Picken, the then Chief Executive Officer for Rexel, also gave evidence against the ACCC’s principal case. I have also found him to be credible. And again, the content of his evidence and that finding is sufficient to find against the ACCC’s case. If Rexel was not a party to the relevant arrangement or understanding as one of the Wholesalers, then the principal case fails for this reason as well. The ACCC did not seek to run a case of the relevant arrangement or understanding involving *one or more* of the Wholesalers. Rather, its case required *all* of the Wholesalers to be parties. In other words, for the ACCC’s case to succeed, Rexel had to be shown to be a party. In my view the ACCC did not establish this.
18. Sixth, the ACCC’s case was principally based upon what was allegedly said at the 23 June 2011 meeting, the minutes thereof and the purpose(s) of the various participants at that time. But there were a number of insurmountable difficulties for the ACCC including the following:
	1. The persons present at the 23 June 2011 meeting who gave evidence before me did not support the ACCC’s version of events.
	2. Further, the finalised minutes of that meeting did not support the ACCC’s version of events.
	3. Further, the ACCC’s “consciousness of guilt” thesis advanced in the context of the evidence showing modifications between the draft minutes and the finalised version had a superficial allure, but ultimately was not sustainable.
19. Seventh, the ACCC understandably sought to place the 23 June 2011 meeting in the context of the parties’ dealings and conduct (whether jointly or unilaterally) before that time (as reflected in the voluminous documentary material tendered) and the context of the parties’ dealings and conduct thereafter. No doubt it had in mind, in the context of circumstantial cases, Wigmore’s conceptual categorisations of evidentiary facts to the extent that they might afford proof or an indication that was prospectant, concomitant or retrospectant. But accepting that I must consider all of the evidence and consider the probative force of its combined weight, without being distracted by simplistic “strands in a cable” or “links in a chain” type metaphors, nevertheless the ACCC’s case does not withstand analysis, particularly when one has regard to s 140(2) of the *Evidence Act 1995* (Cth).
20. Now I accept that it will be rare in contexts such as the present for parties to have openly committed themselves to each other in an easily detectible fashion. And I accept that cases such as the present are likely to be wholly or substantially based upon circumstantial evidence. But to so recognise such realities does not relieve the ACCC of discharging its onus, particularly in relation to meeting the standard of proof required to be met in the present context given the seriousness of the allegations made and the fact that pecuniary penalties are sought.
21. Eighth, I am able to dispose of the ACCC’s primary case on the facts, albeit that its forensic dimensions are tricky and diffuse. However it is necessary to say something about the legal framework, which I do later. But the ACCC’s primary case does not require me to resolve questions of statutory construction and does not invite intellectualisation upon theoretical themes whether legal or economic.
22. Ninth, given that I have found that the relevant arrangement or understanding or its alternative was not made, the ACCC’s “giving effect to” case must also fail. Again I should say, if it is not already apparent, that because the ACCC ran a circumstantial case, the evidence on the “giving effect to” allegation has also needed to be considered on the question of whether the relevant arrangement or understanding was made. But to be clear, I am making this ninth point to simply reflect the separation of the *legal* frameworks of “making” and “give effect to” rather than suggesting any bright line *forensic* separation in the context of a circumstantial case.
23. Tenth, the ACCC has also brought claims against various individuals alleging accessorial liability. In some cases those individuals have had before me separate legal representation from their corresponding corporate entities. I will discuss later the evidence concerning the conduct and state of mind of relevant individuals to the extent that it relates to the allegations against the principal contraveners. But given that I have found against the ACCC as to the existence of the relevant arrangement or understanding (with or without Prysmian), it is unnecessary to separately discuss the accessorial claims against the individuals and to apply *Yorke v Lucas* type principles on the alternative hypothetical foundation as if I had found that the relevant arrangement or understanding had been made. Such an exercise would be artificial.
24. Eleventh, the case against the EWAA was only one of accessorial liability. The case against it also fails for lack of a foundation.
25. Thus far I have only dealt with the ACCC’s primary case. Let me now turn to the ACCC’s secondary and separate case.
26. In addition to the ACCC’s primary case against all respondents, the ACCC has pursued a separate bid rigging case against one of the Rexel entities and Prysmian. The ACCC alleges that Rexel Electrical Suppliers Pty Ltd (Rexel Electrical), the fifth respondent only (rather than including Australian Regional Wholesalers Pty Ltd), and Prysmian engaged in bid-rigging in contravention of the Act. On 13 May 2011, Caltex Refineries (NSW) Pty Ltd issued a request for proposals to supply it with electrical cable for an upgrade of its Kurnell Refinery in Botany Bay, New South Wales. Both Rexel Electrical and Prysmian submitted bids in response to that request. The ACCC alleges that before doing so they made or arrived at an arrangement or understanding containing a provision with the purpose of directly or indirectly ensuring that Rexel Electrical’s bid was more likely to be successful than Prysmian’s bid. The ACCC alleges that the provision was a cartel provision within the meaning of s 44ZZRD(3)(c)(ii) and that Rexel Electrical and Prysmian made and gave effect to that arrangement or understanding in contravention of ss 44ZZRJ and 44ZZRK. I will deal with this secondary case in a separate part of my reasons after I have dealt with the principal case against all respondents. For present purposes, all that need be said is that I reject this case as well.
27. For convenience, the balance of my reasons has been divided into the following sections:
	1. The relevant individuals ([28] to [38]);
	2. Factual chronology ([39] to [389]);
	3. The reliability of witnesses ([390] to [455]);
	4. The pleaded case and its evolution ([456] to [467]);
	5. Relevant legal principles ([468] to [507]);
	6. No case submission ([508] to [513]);
	7. Alleged making of relevant arrangement or understanding ([514] to [639]);
	8. Alleged price fixing ([640] to [659]);
	9. Alleged giving effect to relevant arrangement or understanding ([660]);
	10. Asserted anti-overlap defences ([661] to [665]);
	11. Individual respondents’ liability ([666] to [667]);
	12. Bid-rigging ([668] to [799]);
	13. Conclusion ([800]).

# A. the RELEVANT individuals

1. The individual respondents to the proceeding are each officers of Olex, Prysmian, Rexel, L&H or CNW. As I have said, the ACCC alleges that such individuals aided, abetted, counselled, procured, induced or were knowingly concerned in or party to the principal contraventions.
2. In order to understand the case against the alleged principal contraveners, it is appropriate to elaborate further on these and other individuals before descending further into the factual background. I would note at this point that generally speaking no respondent argued that the conduct or state of mind of an individual officer or employee could not be attributed to the corporation of which they were such an officer or employee, save that in relation to the 23 June 2011 meeting it was contended that whatever was said by any representatives of the Wholesalers at the EWAA meeting did not bind their individual entities as such.
3. In relation to Olex, its general manager at the relevant time, Tony Dunstan (Dunstan), was joined as the second respondent. He was the General Manager – Building and Industry and Sales (1 January 2011 to 19 September 2011) and General Manager – Sales and Marketing (19 September 2011 to 23 July 2012). Dunstan did not give evidence before me. Graeme Moncrieff (Moncrieff) was the Managing Director of Olex during the period from 1 January 2011 to at least 23 July 2012. He gave evidence before me which I have found to be reliable. I will discuss his evidence and reliability questions later. Other Olex individuals who are appropriate to mention are Evan Hudleston, Business Strategy and Pricing Manager (1 January 2011 to 10 September 2012), Greg Stack (Stack), National Sales Manager – Building and Industry (1 January 2011 to at least 23 July 2012), Julien Hueber (Hueber), General Manager – Supply Chain (1 January 2011 to at least 23 July 2012) and Peter Weir, Information Systems Manager from October 2015. None of these individuals gave evidence before me.
4. In relation to Prysmian, Llyr Roberts (Roberts), its Managing Director – Oceania (1 January 2011 to July 2011) and then Chief Executive Officer – Australia and New Zealand (from July 2011) was joined as the fourth respondent. Other relevant Prysmian personnel were Hamavand Shroff (Shroff), Commercial Manager – Trade & Installers (1 January 2011 to 31 January 2012) and Supply Chain Director – Australia and New Zealand (1 February 2012 to 24 July 2012), Stephen Haller, Executive General Manager (Commercial) – Oceania (January to June 2011) and Commercial Director – Australia and New Zealand (June 2011 to at least 23 July 2012), Irene Georgiades, Tenders Team Leader (Commercial), and David Klarich (Klarich), General Counsel, Oceania and then Australia and New Zealand (January 2011 to at least 23 July 2012) and also Company Secretary (July 2011 to at least 23 July 2012). Prysmian called no oral evidence. As it turns out, this was a strategically astute call by Prysmian.
5. In relation to Rexel, Guy Picken (Picken), Chief Executive Officer and Managing Director of Rexel Holdings Australia Pty Ltd (the holding company) (2006 to 28 February 2015) was joined as the seventh respondent and was separately represented to Rexel. He had also been a director of each of the Rexel entities at the relevant time(s). Picken had also been a director of the EWAA (15 February 2011 to at least 23 July 2012) and the EWAA’s Chairman from mid-2012. Picken was called as a witness by Rexel and gave evidence before me in the last phase of the trial; I also found him to be reliable. I will discuss his evidence and reliability questions later. Another relevant individual of Rexel who was called as a witness, but by the ACCC, was Paul Alderson (Alderson), National Sales Manager (March 2008 to March 2011) and Cable Market Development Manager (March 2011 to July 2012). Other relevant individuals were Tony Bombardiere (Bombardiere), Executive General Manager of John R. Turk and Ideal Electrical Wholesalers (Qld & Vic) (1 August 2009 to at least 23 July 2012) and a director of the EWAA (15 February 2011 to at least 23 July 2012), Nadine Brochut (Brochut), General Manager – Strategic Sourcing and Supply Chain throughout the relevant period, Roger Edgar (Edgar), Executive General Manager (at least 1 January 2011 to 15 June 2012) and a director of the EWAA (15 February 2011 to at least 23 July 2012), Darryl Milburn, Business Manager, Michael Power, Executive General Manager (15 June 2012 to at least September 2012), Wayne Williams, Executive General Manager of a related concern (September 2010 to July 2012) and Ruby Faulkner, assistant to the Managing Director.
6. In relation to L&H, Robin Norris (Norris), the Chief Executive Officer and a director throughout the relevant period, was joined as the ninth respondent. He was also a director of the EWAA throughout the relevant period. He did not give evidence. He was separately represented to L&H. Other individuals related to L&H who were also not called as witnesses were Ian Haddon (Haddon), Executive General Manager at the relevant time and also a director of the EWAA throughout the relevant period, and Stephen Hanlon (Hanlon), General Manager and the Executive General Manager – Commercial and Supply Chain (October 2005 to at least 23 July 2012) and also a director of EWAA throughout the relevant period.
7. In relation to MMEM, which was not a party, Colin Lamond (Lamond) was its Chief Executive Officer at the relevant time and also a director of the EWAA throughout the relevant period, Kevin Irwin (Irwin) (now deceased) was its Managing Director (19 May 2000 to June 2014) and also a director of the EWAA throughout the relevant period and Terrence Davis (Davis) was a General Manager and also a director of the EWAA at the relevant time. Only Davis gave evidence before me. I will discuss his reliability later. He was called by the ACCC.
8. Brian Webb (Webb) was joined as the tenth respondent to this proceeding. He was the Managing Director of CNW (1986 to 2014), a director of the EWAA throughout the relevant period and also Chairman of the EWAA (February 2010 to a date before 2 July 2012). He did not give evidence before me.
9. Lawrence Murphy (Murphy) was joined as the eleventh respondent to this proceeding. He was a director of both CNW and Gemcell at the relevant time and a director of the EWAA throughout the relevant period. He did not give evidence before me.
10. Anton Middendorp (Middendorp) was a sales director of Middy’s, a director of Gemcell and a director of the EWAA at the relevant time(s). He also did not give evidence before me.
11. Finally, I should say something further concerning the EWAA. I have referred to its directors from time to time, viz, the Rexel representatives (Picken, Bombardiere and Edgar), the L&H representatives (Norris, Haddon, Hanlon), the MMEM representatives (Lamond, Irwin and Davis) and the Gemcell (and others) representatives (Webb, Murphy and Middendorp). As I have said, Webb was the Chairman of the EWAA at the relevant time of the events in question and Picken was later Chairman of the EWAA from mid-2012. The company secretary was Nick Geddes (Geddes) (1994 to November 2011, save and except for the 23 June 2011 meeting). Geddes was a director of Australian Company Secretaries Pty Ltd and gave evidence before me. He was called by the ACCC. I will discuss his evidence later. At the 23 June 2011 meeting of the EWAA, Geddes was not available and accordingly not present. In his place, John Lemon (Lemon) was used as the company secretary for that meeting. Written evidence of Lemon was tendered before me, although it added little to the other evidence.

# B. FACTUAL CHRONOLOGY

1. It is convenient at this point to set out a detailed factual chronology with elaboration on some of the key factual issues. I will deal later with reliability questions concerning some of the witnesses.

## (a) State of the electrical cable industry in 2010 and 2011 – Background

1. Manufacturers and importers supplied electrical cable to wholesalers who re-supplied that cable to contractors and end-users. Nevertheless, manufacturers and importers also supplied electrical cable directly to contractors and end-users. This was known within the industry as “direct dealing” or “direct supply”.
2. Traditionally, Olex and Prysmian had faced only passive competition from importers. But between 2008 and 2010, importers’ sales to wholesalers increased substantially. According to Prysmian’s estimates, Electra (an importer of cable manufactured in China) had grown its market share from 11% in 2008 to 19% in 2010 and General Cable (an importer of cable manufactured in, inter alia, Thailand and the Philippines) had grown its market share from 10% in 2008 to 17% in 2010. In total, Prysmian estimated that the market share of importers had risen to in excess of 55% by early 2011.
3. By early 2011, Olex and Prysmian were faced with considerable competitive pressures to maintain the viability of their cable manufacturing operations in the face of these competitive pressures. Prysmian considered that local manufacturers were unable to compete with imports on price and that the current level of pricing was unsustainable for local manufacturers. Olex was also concerned about the competition from imports.
4. In terms of direct supply by Olex and Prysmian, this commonly occurred in relation to customers that purchased large amounts of cable ($100,000 or more).
5. By reason of the increased competition from imported cable, in early 2011 Prysmian’s market strategy was to further diversify its customer base by increasing its direct sales business. This had the effect of increasing the level of competition between it and wholesalers. Prysmian accepted that “[t]his may mean taking [a] contractor from [Olex] or an unfriendly wholesaler”.
6. It appears that the level of direct sales was a source of friction between Olex and Prysmian on the one hand and the Wholesalers on the other which they initially sought to resolve through bilateral discussions in the early part of 2011. But before proceeding further with the chronology, I should note various restructuring steps taking place within Olex at this time.

## (b) Olex’s supply chain initiatives

1. From the time that Moncrieff became Managing Director in mid-2010, Olex’s manufacturing business in Australia was facing a number of commercial challenges. Those challenges included:
	1. a transaction-based approach to doing business which was locally focused and inefficient;
	2. warehousing and stock issues;
	3. poor relationships with its wholesale customers;
	4. a high “cost-to-serve” caused in part by a high number of small orders particularly by wholesalers;
	5. increasing imports of low voltage (LV) cable into Australia.
2. Moncrieff officially commenced at Olex in July 2010, however, he had worked at Olex from mid-May 2010, pending the end of his employment at Amcor. At this time, Olex faced significant commercial challenges that had negatively impacted upon profit.
3. The key commercial challenges that Olex faced in 2010 and 2011 included the following:
	1. First, Olex had a “transaction-based” business model which was locally focused, highly transactional and inefficient. Olex and potential customers would typically interact multiple times for any given sale. For example, customers frequently dealt with several Olex employees at different levels of the organisation before they could obtain a price for a product. This increased overhead costs for the business and caused frustration for customers.
	2. Second, during 2010 and 2011, Olex had a network of seven State-based distribution centres for storing and distributing a variety of products, but stock availability was an ongoing issue.
	3. Third, after his commencement at Olex, Moncrieff visited Olex’s wholesalers and observed that a number of them were unhappy with Olex’s approach to product sales and distribution. Moncrieff also formed the view that the wholesalers were not providing Olex or its customers with a sufficient “value add”. For example, wholesalers often failed to aggregate purchases amongst their network of branches, choosing instead to rely upon Olex to distribute product to individual branches within the wholesaler’s network. In addition, wholesalers would order smaller lengths of cable requiring Olex to cut cables, rather than ordering uncut cables and cutting the cables themselves. This was delaying delivery performance and decreasing Olex’s profitability.
	4. Fourth, Olex had a high “cost-to-serve” to its customers which was due to Olex’s inefficient supply chain; Olex dealt with a high number of small purchase orders from wholesalers. There were a number of tasks that were required to service a purchase order and therefore high numbers of small orders led to a higher cost-to-serve compared with a low number of larger orders. The tasks that were required to service an order, regardless of order size, were negotiation of terms including price, and various administrative tasks and warehouse and distribution tasks.
	5. Fifth, Olex faced increasing competition from foreign imports of low voltage cables. Electra increased its activity in the Australian market following the global financial crisis by supplying a low cost “commodity” cable that was suitable for the Australian Government’s “Building the Education Revolution” program. Another major importer of cable in 2010 and 2011 was General Cable, which was part of the US-based General Cable Corporation, one of the world’s largest wire and cable manufacturers.
4. Nexans S.A. (Nexans) was the French-based parent company of Olex at the relevant time. Nexans acquired Olex in 2006. After commencing at Olex, Moncrieff was told by the Nexans management that he should investigate strategies to reduce Olex’s high cost-to-serve. Specifically, the Nexans management told Moncrieff that he should understand the business model adopted by Nexans Canada, which involved strong relationships with wholesalers and a relatively low cost-to-serve, and to consider whether it would be applicable in Australia.

### Reform of Olex’s business model

1. In about October 2010, Moncrieff prepared a presentation which set out a proposal for structural and operational reforms at Olex. The object of the plan was to transform Olex into a more strategic, customer-focused and market driven organisation with a lower cost-to-serve.
2. Key aspects of this reform plan were the following:
	1. First, a separate supply chain function would be established that was independent of and acted as a conduit between the sales team and the manufacturing team. This was aimed at better harnessing the strengths of the business by improved processes and systems. As part of this restructure, Moncrieff created the role of General Manager – Supply Chain and appointed Hueber to this position.
	2. Second, Olex’s commercial operations were restructured which involved implementing a channel-based sales structure (where the focus was on sales by specific distribution channel) in contrast to the existing geographic-based sales structure (where the sales efforts were organised by geographical regions and managers focused on sales and warehouses in their region). The three channels that were implemented were Building (which serviced wholesalers and contractors/installers), Energy and Infrastructure (which included the mining and resources, oil and gas, rail and electricity industries), and Industry and Export.
	3. Third, to address inefficiencies in stock holding and availability, products were re-categorised into three classes and moved towards a centralised warehousing control function.
	4. Fourth, a process of product rationalisation occurred at Olex’s Lilydale manufacturing plant, where the majority of Olex’s LV cables were manufactured, which involved reassessing products produced at the plant and deciding to discontinue certain products, outsourcing the production of certain products, and creating new production rules for products that would be produced in the future. The rationale for the product rationalisation was to increase the run time of the machines and reduce the set up time.
	5. Fifth, Olex’s business was reorganised from a business unit structure to a functional structure. The functional units established were Sales and Marketing, Operations, Supply Chain, Finance, Human Resources, Information Systems and New Zealand.
	6. Sixth, during the course of 2011, Olex continued to consider its approach to warehousing, customer service and quotations. Olex’s warehouse footprint was too large and Olex decided that it should exit smaller warehouses.

### Reform of Olex’s supply chain

1. In addition to the Olex internal restructuring reforms, Moncrieff decided that reforms were needed to improve efficiencies in Olex’s supply chain. This would allow Olex to reduce its cost-to-serve which would also reduce costs for its customers. The efficiencies would be a mutually beneficial outcome for Olex and its customers.
2. In early 2011, after Hueber commenced at Olex, Moncrieff started having discussions with Olex’s key wholesaler customers on the need for changes to the supply chain. The aim of these changes was to address Olex’s high cost-to-serve at the time. The discussions were pursued individually with each of the wholesalers and were mostly conducted by Dunstan and Hueber.
3. Olex implemented supply chain improvement initiatives with L&H and Rexel. In respect of L&H, Olex first introduced a Vendor Managed Inventory (VMI) model at L&H’s distribution centre in Knox, Victoria which was subsequently extended into South Australia and New South Wales. In respect of Rexel, a VMI model was rolled out firstly in Mitcham, Victoria and subsequently in Eastern Creek, New South Wales. The VMI model reduced the number of transactions that needed to be processed in dealings between Olex and its wholesale customers.
4. By 2011, Olex had in place a cutting fee of $35 plus GST per cut. Apparently, according to Moncrieff, the cutting fee was often not charged by Olex. Depending on the contractual arrangement, large end-users would often not pay a cutting fee. Other customers, such as large or medium sized contractors would often negotiate a waiver of the cutting fee on an ad hoc basis. Olex provided a cutting service only if a customer ordered cable. In other words, in one sense it was not a separate service from the supply of cable. The relevance of this observation will become apparent later when I deal with the price fixing case. Olex incurred substantial costs in cutting cable for its customers, which included the following:
	1. First, there were operational labour costs as the cutting service was done either manually or via a rewind machine. Regardless of which method was used, an operator was needed. For larger drums, additional time was required in order to move the drums with a forklift from a storage location to the machine. Further, depending on the diameter and the weight of the cable, the cutting process required different equipment.
	2. Second, costs were incurred in procuring and storing additional drums as the cutting service involved products on a single drum being split between multiple drums. Further, transporting multiple drums (rather than a single drum) was costly and less efficient.
	3. Third, there were administrative labour costs incurred when cable had been cut and wound onto a new drum; additional quality documentation including additional product certifications recording the new batch number was required.
	4. Fourth, there were costs from managing and disposing of waste from tail ends or off-cuts from cutting cable which could not then be sold.
	5. Fifth, holding numerous cut drums in locations around Australia increased the inventory levels in the business and therefore required increased working capital.

### Low voltage cable

1. Before proceeding further, I should make mention of the different types of electrical cable supplied. Electrical cable can be categorised as low, medium or high voltage. Low voltage cables are electrical cables which carry up to 1,000 volts. Medium voltage cables carry between 1,000 to 11,000 volts. High voltage cables carry over 11,000 volts.
2. LV cables are used in secondary distribution infrastructure to carry electricity from transformers to end-users and to carry electricity throughout the end-user’s premises, which are typically homes or businesses. LV cables are comprised of a conductor made of either copper or aluminium, a layer of insulation and in many cases of sheath, which sits on top of the insulation layer.

## (c) February 2011 dealings

1. On 7 February 2011 Olex and Rexel conducted a workshop in which they discussed their relationship. In its presentation to Rexel at that workshop, Olex noted that its sales to Rexel had declined from $51.3 million in 2007 to $23.8 million in 2010. In Rexel’s presentation to Olex, Brochut observed that local manufacturers competed with Rexel, sent salesmen to the distributor, contractor and end-user (often multiple distributors and contractors) and distributed to the distributor, contractor and end-user. Brochut suggested that Rexel wished to consolidate their business to become a strategic partner of Olex as such a partner would not compete with it. Brochut stated that the opportunities of this arrangement included to reduce market competition on direct business and to slow down importer entry in the Australian market.
2. In elaboration, Rexel’s cable workshop presentation to Olex expressly made the points that:
	1. Olex and Prysmian dominated the Australian market “with a share of direct business over 75%”;
	2. “Major erosion has been dramatic in the cable segment for both manufacturers and distributors”;
	3. Local manufacturers “[c]ompete with us”;
	4. Local manufacturers “[s]end Salesmen to the distributor, contractor and end user…”;
	5. “A strategic partner never competes with us”;
	6. “Align Business model to save costs for both parties”.
3. The presentation also contained simple flow charts (slides 8 and 9) showing the manufacturers not supplying to the end-user. In other words, in Rexel’s view, Olex should change its business model so that it only sold to wholesalers/distributors.
4. Now this was Rexel’s wish list so to speak. But the manufacturers, on the evidence, did not agree to any such restructuring.
5. I should say that on 6 February 2011 at 4:10pm, Brochut had sent Picken a draft of this presentation, and said that she planned to share it with Olex and Prysmian. Picken replied to Brochut’s email at 6:54pm and among other things said, “There is nothing in here we shouldn’t say. I don’t think you are going to get them to agree never to compete but what they need to understand [is] there can be no half measures. To survive they can’t afford to have sales and logistics functions their competitors don’t and once they realise this and restructure they won’t be able to complete [sic]”. The reference to “complete” should have been a reference to “compete”.
6. Picken gave evidence that the context, in which the cable workshop presentation suggested that Olex and Prysmian should not compete, was in relation to the proposed strategic partnerships. In Picken’s view, in the event that Rexel entered a strategic partnership with one of the cable manufacturers, it would not work if Rexel committed to purchase all of its cable supply from that manufacturer but that manufacturer could compete against Rexel for projects.
7. Picken understood that the aim of the cable workshop presentation was to provide a basis for exploring with Olex whether Olex and Rexel could agree on a model that would result in the lowest cost distribution of Olex’s LV cable, and that this would involve Rexel acting as Olex’s LV cable distributor. Picken believed that this model could work in relation to “day to day” supply of LV cable for electrical contractors, manufacturing and industrial customers, and in relation to supply of LV cable for capital expenditure projects where the customer wanted a “managed service” that meant a wholesaler could add value.
8. I have discussed dealings between Olex and Rexel at this early time. Let me make some brief observations concerning the dealings around this time between Prysmian and Rexel. In early 2011, Prysmian prepared an internal strategy document for its bilateral negotiations with Rexel. The strategy document noted under the heading “What is RGA [ie Rexel] looking for?” that Rexel was looking for a partnership with two main suppliers, but that:

[i]n return they want the supplier to hand over [the] majority of their direct business and for the supplier [Prysmian] to also put barriers in place for the direct business e.g. a contractor to buy from the supplier would pay [a] significant premium, or better still the supplier only sells majority of the range in standard packs to the end user or charges a premium for cut lengths.

1. Subsequently, Prysmian prepared an agenda for a meeting with Rexel in which Prysmian proposed that “in return” for placing “parameters” on direct business, Prysmian should receive from Rexel “a guarantee on volume and margin”.
2. On 8 February 2011, Prysmian and Rexel also conducted a workshop, in which Brochut proposed that the two parties should work towards entering into a strategic partnership.

### Rexel’s state of mind in early 2011

1. Picken gave evidence of the following matters relevant to his and accordingly Rexel’s state of mind at the time, which evidence I accept.
2. During Rexel’s meetings with Olex and Prysmian up to early 2011, the manufacturers’ representatives said that they were experiencing financial difficulty. In particular, Picken recalls that Olex representatives said in those meetings that Olex was losing money across the whole company and was experiencing difficulty in competing with cable importers. Picken also recalls that the Olex representatives said that Olex was facing a decision as to whether it would continue to manufacture cable in Australia, or whether it would exit local manufacturing and sell foreign manufactured cable in Australia. Picken also recalls that Prysmian representatives said in meetings with Rexel in 2010 that Prysmian was losing money on LV cable due to the loss of volume to cable importers.
3. From Picken’s perspective, the main reason why Olex and Prysmian were experiencing financial difficulty, and were not able to match Electra on price, was because their non-production overheads in Australia were substantially higher than Electra’s overheads. Unlike Electra, which at that time only had a small team of distribution and sales personnel in Australia, both Olex and Prysmian had a number of Australian employees performing roles ranging from research and development, to occupational health and safety, to distribution and sales.
4. For some time Picken had also held the view that Rexel had been acting more like a cable “retailer”, than a cable “wholesaler” or “distributor”.
5. Picken considered that Rexel’s ordering practices were inefficient, in that there were frequent orders from individual branches for relatively small quantities of cable, rather than orders being consolidated. This produced additional costs to manufacturers and also to Rexel. Whilst Rexel’s financial performance was healthy, Picken considered that Rexel could perform even better. As a consequence, Rexel was planning to develop larger distribution centres so that it could purchase cable in bulk, and distribute cable from those locations to its branches and customers. This would result in efficiencies for manufacturers, because the number of deliveries they would need to make to Rexel would be significantly reduced. Rather than delivering daily across Rexel’s branch network, a manufacturer could reduce that to a weekly delivery to a distribution centre. Given that Rexel already had trucks distributing to branches and customers, this would build on efficiencies already present in the supply chain, and remove a significant cost to manufacturers.
6. Given the views that Picken held at the time, there was to his mind an obvious solution to the financial difficulties that Olex and Prysmian were experiencing:
	1. First, if Rexel was to begin acting as a true cable distributor by buying cable in bulk at Big Box branches or distribution centres, the cost to Olex and Prysmian of supplying Rexel would be significantly lower than it had been. This was because manufacturers could deliver to a handful of centralised locations rather than delivering to Rexel’s national branch network of approximately 188 branches, and would reduce the need to employ third party logistics providers. Further, these deliveries would be of cable in standard lengths, and would not require the manufacturers to cut them, which would further reduce the manufacturers’ costs.
	2. Second, as a result of Rexel purchasing cable in bulk, Olex and Prysmian would be in a position where they could reduce the size of their respective sales forces, because they would no longer need to sell cable to each individual Rexel branch.
	3. Third, the manufacturing process would become more efficient, because the manufacturers would have a greater ability to predict the volume of any one type of cable, which would allow them to have longer production runs.
7. Moreover, there was the potential for even greater efficiencies if Olex and Prysmian used Rexel more as their cable distributor, which could further reduce their costs, including their sales and distribution costs.
8. Picken also considered that obtaining greater efficiencies would benefit Rexel, principally because he expected that a proportion of any efficiency gains to Olex and Prysmian would be passed onto Rexel in the form of cheaper overall cable prices, whether that was through a reduction in the unit price of the cable or a larger rebate. Picken expected this because unless Olex and Prysmian reduced their prices to Rexel, which at that time were around 10% more than the prices Electra offered to Rexel, they would not be able to achieve increased sales to Rexel or even maintain their current level of sales.
9. Picken also considered that it would be beneficial to Rexel to ensure the ongoing financial viability of the manufacturing operations of Olex and Prysmian in Australia for two strategic reasons. First, he was concerned that any reduction in cable manufacturing would lead to a reduction in competition between suppliers to Rexel, which might eventually lead to higher prices and less attractive conditions, for example payment terms. Second, he considered that it was important to have at least one Australian manufacturer to ensure that cable was readily available to Rexel at short notice. Two disadvantages of sourcing cable from overseas manufacturers were the long lead times and uncertainty as to when cable would be delivered.
10. Accordingly, the fact that Olex and Prysmian were experiencing financial difficulty, and the fact that Rexel was planning to act more as a cable distributor, presented an opportunity to market Rexel’s value to Olex and Prysmian respectively. It was Picken’s hope and objective in Rexel’s bilateral discussions with Olex and Prysmian respectively that the manufacturers could lower their costs and in turn lower the costs of cable to Rexel, including by Olex and Prysmian using Rexel to a greater extent as their cable distributor. This would help Olex and Prysmian resolve their financial difficulties.
11. To that end, Picken recalled having discussions in the course of his regular meetings in early 2011 with Olex and Prysmian about Rexel’s plans to begin buying cable in bulk, initially via its Big Box branch in Mitcham, and after that, through distribution centres. His discussions were to understand from Olex and Prysmian the extent to which they could offer lower cable prices if Rexel was to purchase cable in bulk and to market Rexel as a distribution channel for them.

## (d) The EWAA

1. Before proceeding further with the chronology, it is necessary to say something about the EWAA. Prior to 2010, the EWAA had been inactive for some time. However, in May 2010, a meeting of the EWAA was held to reinvigorate the association. Changes to the EWAA’s board were discussed and future priorities were identified. It was agreed that the principal issue that the group faced was “leakage” which was described as contractors being supplied by manufacturers rather than wholesalers.
2. At an EWAA meeting on 3 February 2011, a number of new directors of the EWAA were appointed, namely, Picken, Edgar and Bombardiere as representatives of Rexel; Murphy and Webb as representatives of Gemcell; Hanlon and Haddon as representatives of L&H; and Lamond and Davis as representatives of MMEM. The directors resolved to appoint Webb as chairman.
3. The directors had a brainstorming session about objectives that the EWAA should aim to meet. Objectives were graded from one to five according to the benefits that they would deliver to members and the ease with which they could be achieved. Objectives that were the most difficult to achieve or provided the least benefit were graded one and objectives that were the easiest to achieve or would deliver the most benefit were graded five. “Direct supply” and “channel restructure” were both graded five in terms of the benefit that they would deliver.
4. The directors also discussed the viability of Olex and Prysmian. It was apparent to the directors that Olex and Prysmian were in financial difficulty. Olex and Prysmian had embarked on a series of measures to reduce the impact of imported cable on their businesses, including applying for anti-dumping duties to be imposed on certain imported cable, but those measures had been unsuccessful. It was discussed that while Olex and Prysmian should “move away from some of the direct business”, the EWAA should “support local manufacturers more”. The directors agreed that Olex and Prysmian would be invited to the next EWAA meeting to discuss the market situation.

## (e) March 2011 meeting

1. On 7 February 2011, Moncrieff and Picken had a meeting where they discussed the anti-dumping action which Olex, Prysmian and Advance Cables Pty Ltd had lodged in respect of the products being imported by Electra. Moncrieff wanted the wholesalers including Rexel to agree to provide certain information regarding Electra’s pricing levels to the import/export advisor engaged by Olex and Prysmian. The information was necessary to support the anti-dumping case. Picken said that he would see whether Moncrieff could attend the next EWAA meeting so that they could discuss this further. At this point in time, Moncrieff had not been aware of the existence of the EWAA.
2. On 8 February 2011, Moncrieff sent an email to Picken confirming that he could attend an EWAA meeting on 7 March 2011 (the meeting was ultimately held on 8 March 2011) at Ernst & Young’s offices in Sydney (the March 2011 meeting), and requesting an agenda and a list of attendees for the meeting. Apparently, Moncrieff was not provided with an agenda or list of attendees prior to attending the March 2011 meeting.
3. Prysmian was also invited to the March 2011 meeting. On 2 March 2011, Roberts of Prysmian told his superior, Hans Hoegstedt (Hoegstedt), that he understood that at the March 2011 meeting, Rexel intended to table what had been discussed in the 8 February 2011 meeting between Rexel and Prysmian. Roberts stated that for that to work, Rexel wanted the cable manufacturers to, among other things, “stop the direct business”. Roberts stated that “the principle sounds OK although you can imagine what will happen when we have lost all of our direct channels to market and when Rexel start to squeeze us on price!”
4. On 8 March 2011, Roberts and Prysmian’s general counsel, Klarich, met with Dunstan and Moncrieff at the Hilton Hotel in Sydney. Klarich subsequently prepared notes of the meeting. During this meeting they discussed a number of issues including the formation of an Australian cable makers association and the EWAA meeting to be held later that afternoon.
5. At the outset of the March 2011 meeting, in attendance were representatives from Gemcell, L&H, Rexel (Picken) and MMEM. At about 4.35pm, Moncrieff, Dunstan and Roberts joined the meeting.

### Discussion before the Olex and Prysmian executives joined the meeting

1. Before the manufacturers’ representatives joined the meeting, Picken said to the meeting that the purpose of the discussions was to assist Olex and Prysmian to improve their competitiveness (given their cable prices were approximately 10% higher than Electra’s prices). Picken did not believe he would have said this in the context of saying, nor did he say words to the effect of, “we need to agree on a cut-off below which they don’t go direct – but they need to be competitive and they need some guarantees” because, amongst other things, his state of mind at the time was the following:
	1. He was of the view that Rexel would not commit to buying any amount of electrical cable from Olex or Prysmian (whether that was the same amount or more) unless they committed to supplying their cable to Rexel at prices that were competitive with imported cable, and in particular, Electra’s prices, which were approximately 10% lower. Accordingly, it is probable that during this part of the meeting Picken said words to the effect of “they need to be competitive on price”.
	2. Picken recalls that, at some point during the meeting, Middendorp said that the Gemcell members could not cut cable above 25mm2 in many of their branches, and that any initiatives to be discussed with Olex and Prysmian should be limited to cable up to this size. But Picken did not recall any discussion of a dollar value “cut-off” for direct sales and he did not say anything about this at the meeting.

### Discussion while the Olex and Prysmian executives were present

1. After Moncrieff, Dunstan and Roberts joined the meeting, Picken recalls that Webb opened the meeting with the Olex and Prysmian representatives by saying words to the effect of “We’re here to explore how we can be better distributors for you”.
2. After that opening, Picken recalls there was a general discussion about duplication in the supply chain in the industry, the desirability of having trade price lists, and difficulties in the industry. There was also discussion about the competition that Olex and Prysmian were facing from importers. Moncrieff said that the “elephant in the room is Chinese imports” and expressed his concern that if Olex and Prysmian stopped supplying contractors and end-users, the wholesalers might supply them with cable imported from China rather than cable manufactured by Olex and Prysmian.
3. Picken recalls that during this part of the meeting, he asked Roberts a question with words to the effect of:

Are supply chain changes going to be enough if you’ve got significant costs like health and safety issues and R&D? There’s a lot of other overhead here that you have that an importer does not have. Have you done any modelling that suggests that just addressing supply chain costs will get you to the price level you need to be at?

1. Picken cannot recall Roberts’ response to his question, but he remembers feeling that Roberts had fobbed him off in his answer.
2. Picken also recalls Moncrieff saying during the meeting words to the effect of, “What you’re asking us to do is jump off a cliff without a parachute”. Picken remembers thinking, “Well, yes, I am.” This was because Picken considered that if the manufacturers did not improve their competitiveness they would be going out of business anyway, that is, if they continued to charge prices approximately 10% higher than Electra’s prices, they would continue to lose market share to importers like Electra.
3. Both Roberts and Moncrieff indicated that as part of any restructure they wanted some guarantees from the EWAA members. Moncrieff suggested that the EWAA put together a proposal for the manufacturers. He said that he wanted to know “[i]f we do X, what do we get in return”.
4. Picken recalls that there was a discussion about the electrical wholesalers performing some of the distribution function for Olex and Prysmian in order to improve the efficiency of the cable supply chain. During that discussion, the idea of limiting this to cable up to 25mm2 was suggested after Middendorp said words to the effect of, “We would not be able to play at that level [ie all cables], because we have a lot of small wholesalers, so let's do the stuff we have already got equipment for”. Picken believed that Middendorp was speaking for the Gemcell members generally when he said this, and not just for Middy’s. This was his understanding because he believed that some Middy’s branches were quite large and would have had the capability to cut larger cable, whereas the smaller Gemcell members would not have had this capability.
5. Picken also recalls that Moncrieff expressed concern about Olex relinquishing its supply chain.
6. Further, in Picken’s mind, Rexel could not agree to buy more cable (or even the same amount) from Olex or Prysmian without knowing the price they would charge for it. He also recalls that there was a discussion that if a new distribution model that involved using wholesalers as cable distributors did not ultimately result in prices to the end-users falling below that of importers, it would mean that the model was not successful in improving efficiency and lowering the cost of cable.
7. Picken recalls that there was a discussion about the general concept of the wholesalers placing larger orders with Olex and Prysmian in order to give them greater efficiencies in their supply chain. However, he does not recall a specific minimum value of $5,000 being discussed during the meeting.
8. Moncrieff’s version of events is the following. At the meeting, there was discussion about the supply of low cost cables imported from China and Olex’s anti-dumping action in respect of those imports. Moncrieff said that Chinese imports were “the elephant in the room”. Picken said that the issue was that the Chinese were low cost manufacturers and Olex and other Australian manufacturers were high cost. Moncrieff said that the wholesalers’ current business models were unsustainable, and that the wholesalers had to act as “wholesalers”. Roberts said that Prysmian was not profitable and that the cost of cable being imported from China was lower than Prysmian’s variable costs. The EWAA members made various statements during the meeting. Moncrieff recalls forming the view at the time that the EWAA members appeared to have different views about the matters being discussed. He recalls that he said that wholesalers needed to work out what they wanted and that the wholesalers should put their comments in writing to Olex.
9. Once Roberts, Dunstan and Moncrieff had left the meeting, there was a further discussion amongst the EWAA directors about the measures that they should propose to Olex and Prysmian. Picken recalls that Middendorp volunteered to circulate a draft proposal to the EWAA directors for comment regarding how the EWAA might take the matters discussed with Olex and Prysmian further. However, Picken did not believe that there was any discussion that each of the wholesalers had agreed to implement the points that Middendorp would include in the proposal. They had not seen the proposal. Further, Picken could not have agreed to implement anything unless Olex and Prysmian told him the price they would charge Rexel for cable. Absent that, if there had been a discussion to that effect, Picken would have firmly rejected any such commitment on the part of Rexel.
10. Let me draw some threads together at this point. The evidence does not support a conclusion that Roberts and Moncrieff agreed at this meeting that they should speak with the EWAA about supply chain restructure so that manufacturers only sell cable to wholesalers, and wholesalers then sell to contractors and end-users. The minutes refer to supply chain restructure excluding “high end business” and involving the manufacturers delivering product to the wholesalers “in bulk”. But this does not mean that the manufacturers would *only* supply product to the wholesalers. It meant that manufacturers would supply products to wholesalers more efficiently in larger order sizes. Now the minutes state that Moncrieff and Roberts “agreed” certain matters, but I accept Moncrieff’s evidence that the matters were merely discussed and that no agreement was reached about them at the meeting.
11. Now although Geddes attempted to record various statements made at the meeting by handwritten notes, those notes are disjointed. Moncrieff’s evidence was that the discussion was free flowing and from Moncrieff’s perspective uncoordinated, confusing and contradictory. Such evidence is consistent with Geddes’ handwritten notes. Indeed, the minutes of the meeting prepared by Geddes make no attempt to summarise the discussion. Moreover, no decisions were made at the meeting and more importantly the ACCC does not allege that at this meeting any contract, arrangement or understanding was reached. Nevertheless, it is relevant context for the events that followed.
12. Now there is little doubt that the wholesalers through the EWAA were desirous of industry restructure and had considered at any early stage in 2011 a market/customer “sharing” arrangement. They well knew of the manufacturers’ difficulties and were desirous of structural change. For example, see an internal email of Middendorp on 4 February 2011 which referred to the EWAA and noted:
* Key issues to be dealt with up fron[t] include:
* Set up of 3rd party credit bureau using NCI as the agency to co-ordinate – Guy sourcing proposal from them
* Cable identified as the key issue for the group which I was very pleased to get up as the number one issue.
* manufacturers (olex & prysmian) to be invited to a special meeting in early march to discuss the market situation
* neither mfr is making money presently and w/sale margins very poor
* structural change required with mfr’s to be encouraged to close some of their depots in favour of w’salers taking a more proactive approach with larger stocking/cutting facilities
* mfr’s to move away from some of the direct business and w’salers to support local manufacturers more
* no one wants the local mfr’s to scale down/shut their manufacturing which is a real possibility
* trade price list favoured by all and with EWAA & lex/prysman support we are confident that this can get up. Cu surcharge favoured also as any easy mechanism to reflect changes in cu price.

(errors original)

1. Indeed, early in 2011, some of the EWAA’s members appear to have asked “the cable suppliers to convert direct business back to the wholesale channel ‘in exchange’ for wholesale channel reducing their support of Chinese imports” (see the minutes of Gemcell’s directors’ meeting of 16 March 2011). There was also, I am prepared to accept, some awareness that this could potentially involve trade practices questions. Although the view seems to have been at the time that “[c]ollusion against customers is illegal but there is nothing to stop us acting in unison with suppliers” (see for example, Lamond’s email to Davis and others on 22 March 2011), there was some thought that there could be problems; see Vaughn Stephens’ response who expressed the problem in terms “that it is limiting our suppliers from servicing customers (contractors) directly which in turn, potentially changes the competitiveness of the market for the contractor”.
2. But where all of this takes the ACCC’s case is another matter. No doubt this is useful background context which the ACCC seeks to leverage off to make its principal case concerning the making of the relevant arrangement or understanding on 23 June 2011. But the subsequent course of events, particularly those closer to and on 23 June 2011, and which are more probative, do not make out the ACCC’s principal case. Let me continue with the chronology.

## (f) The EWAA’s proposal and the Geddes email

1. After the March 2011 meeting, on 9 March 2011, Middendorp sent an email to other wholesalers in the following terms referring to the previous day’s EWAA meeting:

Guys,

Pls find below details of the discussion at yesterday’s meeting:

* Objective is to being about structural change to cable distribution whereby wholesalers take a greater role in the distribution of cable to the contractor market. This is being done to eradicate inefficiencies with the current distribution model whereby there is significant duplication of facilities and inefficient practices in quoting & distribution.
* Wholesalers proposed to be the exclusive channel for all LV power cable to the contractor market.
* Suggested to tackle this objective in a staged approach whereby cables 25mm and below are worked upon initially with a view to encompassing all LV power cable over time.
* Under this proposal the manufacturers will:
* Make wholesalers the exclusive channel for sales of LV power cable up to & including 25mm.
* Only supply full pack quantities of these cables (ie: not cuts)
* Commit to keep wholesalers competitive in the market
* Not quote LV power cable up to & including 25mm (ie: wholesalers agreed day to day rates will apply). Quotes will still be done by manufacturers on cables 35mm and above. Quotes with combined quantities of <25mm cable & >35mm cable will only have the >35mm component quoted.
* Provide wholesalers who are supporting the local manufacturers with enhanced value added services and price differential on quotes (ie: LV power cables over 35mm). This enhanced service will only be available to supporting industry participants
* Develop an industry wide trade price list that is actively promoted in the market. This is designed to better communicate price changes in the market to contractors, builders and their clients. This price list to be varied by product category and to operate broadly between 40-60% discount from trade price to wholesaler net prices (before rebates).
* Under this proposal wholesalers will:
* Place orders on manufacturers for a minimum of $5k (ex GST) per order
* Commit to increase their relative share of locally manufactured cable by say 5% total market share
* Consider protecting local cable manufacturers by quarantining say 5% rebate on imported cable brands and distribute this back to branches based on their relative support of local cable manufacturers
* In order to provide effective information upon which to measure market shares of local vs. imported cable, information will be provided to an independent body (say a leading accounting firm) under confidentiality undertaking, that will aggregate the following information and provide relative market share information back to EWAA & the manufacturers:
* Wholesalers to advise of their dollar purchases by supplier
* Manufacturers to advise their dollar sales to wholesalers by customer

Other suggestions to manufacturers:

* Develop a common brand identity for locally made product which is trademarked and licenced for use on locally made cable only. This is designed to facilitate more awareness at user level and potentially facilitate broader marketing initiatives promoting the use of locally made product.

Nick, can you pls review the above to ensure that we are not transgressing any legal requirements.

EWAA Directors can you pls review and provide your feedback by email copying all. I suggest that member organisations agree their feedback and provide only one response from each organisation (ie: four in total). All comments to be in by Friday 25th March and our objective will be to get provide this information to the manufacturers by Thursday 31st of March.

1. Now this is a draft proposal from the *wholesalers*, rather than the manufacturers, and at most can only speak to the wholesalers’ purpose or more correctly their “wish list”.
2. On 21 March 2011, Lamond described the earlier EWAA meeting in terms:

Terry [Davis] and I attended an EWAA meeting earlier this month at which the structure of the cable market, concerns over the viability of local manufacturers and what to do about it were discussed. Olex and Prysmian attended the latter half of the meeting.

1. Between 23 and 24 March 2011, Picken communicated via email with Gemcell and Middy’s in regards to the proposed EWAA proposal.
2. On 23 March 2011 at 2.19pm, Picken sent an email to the directors of the EWAA and Geddes. In that email, he referred to an “agreement in principal [sic]” with Olex and Prysmian. Picken says he meant an agreement in principle with Olex and Prysmian to explore opportunities in relation to realising efficiencies in the electrical cable supply chain. Part of the email is in the following terms:

The only person we have spoken to is Olex and Prysmian. We have no ‘agreement in principal’ with anyone else.

My understanding is our motivation here is to support these two organisations who add more value than others to our industry as long as they rethink their distribution policies. RGA are certainly not supportive of taking the concept beyond those two suppliers unless we all have the opportunity to discuss and agree to it. This was not the decision of the last meeting as such shouldn’t be included.

1. On 25 March 2011, Lamond in an email on behalf of MMEM wrote to other wholesalers:

MMEM is supportive of the intent to streamline the industry to make distributors the primary supply channel and reduce manufactureres’ [sic] costs. For this to have any serious chance of success I think it is imperative that we expand discussions beyond just Olex and Prysmian as, without broader agreement, these two will be further disadvantaged by direct suppliers/importers.

Subject to the following two concerns, I am happy with Anton’s wording as an accurate summary of the discussion and think it clearly puts the ball into the manufacturers’ court to see whether or not they are serious about working with us to address their current difficulties.

1/ The thought to “Consider protecting local cable manufacturers by quarantining say 5% rebate on imported cable brands …” is not one MMEM is comfortable with from either a commercial viewpoint or a legal one – we’re concerned this may be flirting with ACCC guidelines.

2/ MMEM’s shareholders do not generally share business information so we not [sic] want to provide cable purchase information.

Also, I agree that a new trade price structure should include an adjustment mechanism based on copper price movements in A$.

1. Also on 25 March 2011, Haddon in an email on behalf of L&H wrote:

On behalf of the L and H Group we confirm that we are in general agreement with Anton’s notes regarding cable distribution with the following comments regarding wholesalers’ commitments.

1. An area that may need addressing is wholesaler’s commitments to grow relative share of locally manufactured cable by say 5% total market share. We believe that the manufacturers will ask for a more concrete commitment. An alternative proposal could be to negotiate individual targets with each of us, relative to our current individual spend level. Having said this we are happy to leave initial proposal as per Anton’s note and see what the response is.

2. Quarantining of rebate on imported cable should be a commercial decision of each individual wholesale member not a widely agreed condition of the EWAA.

1. Further, also on 25 March 2011, Wayne Sampson (MMEM) wrote internally:

Some comments re proposed initiatives:

> Generally the objective / desired outcomes re changing the market structure for cable would be good for the industry, ie more business through wholesale should be of great benefit to our side of the industry.

> A point for consideration re Cable Cutting:

- It’s possible that non-participating cable companies (eg. the importers) will see a benefit if they elect not to follow the lead of the others re “no cutting < 25sq mm”.

This may come about as many contractors will actively seek out avenues to purchase direct from a cable companies [sic] that still supply / cut cables < 25sq mm. Similarly some wholesalers will seek out cable companies that will still cut < 25sq mm (for the convenience & potential cost saving of not having to do it themselves).

The end result could a [sic] strengthening of the importers as some business may well shift to them (or they attract it using the <25mm direct selling / cutting service as a selling differentiator).

- It may be worth requesting some statistics from the cable companies re the number of < 25 sqmm cable cuts involved and their estimate of the true cost of performing this function (i.e. $ per cut). Although the plan would see these cuts spread over many wholesalers it could be a big step for many of the individual locations to take on this service (i.,e, stock / personnel – time / OH&S matters / equipment, etc).

> Brendan’s comment re changing discount structures is important as its [sic] a big task to change discount structures – although this may be alleviated via a specially written program which automatically changes discounts via our computer systems (this has been done before).

> Expect a reaction form [sic] the contractors re the structural change – many will see it as a move against them. It will need to be explained (i.e. sold) well. Note that when the cutting charges were introduced some years ago many contractors complained to the competition regulator which resulted in a formal investigation (which was ultimately unsuccessful).

1. On 28 March 2011 at 1.36pm, Middendorp sent Picken an email in which Middendorp proposed amendments to the EWAA’s proposal circulated on 9 March 2011. At 2.33pm, Picken replied to Middendorp’s email and said that the proposal still referred to “increasing purchases to locally manufactured suppliers not Prysmian and Olex” and that “[t]his was [not] the agreement and is not [Rexel’s] position”. Picken’s comment that “This was [not] the agreement” was a reference to the fact that the EWAA had only had discussions with Olex and Prysmian. At the time Picken thought that Middendorp was trying to advance a self-interest, because he suspected that Middendorp had an interest in Advance Cables. Further emails were exchanged between Picken and the EWAA directors and Geddes on 29 March 2011 regarding the wording of the EWAA’s proposal to put to the manufacturers.
2. Now stopping at this point, a number of observations can be made.
3. First, this material demonstrates that at this point, no relevant arrangement or understanding had been reached between the manufacturers and wholesalers. What was being discussed by the wholesalers was a proposal to be put.
4. Second, this material demonstrates if at all the then state of mind of the wholesalers, not the manufacturers.
5. Third, the relevant emphasis was upon *LV* power cable and not *all* power cable.
6. Fourth, the wholesalers were aware of the manufacturers’ concerns to make or achieve costs efficiencies.
7. Fifth, this material provides some contextual support for a suggested broader restructuring within which the ACCC has contended that the relevant arrangement or understanding was entered into or was the first preliminary step(s). I will return to this dimension later.
8. By 5 April 2011, the EWAA’s proposal was finalised and was sent by the EWAA’s secretary, Geddes, to Moncrieff and Roberts (the Geddes email). The stated objective of the proposal was “to bring about structural change to cable distribution whereby wholesalers take a greater role in the distribution of cable to the contractor market”. A number of steps were proposed to achieve this objective, which relevantly included the following:
	1. First, the manufacturers would make the wholesalers the “exclusive channel” for cable up to and including 25mm cable and would only supply “full pack quantities” of cable up to and including 25mm cable. A “full pack” of electrical cable is a standard length of cable, that is, one that has not been cut to a shorter length at the request of the customer.
	2. Second, the EWAA members would increase the size of their orders to at least $5,000 per order and would increase the proportion of Australian made cable that they acquired.
9. The Geddes email is in the following terms:

Further to our meeting earlier in the month EWAA have summarised the key initiatives that we see as a way forward for potential industry reform as follows:

* Objective is to bring about structural change to cable distribution whereby wholesalers take a greater role in the distribution of cable to the contractor market. This is being done to eradicate inefficiencies with the current distribution model whereby there is significant duplication of facilities and inefficient practices in quoting & distribution.
* Wholesalers proposed to be the exclusive channel for all LV power cable to the contractor market.
* Suggested to tackle this objective in a staged approach whereby cables 25mm and below are worked upon initially with a view to encompassing all LV power cable over time.

Under this proposal the Olex & Prysmian (the “manufacturers”) will:

* Make wholesalers the exclusive channel for sales of LV power cable up to & including 25mm.
* Only supply full pack quantities of these cables (ie: no cuts)
* Commit to keep wholesalers competitive in the market
* Not quote LV power cable up to & including 25mm (ie: wholesalers agreed day to day rates will apply). Quotes will still be done by manufacturers on cables 35mm and above. Quotes with combined quantities of <25mm cable & >35mm cable will only have the >35mm component quoted.
* Provide wholesalers who are supporting the manufacturers with enhanced value added services and price differential on quotes (ie: LV power cables over 35mm). This enhanced service will only be available to supporting industry participants
* Develop an industry wide trade price list that is actively promoted in the market. This is designed to better communicate price changes in the market to contractors, builders and their clients. This price list to be varied by product category and to operate broadly between 40-60% discount from trade price to wholesaler net prices (before rebates).

Under this proposal wholesalers will:

* Place orders on manufacturers for a minimum of $5K (ex GST) per order
* Commit to increase their relative share of Olex & Prysmian cable by say 5% total market share

Other suggestions to manufacturers:

* Develop a common brand identity for locally made product which is trademarked and licenced for use on locally made cable only. This is designed to facilitate more awareness at user level and potentially facilitate broader marketing initiatives promoting the use of locally made product.

As discussed each member of EWAA has reviewed and agreed the above initiatives and we no [sic] provide this framework to the key manufacturers for your feedback.

Our objective will be to have a jointly agreeable concept that can form the basis of further review and refinement that can be done by a smaller working group from each organisation. In order to maintain a timeframe around this project we would request that you have a response back to EWAA by the end of April 2011. Can you pls confirm that this timeframe is acceptable.

1. There are a number of important features to note.
2. First, it is strictly a proposal on behalf of the EWAA rather than any individual wholesaler, although it does say that “each member of EWAA has reviewed and agreed the above initiatives”. Relatedly, it is the EWAA’s “way forward for potential industry reform”, not the manufacturers’ proposal.
3. Second, there is recognition in the first dot point of the need to reduce inefficiencies, albeit referring to the distribution model.
4. Third, the reference to the wholesalers being the exclusive channel for sales to the contractor market was a reference only to sales of *LV cable*. One can compare this with the ACCC’s pleaded case in its various evolutionary stages which is not confined to LV cable. That is a further and significant flaw in the ACCC’s case.
5. Fourth, in the context of LV cable, the EWAA was requesting that the manufacturers “only supply full pack quantities of these cables (ie no cuts)”.
6. Fifth, the EWAA was suggesting that as the quid pro quo for the manufacturers, the wholesalers would:
	1. place minimum orders of $5000 (ex GST) per order; and
	2. commit to increase their relative share of Olex and Prysmian cable by say 5% total market share.
7. Pausing at this point, it would seem that:
	1. the wholesalers did not want the manufacturers doing the cutting on LV cable; and
	2. the manufacturers were perceived to want minimum orders.
8. These observations have relevance to the ACCC’s case as it finally evolved. I would also note that it is now established on the evidence that the commitment for the wholesalers to increase their share of purchases from the manufacturers was never carried forward. This partly also explains the belated evolution of the ACCC’s case on the alleged “support provision”, which I will describe in more detail later.

## (g) Picken’s views of the Geddes email

1. On 14 April 2011 at 9:07pm, Geddes sent Picken an email that included in the chain the Geddes email. Picken considered that the Geddes email merely proposed a framework for further discussions of measures to assist Olex and Prysmian to become more efficient and reduce their prices. Picken also considered that, once a general framework for discussions was established, it would then be up to each individual wholesaler to negotiate separately with each of Olex and Prysmian, and the initiatives outlined in the framework needed to be discussed in more detail between the manufacturers and the wholesalers individually. The email itself concluded by referring to the matters as a “framework” and by proposing individual working groups from each organisation. Picken understood that further discussions giving effect to the framework would be bilateral discussions between each wholesaler and each manufacturer. So far as Picken was concerned, a difficulty to overcome in those discussions was that, until Olex or Prysmian could offer pricing that was competitive to Electra, Picken could not agree to Rexel entering into any commitment to increase its purchases from Olex or Prysmian, or to maintain any level of business with Olex or Prysmian.
2. Further, according to Picken there was never any sense in which the EWAA could, or was going to, do a commercial deal with Olex and Prysmian on behalf of the members because:
	1. the EWAA was not a buying group, and each wholesaler’s distribution capability was vastly different;
	2. no price modelling had been proposed, and any commercial deals were a matter for each wholesaler business to negotiate separately with its suppliers; and
	3. from a commercial perspective, Picken was not prepared to allow the EWAA to enter into any arrangement which would commit Rexel to anything because he thought that Rexel, as one of the larger wholesalers represented, had the ability to negotiate better deals than might be negotiated by the EWAA. Picken wanted to preserve the ability of Rexel’s commercial team to negotiate deals which would give Rexel a competitive advantage over its competitors.
3. Picken was also not prepared to agree to Rexel entering into any arrangement with Olex or Prysmian, or committing to any level of purchasing, unless the manufacturers’ prices became competitive, which at the time meant that their prices would have needed to fall by approximately 10%. In Picken’s view, there was in any event no need for any commitment by Rexel because he considered that if a manufacturer provided Rexel with competitive prices, this would logically cause Rexel to purchase more from that manufacturer.
4. Picken considered that the matters that had been set out in the Geddes email were matters that, if taken up by Olex and Prysmian, could lead to lower prices, which, if competitive, could lead to more orders being placed by Rexel with those manufacturers. However, if those suggestions were not taken up by the manufacturers or did not lead to lower prices, they would not assist them in obtaining increased business, and would not have caused Rexel to increase its cable purchases from Olex or Prysmian in the absence of more competitive prices. Picken therefore considered that it was really up to Olex and Prysmian as to whether they decided to adopt what had been proposed, which if adopted, might lead to greater efficiencies and lower prices.
5. Alternatively, if Olex and Prysmian could have generated costs savings by other means, and if those led to lower prices that were competitive, that would also have led to Rexel purchasing more cable from those manufacturers. However, Picken would not have committed Rexel to buying more (or buying at any level) until he saw what the lower prices were going to be.
6. Although the Geddes email referred to a commitment by the wholesalers to increase the relative share of locally manufactured cable by, say, 5% of total market share, the proposal also referred to a commitment by Olex and Prysmian to keep the wholesalers competitive in the market. Picken considered that these issues would have to be dealt with in further detail in bilateral negotiations between Rexel and Olex or Prysmian.

## (h) Olex’s response to the wholesalers’ proposal and Geddes email

1. On 5 April 2011, Moncrieff received the Geddes email.
2. Dunstan in an internal email on 5 April 2011 at 8.48pm to Stack stated:

Further to my earlier note forwarding same, can you pls discuss this concept with Craig, Travis and David to gather their reaction/thoughts. The market share gain comment of 5% I don’t properly understand – perhaps there is some issue with stating other comments (ie removing a competitor!) In such emails.

My other thought is we charge a large fee for quotes under the threshold agreed (on premise we often don’t know value until quote is done).

1. Further, at 9.41pm on 5 April 2011, Dunstan sent an email to Moncrieff in the following terms:

5% increase in share is interesting. I guess (and hope) this results from having to be careful about what is put into print!

I have passed this onto Greg Stack for him to discuss with the regional guys and gather feedback for our review next week.

1. On 6 April 2011, David Gameau of Olex circulated some discussion points for the EWAA proposal outlined in the Geddes email. It included the following:

Replacement sales and margin from the Major Contractor segment

* Over time the EWAA proposal would likely see all LV cable move to wholesalers, and therefore reduce the margins and volumes of Olex in the contractor segment.
* The risk is real because the above mentioned loss of key relationships with contactors (assuming Olex would have to lose 5 Contractor Account Managers in the states to combat the loss of CM when selling to wholesalers instead of direct).
* A loss in contractor sales and CM for Olex will also result from Olex being shopped off against other cheaper competitors that wholesalers can source, as wholesalers strategy to major contractors is unlikely to change from their current “sell on price” culture.
* Subject to financial modelling being done on the extra 5% market share that EWAA are proposing, it seems unlikely that the wholesalers will be able to pass on this extra 5% market share without Olex dropping our CM return to wholesalers … otherwise, why aren’t we growing with them now??
* And does the 5% growth target include the contractor business that we are being asked to pass over to them? If it does, then we have gained nothing. If it is additional market share above the major contractors business, how can we ever measure it?

Irreversible Strategy

* If the strategy proposed by the EWAA does not work financially for Olex, we will be in a position that will not be possible to reverse and go back to a direct business strategy for the following reasons.

1. The wholesalers will threaten to reduce/remove our stock in their 1500 branches

2. The Olex Contractor Account Managers will either have been made redundant or moved on due to frustration with losing the direct link with contractors and the experience/relationships will be difficult to start up again with the major contractors.

Min Order Value may work against us

* The proposal to have a $5k minimum order value for Olex sounds beneficial, but individual branch managers will place less than $5k orders with other suppliers (Electra / Advanced / General) that do not have this stipulation on them.

The risk of non EWAA members

* What is to stop non EWAA wholesalers from sourcing cable from outside Olex/Prysmian and putting together a major contractor Account Management team and going up against EWAA/Olex/Prysmian to major contractors

Advanced or other cable manufacturers?

* Is there any guarantee that this proposal will be exclusive to Olex/Prysm. How does Aussie made Advanced feel about this proposal? Will this leave the door open for Middys/Advanced to attack the contractor market direct?

Summary

* There needs to be more upside for Olex than a non measurable 5% market share hand over, and a potential trading restraint of min $5k orders.
* We need action points that will see all EWAA members ridding themselves (or at very least reducing their stock holdings) of Electra from their shelves, in return for this proposal.
* I agree that an “Aussie made” campaign funded by Olex/Prysmian and possibly Advanced and supported by EWAA members would be a positive move, but will only have a financial gain for Olex if it is backed with an Electra stock reducing campaign.
1. On 11 April 2011, Dunstan circulated internally his response to the EWAA proposal (Proposals 1, 2, 3, 4a and 8):

**Proposal 1**

Make the Wholesalers the exclusive channel for sales of LV power cable up to and including 25mm2

**Olex Response**

* Agreed where exclusivity relates to the ‘Building Sector’ market (not ‘Utility’ or ‘large Resource’ Projects)
* There should be a ‘carve’ out where the predominant products on a quote/inquiry are products outside this criteria (eg 75-80%) which would render it impractical (and at odds with the intent of creating a more efficient distribution model) to split the inquiry into two supply sources.

**Proposal 2**

Only supply full pack quantities of these cables (ie LV power cables <= 25mm2)

**Olex Response**

* Agreed when supplying distributors
* To support this revised approach, the ‘cut service fee’ should be increased to cover the true cost of cutting to non distributors (TBD, but say $75/cut)

**Proposal 3**

Commit to keep wholesalers competitive in the market

**Olex Response**

* Olex will provide competitive pricing in line with market. It will remain the role of the wholesaler to continue to demonstrate its value add to the end user.

**Proposal 4a**

Manufacturers not to quote LV power cable <= 25mm2.

**Olex Response**

* Agree not to quote LV power cable <= 25mm2 if the quote/inquiry is only for product under this size

[…]

**Proposal 8**

Distributors will commit to increase their relative share of Olex and Prysmian cable by say 5% total market share

**Olex Response**

* Whilst the principal [sic] of the proposal is agreed, the value of increased share will need to be agreed by each of the members with Olex (and Prysmian) separately to ensure acceptance
* Preferable, the proposal here could be better worded to note that the EWAA agree to increase their percentage of ‘Australian made’ LV power cable products by an agreed sum (eg 60% to 80% ?). This could then be reviewed quarterly by the EWAA members providing data to an independent source who can then provide that aggregated data back to Olex (and Prysmian) for review and confirmation that the cable reform initiative(s) are on track
1. A number of observations may be made concerning Olex’s draft response.
2. First, exclusivity was to be confined to a *sub-set* of sales of LV cable up to and including 25mm2. There was to be carve outs. Moreover, “utility” and “large resource” projects were to be excluded.
3. Second, in relation to the “non-cutting” proposal, not only was it to be confined to LV cables equal to or less than 25mm2, but it was confined to supplying distributors. It was not saying this for end-users. Further and importantly, the “cut service fee” increase was *to cover the true cost of cutting to non-distributors*. In other words, this supports Olex’s case that the fee was not for diversionary purposes but rather to cover the true cost.
4. Third, and generally, it is well apparent that Olex was retaining for itself the trade with end-users, particularly significant or large end-users.
5. Moncrieff was in Europe on holidays during the first week of April 2011 after having attended the Nexans Management Convention at the end of March 2011 in Sitges, Spain. On or about 12 April 2011, Moncrieff arrived back in Australia.
6. Moncrieff felt that it was important that Olex respond to the Geddes email from a customer-relations perspective as the EWAA members represented a significant part of Olex’s business. He also viewed Olex’s response to the Geddes email as being part of Olex’s ongoing engagement with wholesalers on supply chain strategies. To his mind, the EWAA was not a forum through which any agreement could be reached with individual wholesalers. His view was that the wholesalers had different businesses and agendas, and any agreement with them would need to be separately negotiated and documented.
7. While the Geddes email asked Olex to provide a response by the end of April 2011, Moncrieff wanted further time to work on Olex’s response before it was submitted. On 14 April 2011, he sent an email to Geddes requesting that the response date be moved to the end of May 2011.
8. There were further iterations of Olex’s draft response. For example, on 21 April 2011 Dunstan circulated a further draft which is notable in various respects.
9. First, exclusivity was couched in terms that “the EWAA will be the ‘preferred’ channel to market” for LV cable up to and including 25mm2.
10. Second, in terms of cutting, the following was stated:

Olex will only supply full quantities of LV Cable to the market. It will be the responsibility of the EWAA members to invest in facilities to enable them to effectively cut and distribute this power cable range to its customers.

Olex will continue to provide a cut to length service for such cables to non-Wholesale custom [sic], where such custom [sic] continues to choose to buy direct from a manufacturer. This cut to length service will be costed on a true ‘fee for service’ scale, based upon the time and effort involved in cutting the particular cable requested. Indicatively, it is expected such fee for service charges will be in the range of $50 to $100 per cut.

1. In other words, the increase in the cutting fee was all about cost recovery, as Moncrieff said repeatedly in his evidence. The ACCC in the presentation of its case always sought to downplay or ignore such a motivation on the part of Olex in a manner that was less than convincing.
2. In relation to the MOV, the following was said:

Olex will implement a tiered Minimum Order Value (MOV).

Orders received over AUD 10,000 (ex GST) will be processed free of charge. Orders received with a value between AUD 5,000 and 10,000 will incur a processing fee of $100. Orders below AUD 5,000 will incur a processing fee of $250.

All orders will be processed as received. Charges for orders which fall below the MOV will be added to the invoice.

1. Indeed, it seems to me that Olex’s proposal for a MOV was also all about it achieving economic or cost efficiencies.
2. By May 2011, Olex’s response to the Geddes email was well developed and Moncrieff decided that Olex should discuss its proposed response separately with each of the individual wholesalers. His primary purpose in doing so was from a customer-relations perspective. He wanted to ensure that each of Olex’s wholesaler customers understood what Olex was going to propose in its response before the response was sent formally to the EWAA. Moncrieff also intended to take into account any feedback given to it by its customers before finalising the response to the Geddes email.
3. In May 2011, Olex engaged in a series of written communications, telephone calls and meetings with each of the EWAA members to discuss and gain support for its draft response.
4. On 4 May 2011, Moncrieff received a copy of an email Dunstan sent to Hanlon with a copy of Olex’s draft response to the Geddes email. Moncrieff received an email update from Dunstan which stated that L&H supported Olex’s draft response.
5. Also on 4 May 2011, Moncrieff received a copy of an email sent by Dunstan to Middendorp attaching Olex’s draft response. Later that day, he received an email from Dunstan informing him that Middendorp and Murphy were available to meet at 11:30am on 6 May 2011 at the Windsor Hotel in Melbourne. Moncrieff did not attend this meeting. Olex’s draft response was also sent to Middendorp.
6. Further modifications to Olex’s draft response were made. A significant change was made in relation to cutting. But the same cost recovery justification is well apparent. The relevant paragraph provided:

During a period of transition (to be determined) Olex will continue to provide a cut to length service for such cables, where such custom [sic] continues to choose to buy direct from a manufacturer. This cut to length service will be costed on a true ‘fee for service’ scale, based upon the time and effort involved in cutting the particular cable requested. Indicatively, it is expected such fee for service charges will be in the range of $75 to $150 per cut.

1. There were some trade practices concerns within Olex, but it seems to have related to potential collusion between Olex and Prysmian. At all events, on 9 May 2011, Andrew Davenport (Commercial Manager) in an email to Dunstan said:

Confirming our discussion today – the response should not be shared with other cable manufacturers as initiative 5 contains pricing model changes which should be disclosed to the market first. I also suggest that the proposed working group has an agreed agenda prior to the meeting taking place.

1. I should say at this point that Olex’s proposal was not at any stage given by Olex to Prysmian. This reflects a fundamental difficulty with the ACCC’s case generally. There was no evidence of any collusion between Olex and Prysmain prior to 23 June 2011.
2. On 11 May 2011, Dunstan sent Davis Olex’s draft response to the Geddes email and a document containing data regarding the median and average quote and sales figures for the supply by Olex of its products to MMEM. Dunstan described the document as containing “some data on the order and quotation activity between ourselves and MMEM for 2011 YTD”.
3. Also on 11 May 2011, Dunstan sent an email to Edgar attaching Olex’s draft response to the Geddes email and a document containing data regarding the median and average quote and sales figures for the supply by Olex of its products to Rexel. Moncrieff received a blind copy of that email. Later that day, Edgar forwarded to Picken the email he had earlier received from Dunstan.
4. When he read Olex’s draft response to the Geddes email, Picken recalls thinking that Olex’s proposals were well considered and that they were potentially viable. Picken thought that if Olex adopted its proposals, it could lead to greater efficiencies, which could lead to lower costs, but the success of these initiatives depended on the extent to which Olex would be able to reduce its costs so that its prices could be at a level competitive with Electra. At that time, that remained to be seen. Picken also recalls thinking that he did not like the reference above “Initiative 1” to “Australian domestic power cable manufacturers”, because he thought the EWAA was only exploring working with Olex and Prysmian.
5. Olex’s draft response to the EWAA stated that implementing the initiatives contained in the proposal was contingent on the EWAA members sourcing 75% of their LV cable requirements from the Australian domestic power cable manufacturers. As well as not liking the reference to “Australian domestic power cable manufacturers”, Picken considered that this aspect of the draft response put the issue the wrong way round, in that if Olex adopted its proposals and allowed it to reduce its prices to a level competitive with Electra, Olex could then benefit from significantly more orders. But in his view, this all depended on the cable pricing to be offered by Olex.
6. Picken considered that the initiatives set out in Olex’s draft response were matters that Olex could adopt unilaterally and that if they led to competitive prices, it would result in Olex obtaining more business. However, Picken was not prepared to commit Rexel to maintaining or increasing its purchases from Olex unless and until Olex offered competitive pricing.
7. Picken also considered that any commitments from Rexel would only be forthcoming following detailed bilateral discussions with Olex and until competitive analyses had been conducted by Rexel. For instance, the bilateral agreement that Rexel ultimately entered into with Olex only occurred after Rexel had performed detailed modelling of how Olex’s proposed prices would affect Rexel’s working capital and margins on a number of projects that had been recently completed at that time.
8. Picken also believed that this was the first time that he became aware that Olex was raising the prospect of increasing cutting fees or introducing a MOV fee. Picken was not concerned about such a prospect because of the following reasons.
9. First, Picken considered that those fees would represent a small component (ie 1%) of Rexel’s total cable spend. Further, Picken believed that the MOV fees were even less significant than cutting fees.
10. Second, Picken considered that it made sense that Olex would increase its cutting fee if it was not currently covering its costs of supplying cut to length cable.
11. Third, charging the real cost of supplying small lengths of cable would lead wholesalers to consider buying in bulk because the costs involved in ordering small lengths of cable would no longer be subsidised by the manufacturers to the extent they had done previously. Picken believed that this could lead to more efficient ordering practices at the branch level by wholesalers, which would reduce manufacturer overheads and lead to lower cable prices.
12. Fourth, in any event, given that Olex was approximately 10% more expensive than Electra, Picken considered that unless this strategy enabled Olex to lower its overall cable prices, Rexel would not continue to purchase from Olex in the longer term and Olex would have to abandon this strategy and try something else. If the cost savings achieved by Olex were not passed onto Rexel, Rexel would gain no benefit from the implementation of the strategy, and Olex would be financially worse off by raising fees when it was already uncompetitive.
13. Fifth, Rexel at the time was intending to implement distribution centres, so Picken did not expect that Rexel would pay the increased cutting fees or MOV fees under its business model anyway. Rather, Picken thought that an increased cutting fee could give Rexel a minor competitive advantage over other electrical wholesalers, including other members of the EWAA, because Rexel would not have to pay the increased cable cutting charge whereas other wholesalers who did not have distribution centres would be more exposed to the charges.
14. Picken viewed Olex’s proposals as an intention by Olex to lead to greater efficiencies and practices which would enable Olex to reduce its prices. However, if the proposals did not have that effect, and given that Olex was proposing fee increases, they would simply result in Olex’s prices being higher than they already were in an environment where Olex was already uncompetitive. That would have meant that Rexel’s purchases from Olex would have continued to decline, and likely at a faster rate of decline. Accordingly, if Olex’s initiatives did not lead to lower prices, then there would be no benefit to Olex in terms of increased business.
15. On 17 May 2011, Edgar and Picken had dinner with Moncrieff and Dunstan at Rockpool Bar and Grill in Sydney. At this meeting they discussed Dunstan’s email of 11 May 2011 to Edgar, which attached a document containing data with the median and average quote and sales figures for the supply by Olex of its products to Rexel. The purpose in providing this data to Rexel was to explain the MOV fee which Olex was proposing in its response to the Geddes email. Picken recalls that Moncrieff talked a lot about Olex’s cost base and cost drivers, and the sources of inefficiency in Olex’s business. One of those sources of inefficiency was the amount of small orders (as distinct from cable cuts) that Rexel had been placing with Olex to date.
16. On 19 May 2011, Moncrieff had breakfast with Davis and Lamond at the Radisson Blu Plaza Hotel in Sydney. At this meeting they discussed a document containing data regarding the median and average quote and sales figures for the supply by Olex of its products to MMEM. Moncrieff understood that Dunstan sent this document to Davis in advance of the meeting, together with Olex’s draft response to the Geddes email. The document showed the median sales value for MMEM. Davis or Lamond said that they were not surprised with the figures provided to them and that the MOV and cutting fee should be much higher.
17. On 19 May 2011, Dunstan internally circulated an email stating, inter alia:

We have now completed our discussions with each of the 4 major wholesaler groups on the topic of LV Cable reform. There is resounding agreement to the proposals contained within the draft document by each of the recipients.

I have called a meeting tomorrow morning with you both (albeit brief, due to other commitments [sic]) – this was to be the meeting I had hoped to have yesterday – to discuss how we should structure Inside sales to support that model. It is clear that the current model of servicing cannot be sustained if our Building business is to survive, because the customers are not paying for that value add as they used to, nor are they willing to.

In my view, the model that we need to move toward as quickly as we can if agreement is reached with the EWAA is a structure that is right-sized for the order/quote level moving forward, but also geared towards the customer groups specifically (L&H, Rexel, MMEM, selected Gemcell members), incorporating a high level of outbound marketing and sales support/quotation follow up activity. The understanding I have from discussions with Gemcell and MMEM is that others are reverting to that approach.

1. By mid-May 2011, Moncrieff was aware that Olex had received feedback from the wholesalers in response to its draft response to the Geddes email which was to the effect that they wanted more certainty about the proposed increased cutting fee. To this end, Moncrieff asked Dunstan to arrange for some analysis to be done on the cost of providing the cable cutting service. Olex’s analysis indicated that its average costs per cut were approximately XXXX several multiples above its existing cutting fee. On 19 May 2011, Moncrieff received a copy of an email from Dunstan to Hueber in which he asked Hueber to give some thought to how the cutting fee should be presented to the EWAA.
2. As a result of Olex’s discussions with wholesalers, specifically Gemcell, aspects of Olex’s draft response became known to Prysmian. An internal Prysmian email of 20 May 2011 records that Gemcell showed Olex’s draft response to Prysmian and the email notes aspects of Olex’s response although not in relation to cutting fees. Olex was unaware of this.
3. Olex was concerned with cost recovery for value added services such as cutting. Cost recovery issues were to the fore on 25 May 2011 when Stack wrote in an email to Dunstan:

Can we discuss before implementing any changes. There is an obvious underlying need to increase cutting charges (as well as not offer cut to length on certain lines) however these changes will have a different impact for the contractors as opposed to the wholesalers.

This issue runs parallel with the LV cable reform proposal and is crucial for our ongoing success. Am I right that we are discussing this in more detail on the 9th of June? If so we should table cutting charge reform at the same time.

Happy to discuss my thoughts further

1. Indeed, there are two points. First, the cable reform was perceived to concern *LV* cable. Second, further cutting charge reform was seen as being in one sense a free standing question. For completeness, Dunstan in a return email expressed concern at that stage about moving unilaterally.
2. On 25 May 2011, Moncrieff received an email from Hueber giving the results of the cutting fee analysis undertaken by Philip O’Keefe, Olex’s National Logistics Manager. This email stated that Olex’s average cost per cut was significantly more than Olex’s existing cutting fee. Hueber also reported that the analysis found that the cost of cutting cables below 20mm2 was XXX per cut and above 20mm2 was XXX per cut. Hueber went on to suggest that the cutting fee for cables below 20mm2 be set at XXX per cut and for cables above 20mm2 be set at XXX per cut. In his email of 25 May 2011, Hueber also reported that a majority of Olex’s customers were not being charged a cutting fee.
3. On 26 May 2011, Dunstan sent Geddes (copying in Moncrieff) Olex’s response to the Geddes email (the Olex Response). The Olex Response was largely identical to the draft Olex response which had already been circulated and discussed with individual wholesalers. On 26 May 2011 at 3:28pm, Picken received an email from Geddes that attached the Olex Response. The Olex Response was similar to the draft proposal that Dunstan had sent Edgar on 11 May 2011 and which had been forwarded to Picken by Edgar on that date. The MOV aspect was as set out above. Following feedback from wholesalers, there was an amendment to initiative 1 to change the value of the proposed increased cutting fee to the range of $70 (up to and including 25mm2) to $100 (over 25mm2). The cutting fee aspect was expressed in the Olex Response as follows:

Olex will only supply full pack quantities of LV Power Cable to the market. It will be the responsibility of the electrical wholesalers to invest in facilities to enable them to effectively cut and distribute this power cable range to its customers.

During a period of transition (to be determined) Olex will continue to provide a cut to length service for such cables, where such custom continues to choose to buy direct from a manufacturer. This cut to length service will be costed on a true ‘fee for service’ scale, based upon the time and effort involved in cutting the particular cable requested. Indicatively, it is expected such fee for service charges will be in the range of $70 (product up to and including 25mm2) to $100 (product above 25mm2) per cut.

1. The Olex Response contained an opening statement and various “initiatives”. The opening statement stated that implementing the “initiatives” was contingent on the wholesalers acquiring 75% of their cable from Australian domestic manufacturers. Moncrieff had no expectation that the wholesalers would or could agree to this. Rather, this was included to make clear to the wholesalers that it was important to Olex that they supported Olex as an Australian manufacturer. The “initiatives” set out in the Olex Response were designed to reduce Olex’s high cost-to-serve and implement supply chain efficiency, which would enable the EWAA wholesalers to be the lowest cost channel to market for the Australian domestic cable manufacturers.
2. Moncrieff has provided evidence of the following:
	1. Initiative 1 (which involved Olex phasing out cutting services by supplying only full packs of cable and increasing its cutting fee in the meantime) was designed to decrease Olex’s high cost-to-serve by reducing the number of orders and improving delivery performance and by moving Olex’s cutting fee closer to its actual cost of providing cutting to customers.
	2. Initiative 2 (which involved the manufacturers becoming Olex’s “preferred” supplier for LV cable) reflected Moncrieff’s view that it was not economic for Olex to supply cable to all small buyers and the lowest cost route to market for Olex in respect of many small buyers was through the wholesalers. It was not Moncrieff’s intention that Olex would only supply cable to wholesalers, ie exclusively.
	3. Initiative 3 (which involved Olex’s quotation process) was designed to reduce Olex’s cost-to-serve and increase efficiencies. Upon Moncrieff’s arrival at Olex, he recognised that Olex was generating a significant number of quotes, often for very small jobs. Moncrieff also observed that Olex was not able to quote within a reasonable timeframe, and customers would take their orders elsewhere. This initiative was aimed at ensuring that Olex would focus on larger quotes, with the small value jobs being supplied through the wholesalers at a lower cost-to-serve for Olex.
	4. Initiative 4 responded to the suggestion in the Geddes email that manufacturers should develop an industry wide price list. This initiative restated Olex’s “business as usual” approach to trade price lists. Olex was already publishing a trade price list which provided a sufficient basis to help downstream wholesalers and other customers keep track of movements in cable prices that reflected things such as movements in copper prices and the value of the Australian dollar.
	5. Initiative 5 (which involved a MOV fee) was another initiative aimed at reducing Olex’s cost-to-serve and increasing efficiencies by encouraging our customers to increase their order sizes. When Moncrieff arrived at Olex, he observed that there were no rules and strategy as to how Olex sold and distributed its product to the market. He wanted to implement an increased MOV fee in order to increase the average order size, thereby reducing administration in accounts receivable, customer service, order planning and transport optimisation.
	6. Initiative 6 reflected many of the principles of supply chain reform that Moncrieff considered were important to Olex. His intention was that Olex would use these principles to tailor supply chain changes which met each wholesaler’s individual needs and would be pursued in discussions with individual wholesalers.
	7. Initiative 7, which related to marketing initiatives, was aimed at highlighting the fact that Olex’s products were manufactured in Australia. In turn, wholesalers and contractors that sourced Olex products could highlight to end-users that the cables were Australian made.
3. On or about 30 May 2011, Moncrieff spoke to Webb who asked him to keep 23 June 2011 free so that Olex could attend the next EWAA meeting. Moncrieff sent an email to Dunstan informing him of that conversation with Webb.
4. On or about 10 June 2011, Moncrieff spoke to Webb who confirmed that the EWAA meeting would take place at the Conrad Treasury Hotel in Brisbane on 23 June 2011 and that the cable manufacturers were invited to attend. Moncrieff told Webb that he and Dunstan would be attending the meeting.
5. It is worth interpolating at this point some observations about the ACCC’s final case thesis concerning the cutting charge increase.
6. The ACCC has suggested that the cutting charge increase proposed by Olex in its proposal to the EWAA was an initiative that was sought by the wholesalers for their benefit, or a transitional step to bring about a situation in which Olex would no longer supply cut cable.
7. But Picken said that he did not seek an increased cutting charge at any time. Nor did he propose it at any time. He also did not hear any other wholesaler representative at an EWAA meeting, or in any other context, propose an increase in the cutting charge, nor did he understand that to be sought by any other wholesaler representative. In my view, none of that evidence was undermined by the ACCC’s cross-examination.
8. When Picken saw a cutting charge increase proposed by Olex at this time, he did not consider that it was equivalent to, or a step along the path towards, the matters recorded in the Geddes email, namely, that Olex would supply full pack quantities only, or not cut cable. Nor did he consider that it would bring about that result. He understood that Olex’s proposal to increase the cutting charge was to enable more rational cost recovery, but in an environment where Olex would continue to cut cable and continue to supply cable in less than full packs. Picken considered that to be very different from a proposal to cease cutting cable and to supply cable in full packs only. Again, the ACCC’s cross-examination hardly disturbed the force of that evidence.
9. The ACCC has suggested that from a wholesaler perspective, a cutting charge would be viewed as directed towards reducing direct supply by manufacturers and therefore reducing competition between a relevant manufacturer and a wholesaler. But there are commerciality type difficulties with this suggestion:
	1. First, a cutting charge was only a very small component of the overall cost of cable and therefore unlikely to change customers’ decisions about their source of cable supply. Further, a customer’s purchasing decision depended on the overall price of cable, and not the cutting charge. Olex might take into account any increased cutting charge by reducing the price it charged for the cable itself. If Olex did not do that, then the cutting charge had the potential to be commercially damaging to Olex. It would simply be a price rise in circumstances where Olex may already have been uncompetitive. Whether a direct customer continued to purchase from Olex would therefore depend upon whether Olex’s overall proposal to that customer was attractive.
	2. Second, if a cutting charge was seen by direct customers as a significant cost, then a direct customer could always undertake the cutting of the cable itself, and avoid the charge. Customers large enough to buy direct from Olex typically had the ability to cut cable themselves and therefore could order standard lengths to avoid the cutting fees. Such customers frequently did so. In any event, any cutting fees charged to these customers for large projects would be a very small proportion of the overall cost of cable, in circumstances where Olex would be negotiating its prices to ensure that its overall cost of cable was competitive.

## (i) Prysmian’s response to the Geddes email

1. Let me now address Prysmian’s response to the Geddes email. By way of background, I would note that on 30 March 2011 Roberts emailed Shroff and Haller noting that the Prysmian “cannot compete on price or on commercial conditions” and that the “situation is critical”. He proposed that Prysmian continue working with the EWAA to restructure the industry, but noted his reservations about working with the wholesalers. He said relevantly:

Given that the progress is going to be slow with a number of the Wholesalers (particularly MMEM), let’s run with Rexel in order develop the model [sic]. I’m not sure how its [sic] going to work if only Rexel adopt this strategy, we will have to move forward and make it up as we go!

1. When Roberts received the Geddes email on 5 April 2011, he sent it to Haller, Shroff and Klarich for their consideration. He observed that the proposal might not be perfect in its current form, but considered that it was a step forward that they were now discussing industry reform.
2. Between 7 to 8 April 2011, Prysmian discussed some proposed draft trading terms for 2011 to 2012, which included increasing the cutting charge “in line with the planned market increase to be rolled out effective 1st July” and a minimum order value. It was discussed that any trading terms would need to be “consistent” and “supportive” of the wholesalers’ proposal.
3. In the meantime, Prysmian continued its bilateral discussions with Rexel about a possible “strategic partnership”. During a meeting on 14 April 2011 between representatives of Rexel and Prysmian, Haller delivered a presentation by reference to slides which described the proposed partnership as a “type of cooperative strategy in which corporate alliances are made between organizations, including between former rivals”. As part of the proposed partnership, certain customers would be “re-channelled” so that they would buy cable manufactured by Prysmian from Rexel rather than directly from Prysmian. Prysmian would also wind back some of the services that it supplied to the market such as cutting electrical cable and Rexel would take over the provision of those services.
4. On 18 April 2011, Brochut sent an email to Haller, Shroff, Alderson and others in relation to the Geddes email. In the context of the proposed Rexel/Prysmian strategic partnership, Brochut noted that regarding the MOV and the cutting services, Rexel and Prysmian “need to work on a target with progressive implementation in line with our charge of Business Model”. She then noted that Rexel and Prysmian’s discussions are “part of broader discussions happening at the Industry level”.
5. On 19 April 2011, Shroff circulated internally an internal presentation about industry restructure. Under the heading, “Australia: T&I Medium-Term Actions”, it was stated that Prysmian would “[c]ontinue working with the Electrical Wholesale Association (EWA) in order to change the business model”.
6. Later that day, Shroff sent an email to the Electrolink Group attaching Prysmian’s proposed trading terms for 2011 to 2012. Shroff noted that Prysmian was working in conjunction with the EWAA and that the cutting charge and minimum order value were “under review”, and that they expected the values to “change/increase 2 to 3 times over the next 12 months”.
7. During the course of April and May 2011, Prysmian had various internal discussions about the proposed framework for a strategic partnership with Rexel. There were also bilateral discussions regarding the same between Alderson and Haller/Shroff during this period.
8. As I have already intimated, on 19 May 2011, Shroff was shown a copy of the draft Olex Response by representatives of Gemcell at a meeting between Prysmian and Gemcell. He later sent an email to Roberts and others setting out some of the details of the draft Olex Response. As I have said though, there was no collusion between Olex and Prysmian.
9. Shroff subsequently prepared Prysmian’s response to the Geddes email. It was finalised on 24 May 2011 and sent to the EWAA on 25 May 2011 (the Prysmian response). The Prysmian response set out a series of proposed measures including the following:
	1. First, reducing the level of services for LV cable which would involve redirecting this business to wholesalers that had appropriate storage and cutting facilities, and which could add value to the supply chain.
	2. Second, supplying only full packs of 25mm LV cable and increasing cutting fees for other types of cable (it had a cutting fee of $35 at the time); those fees would increase from $50 on 1 July 2011 to $100 on 1 October 2011 then $150 on 1 January 2012.
	3. Third, introducing the MOV fees; there was to be a staggered introduction of the MOV fees until 1 January 2012; after that time, the same fees as those proposed by Olex would apply.
10. The Prysmian response also stated that the EWAA members would need to commit a significant share of their total cable spend to local manufacturers and that local manufacturers’ share of sales would need to grow.
11. The Prysmian response is in the following terms:

Following the meeting with EWAA in March and your email of 5th April ’11 summarising the key points, herewith please find Prysmian’s proposal to bring reform and structure into the LV cable market.

We would like to propose the following initiatives towards achieving the end goal:

Improve supply chain efficiencies:

* Form a Cable Working Group under the EWAA charter to map the existing supply chain, identify inefficiencies, duplications, and recommend improvements.
* Manufacturers to reduce the level of services for standard LV cables over the next 3 years. This includes a full review of the manufacturer’s stock profile, stock levels, cuttable range and redirect this business to Wholesalers that are able to provide these services and add value to the supply chain.
* We will increase the range of non-cuttable items to ≤ 25sqmm standard LV Cables. In principle, we would supply these in standard drums lengths of 500m, 1000m, or 2000m both to wholesalers as well as the commercial contractors.
* Manufacturer’s to increase Minimum Order Value (MOV) in the following gradual steps:
* $1,000 per order from 1st July ’11; orders received below $1,000 would incur a processing fee of $250 per order
* $5,000 per order from 1st October ’11; orders received below $5,000 would incur a processing fee of $250 per order
* $10,000 per order from 1st January 2012; orders between $5,000 and $10,000 would incur a processing fee of $150 per order (whilst below $5,000 would remain as $250 per order).
* The other aspect is to reduce the transactional activity and the associated high cost to serve. For this we propose to implement a Minimum Quote value in conjunction with the above MOV:
* $1,000 from 1st July ‘11
* $5,000 from 1st Oct ‘11
* $10,000 from 1st Jan ‘12

[…]

* Review cutting charge as today it is significantly below the Manufacturer’s cost. We propose to implement:
* $50 per cut from 1st July 11
* $100 from 1st Oct’ 11
* $150 from 1st Jan ‘12

[…]

* All fees associated with these services – cutting, MOV, order processing, potentially even drum charge are to become non-rebatable from 1st July ’11.
* Manufacturer to consolidate deliveries and optimise transport – propose to consolidate orders and carry out two deliveries per branch per month.
* As manufacturers reduce their stock levels, it is envisaged that “advanced firm orders” would be placed 4 to 6 weeks out for the critical lines. With the advance ordering, we would be happy to discuss the metal management strategy with EWAA Members e.g. applying the AIG Copper rate at the time of despatch and varying the invoice price accordingly. This would protect the Wholesalers from fluctuations in the value of the cable associated with metal movement between the time an advance order is placed and despatched.

Trade Price List for Cables

As requested, Prysmian will publish a trade price list for products and services in June ’11, and support EWAA in promoting it.

[…]

Prysmian is committed to the overall restructure of the manufacturer/wholesaler supply chain. However for Local Manufacturers to apply and maintain this strategy in a sustainable way, we believe EWAA Members will need to commit significant share of the total cable spend to local manufacturers. As the above industry reform and restricting continues into the future, it is expected that the share of business to local manufacturers will need to grow as well.

Prysmian looks forward to EWAA’s response to our proposal and a follow-up meeting to discuss the next steps.

1. I would note the following in relation to the Prysmian response. First, it did not refer to a cutting charge of $85 or a MOV in relation to $2,500 orders. Second, and generally, prior to the 23 June 2011 meeting, there is no Prysmian document reflecting a Prysmian proposal to implement the fees that Moncrieff raised on behalf of Olex at the 23 June 2011 meeting. Third, even though Prysmian became aware through a wholesaler of Olex’s proposal, Prysmian’s response did not copy Olex’s proposed charges. Moreover, Prysmian proposed charges were the subject of detailed internal consideration by Prysmian over many days by many individuals. Moreover, it is also apparent on the uncontested evidence that Roberts did not determine these fees unilaterally. Rather they were determined after detailed consultation with senior Prysmian executives.
2. Further, as Prysmian rightly contended, there is no evidence that Olex directly communicated to Prysmian prior to the 23 June 2011 meeting its proposed cutting charge of $85 or MOV of $2,500 via the Olex Response or otherwise. Moncrieff’s evidence was that he did not show Roberts the Olex Response or discuss it with him prior to that meeting. He was not challenged on that evidence. It appears to form no part of the ACCC’s case (and in any event there was no evidence) that there was a pre-meeting consensus between Olex and Prysmian and that they went to the 23 June 2011 meeting together to seek the agreement of the Wholesalers to their pre-meeting consensus.
3. On 25 May 2011 at 8:54am, Picken received an email from Geddes that attached a letter from Prysmian in response to the Geddes email. This was the first time that Picken became aware that Prysmian was raising the prospect of increasing cutting fees or introducing a MOV fee.
4. On 2 June 2011, Haller sent an email to Hanlon in relation to a proposed strategic partnership between L&H and Prysmian to increase their margin and longer term competitive advantage.
5. On 20 June 2011, Prysmian held internally a pricing working group meeting in which it was discussed that the cutting fee should be increased to $40 from 1 August 2011.

## (j) Olex’s decision to increase cutting fee and implement MOV fee

1. In an internal Olex presentation on 30 May 2011 as “Actions Plans” in terms of “Relationship Building” there were, inter alia, two points noted:
* Increase MOV of LV Product to push activity to distributors;
* Increase cutting service charge to properly reflect full cost of service offering (labour and drum); $70/cut for product < = 25mm2, $100/cut for product > = 25mm2.
1. In or about early June 2011, Moncrieff had decided that Olex would implement two initiatives that had been proposed in the Olex Response: an increased cutting fee and a MOV fee. He considered that those initiatives were capable of being implemented immediately and would reduce Olex’s cost-to-serve. He understood that Olex had received support for these initiatives from those wholesalers they had met with during the previous month. Moncrieff had decided that Olex’s increased cutting fee would be either a “flat fee” of $85 per cut or a “split fee” of $70 per cut for cable less than 25mm2 and $100 per cut for cable more than 25mm2, and that the MOV fee would be $250 for orders less than $2,500. From his perspective, either the “flat fee” or the “split fee” would achieve Olex’s objectives. He wanted to give the wholesalers a choice because he considered it would make them feel like they had “had a win” one way or the other. The MOV fee was lower than that proposed in the Olex Response, but he thought that the fee would be sufficient to achieve Olex’s objectives. The ACCC challenged whether such a decision(s) had been made before the 23 June 2011 meeting but in my view it had been. I will elaborate on this point later.
2. By early June 2011, Olex management was developing a presentation to be delivered to Nexans management at a scheduled conference of the Asia-Pacific Region to be held in Shanghai, China on 29 June 2011 (the Shanghai presentation). On 1 June 2011, Hueber sent Moncrieff a draft of the Shanghai presentation.
3. A version of the Shanghai presentation around this time stated:

**Current:**

* 41 000 cuts per year
* Charge = either 35$ per cut or including in the cable price
* All warehouses have cutting lines
* Cutting lead-time in TM = 3 to 7 days
* Overtime in week ends since January to cope with demand

**Cost analysis:**

* Labor (from 10’ to 40’ per cut) + drum (from XX to XX per drum)
* Average cost = XX per cut
* below 25mm , cost = XX per cut / above 25mm = XX per cut

**Proposal to market:**

* below 25mm, go from 35$ to 70$
* above 25mm, go from 35$ to 100$
* make sure all Customers pay for it

**Estimated impact = 05.M$aud H2 2011**

 **= 1.2 M$ aud full year**

1. On 21 June 2011, Moncrieff sent the current draft of the Shanghai presentation to Nexans Asia-Pacific management for their review. On page 67, under the heading “Actions”, the presentation stated that Olex would be increasing its cutting fee. I should note that similar themes were set out in later drafts circulated within Olex and Nexans on 21 and 24 June 2011. In other words, Olex was considering unilaterally increasing cutting charges for *separate* costs recovery purposes. This is quite contrary to the ACCC’s case thesis.
2. On 17 June 2011, Moncrieff met with Dunstan to discuss the forthcoming 23 June 2011 meeting with the EWAA. Olex had come to the view that implementing all of the proposed changes to the cable industry would take considerable time and that it was preferable to start with small steps. At Moncrieff’s request, for the purposes of that meeting, Dunstan put together a “one page” document that captured the two initiatives (ie increased cutting fee and the introduction of a MOV fee of $250 for orders less than $2,500) which Moncrieff had decided that Olex could implement easily and quickly (the Moncrieff proposal). That document was completed on or about 22 June 2011.
3. On 21 June 2011, Dunstan sent emails to Hanlon and Murphy that attached a revised draft of the Moncrieff proposal. Dunstan said that he planned to put the Moncrieff proposal to the EWAA at the upcoming meeting and that his idea was to “suggest some immediate actions for implementation that can be applied to all members to at least get things started”. The suggestions were for a cutting fee and a MOV fee. The cutting fee would be implemented first and would be either $70 per cut for cable up to and including 25mm2 LV cable and $100 for all other cable, or a flat $85 fee for all cable. The MOV fee would be implemented later and would be $250 for any orders less than $2,500 in value.
4. On 22 June 2011, Moncrieff met with Norris of L&H at the Park Hyatt in Melbourne. At this meeting, they discussed the Moncrieff proposal. Moncrieff recalls that Norris said that the document was consistent with L&H’s expectations.
5. In relation to the position immediately prior to the 23 June 2011 meeting, the following may be noted.
6. First, nothing had been agreed or arranged between the manufacturers and the wholesalers. Olex had in some respects disclosed its position as too had Prysmian.
7. Second, early on 23 June 2011 and prior to the meeting, Murphy of BGW/Gemcell circulated an email within BGW in the following terms:

Today Brian and I will be meeting with the Electrical Wholesalers Association and an agenda item is to improve the actions of the wholesaling fraternity in how we handle cable distribution. One of the proposals is to have a minimum order value of $2,500 per order. Failure to meet this value would be met with a financial penalty. The overall strategy is to have wholesalers act more like distributors and the cable companies to act more like manufacturers and not wholesalers. There is also a vision of working with the Australian manufacturers to reduce direct dealing and take costs out of the supply chain.

I am inquisitive as to your thoughts about our ability to change our purchasing practices to meet the minimum order requirement. For you [sic] information, we currently have an average invoice value with Olex of $746. Our meeting is at 12 noon so your response would be appreciated. Not war and peace just some bullet points would be good.

1. The minimum order value of $2,500 is a reference to a proposal from Olex.
2. One response from Simon Baynes of BGW was the following:

If the direct business is distributed back the Wholesalers I don’t have a problem with it. It will force us to have better purchasing practices in our business. We may initially have some teething problems but when it comes to stock our model is very well structured to handle this change and may present some opportunities. My major concern would be that we do the deal and then the direct business is still taken when it suits the cable manufacturer.. “I had to take it direct because General priced it direct”. Can they be trusted, it’s like a tax, once it’s implemented it will be hard to reverse. (all errors are in the original version)

1. Another response from Mike Siggins of BGW was the following:

I have no issue with this so long as all cable manufactures implement.

There will be numerous issues however we have to start somewhere.

No one will have a issue with doing this with alined manufactures it will be the ones we are not alined with due to the possibility of have to buy more cable at non competitive pricing to full fill the min order value.

Will this be a trial period? As we need to see that the cable Manufactures are doing there part.

(all errors are in the original version)

## (k) The 23 June 2011 meeting

1. Olex and Prysmian were invited to attend the 23 June 2011 meeting to discuss any proposal to be put. Moncrieff and Dunstan flew from Melbourne to Brisbane to attend. The 23 June 2011 meeting was held at the Conrad Treasury Hotel in Brisbane. Geddes was unavailable on the day and at late notice the EWAA arranged for Lemon, a professional company secretary, to act as secretary in the meeting. Lemon had a laptop computer and during the meeting he typed notes directly into a document which later became the draft meeting minutes.
2. The manufacturers’ representatives were only invited to attend for part of the meeting and the members of the EWAA (such as representatives of Gemcell, Rexel, L&H and MMEM) had already assembled for their meeting before they arrived. Roberts, Dunstan and Moncrieff joined the meeting at about 2.10 pm and sat at one end of the table. Moncrieff handed out the Moncrieff proposal, explained the contents of it and asked for the EWAA directors’ comments.
3. There was a discussion regarding the Moncrieff proposal. In relation to the two cutting fee options, the EWAA directors indicated a preference for the flat fee of $85 for all cable.
4. Moncrieff’s version of events is as follows.
5. When Moncrieff was invited by Webb to speak, Moncrieff used the Moncrieff proposal as his speaking notes. He did not hand out the Moncrieff proposal at this point. He told the attendees at the meeting that Olex was keen to move forward with the initiatives outlined in Olex’s response to the Geddes email, although Olex recognised that it would take some time to implement all of these initiatives. Moncrieff said that, to get things moving, Olex was starting with the implementation of an increased cutting fee and the MOV fee, which he described as high priority items.
6. Moncrieff said that it was Olex’s decision to increase the cutting fee as part of its efforts to improve supply chain efficiencies and to recover its costs of providing the cutting. Moncrieff said that Olex had two options for increasing the cutting fee. The first option was to have two cutting fees differentiated on the basis of cable size. On this option, he said that Olex proposed $70 per cut for product less than 25mm2 and $100 per cut for product greater than 25mm2. The second option was to have a flat fee irrespective of the cable product. On this option, Moncrieff said that Olex proposed $85 per cut.
7. There was discussion about the proposals. Moncrieff recalls that all of the EWAA members that spoke expressed a preference to have a single cutting fee. Some of those present also stated that it was important that the cutting fee was itemised on invoices.
8. Moncrieff then commenced talking about the MOV fee. At this point of the meeting, Moncrieff formed the impression that the EWAA members appeared to be confused about the details regarding the implementation of the MOV fee. Moncrieff decided to hand out the Moncrieff proposal. Moncrieff asked Dunstan to hand out copies of the document. Moncrieff asked Lemon to hand it out. Moncrieff did not know Lemon’s name at the time of the 23 June 2011 meeting. Dunstan walked around the table and handed the document to Lemon. The two of them had a brief discussion, after which Lemon said that it was okay to hand the document out. Dunstan then proceeded to hand out the document to the EWAA members, but *not* to Roberts.
9. Moncrieff said that Olex was going to implement a fee of $250 for orders that fell below $2,500. He said that these measures would cut paper work and reduce inefficiencies. Some EWAA members asked questions regarding how the MOV fee would be implemented in practice. Moncrieff recalls thinking that these details may need to be worked out prior to the implementation of the MOV fee.
10. Moncrieff did not recall Roberts speaking while they were discussing Olex’s cutting fee and MOV fee. However, he recalls that as they were getting up to leave the meeting, Roberts said that Prysmian would make up its own mind on these things. Roberts said this in response to a question from one of the EWAA members regarding Prysmian’s plans.
11. According to Moncrieff, during the meeting Roberts gave Moncrieff no indication as to what Prysmian’s business decisions would be in regards to the cutting fees or MOV fees, and Moncrieff did not seek any such indication. At that time, Moncrieff did not know what Prysmian would do in relation to cutting fees or MOV fees.
12. Picken recalls that Moncrieff wanted to make an announcement, and he asked Lemon if he could make his announcement with Roberts in the room, given that Prysmian was a competitor. Moncrieff showed Lemon a note, and Lemon looked at the note and confirmed that it was fine for Moncrieff to hand the note around and make his announcement. Lemon also confirmed that it was fine for Roberts to be in the room whilst Moncrieff made his announcement. Picken recalls that copies of the note were handed out. Although Picken cannot remember the contents of the note specifically, he recalls that it proposed that Olex would increase its cutting fee and introduce a MOV fee. Picken does not recall either anyone from Olex, or any of the EWAA members, giving Roberts a copy of the note.
13. Picken recalls that Moncrieff discussed value chain mapping that he had undertaken in order to understand Olex’s costs, and where Olex was “bleeding”. “Value chain mapping” is a concept which places a monetary value on each part of the supply chain and is intended to identify areas in the supply chain which are not cost efficient. Moncrieff then said that he had identified the inefficient distribution of cable as an issue and that the charges proposed in his note were how Olex was going to fix its problems. In particular, Picken recalls Moncrieff saying in relation to his note that:
	1. Olex’s analysis of its actual cost of cutting cable was $130 per cut;
	2. Olex did not think an increase in its cable cutting charge to $130 would be accepted by the market;
	3. accordingly, Olex had decided to increase its cable cutting charge to $85; and
	4. $85 represented a subsidisation by Olex of the actual costs of cutting cable to length because Olex would still not be recovering its full cutting costs.
14. Picken also recalls that Moncrieff said words to the effect of: “We’re going to charge a $250 fee for orders less than $2,500.”
15. Picken recalls that the announcement in relation to this minimum order value fee did not cause much discussion. From his perspective, Picken did not say anything because he considered that he was already aware from his earlier discussions with Olex of Olex’s rationale for the increased fee as it related to Rexel. Olex had raised in that earlier meeting the inefficiencies resulting from the small orders that Rexel had been placing with Olex.
16. Picken recalls that Webb said that Olex’s fees sounded reasonable, but Moncrieff needed to discuss it with each member separately. Picken interpreted Webb’s comment as meaning that Olex would need to deal with each wholesaler member of the EWAA separately. At no point after that did Webb, or anyone else at the meeting, say any words indicating that the EWAA supported the charges that had been announced by Olex. Further, Picken says that Webb did not use the words “the EWAA”. According to Picken, Webb could not speak on behalf of the entire membership of the EWAA, and did not purport to do so at the meeting. The only reference to the attitude of the wholesalers to Olex’s announcement of the increase in its cutting fee and MOV fee made at this meeting was the statement made by Webb. Further, Webb did not say anything about supporting a trade price list and a minimum order quantity in return for a cable cutting charge.
17. Picken recalls that Norris asked Moncrieff whether Olex could put the fees as a separate item on the invoice so that the wholesalers would not forget to factor in the fees when setting prices to customers.
18. Picken does not recall Roberts saying anything in relation to Moncrieff’s announcement of Olex’s introduction of an increased cutting charge and a MOV fee. Picken does not recall Roberts saying anything about whether Prysmian would be introducing a similar increase in its cable cutting charge or a MOV fee.
19. Picken considered Olex’s announcement about the increased cutting charge and a MOV fee to be a unilateral one by Olex about additional fees it intended to impose for its own benefit. Picken did not think at the time that the purpose of the fees was to reduce direct supply by Olex. Rather, Picken believed that they were designed to change ordering practices, primarily by wholesalers, with a view to lowering Olex’s costs overall. Picken recalls thinking at the time the following.
20. First, he had already seen a version of the proposal that Olex had been considering. Changes to the cutting fee and the MOV fee were not news to him, but he did not recall and did not know if others were surprised by this. He understood from Moncrieff’s statements at the meeting that Moncrieff was putting forward these changes to the EWAA as though he was going to implement them, and that he was making an announcement.
21. Second, Picken understood that Olex wanted to increase its cutting charges, and introduce a MOV fee, because Olex wanted to encourage the wholesalers to buy cable in bulk, rather than in non-standard lengths that had to be specifically cut, or buying in small quantities. Picken also understood that Olex wanted to recover more of the cost of cutting cable when wholesalers requested non-standard lengths, and to avoid the cost of supplying multiple small orders.
22. Third, Picken was not concerned about Olex increasing its cutting fee. However, at the time he still wanted Olex to negotiate this with Rexel. In particular, he was conscious to ensure Brochut had a chance to negotiate a better price from Olex, given that this was the role of her team. He did not care very much about the cutting fees or MOV fees if it led to lowering Olex’s overheads and lowering its cable prices. Picken was even less concerned about Olex introducing a MOV fee than the cutting fee, because there was no good reason why Rexel’s branches could not buy more than $2,500 in any one order, given that the branches would be able to combine several smaller orders into one order from Olex so that the combined value was over $2,500. Based on his knowledge of Rexel’s branch network, he believed at the time that $2,500 equated to only around 2 days’ worth (or less) of orders for the average Rexel branch.
23. Fourth, Picken viewed these fees as small steps towards the overall outcome that he had in mind, namely for Olex to implement measures that would assist Olex to lower its costs, and in turn, offer lower cable prices to Rexel. Although these fees were something that Olex wanted to introduce because they were to Olex’s immediate benefit, he considered that because they would discipline the ordering practices of Rexel’s branches, and presumably other wholesalers’ branches, they were ultimately steps in the right direction for Olex to improve its efficiency by reducing its sales and distribution functions and therefore ultimately being able to offer cable prices that were competitive with Electra’s prices.
24. At no time did Picken consider that Rexel, individually or as a member of the EWAA, was making any sort of arrangement or understanding with Olex, or Olex and Prysmian, and the other wholesalers in relation to these fees. Nor did he consider Olex or Prysmian to be under any obligation, or for Rexel to be under any obligation, in relation to the fees. This is because the EWAA was not a buying group and had never conducted itself as one. The EWAA never purchased product, be it cable or other electrical products, and similarly had never negotiated industry wide deals. Further, although Picken considered that Moncrieff’s announcement was reasonable, he did not regard Olex’s announcement as a proposal, or as a matter for agreement between Olex and all the wholesalers represented at the meeting, given that Webb had said that these fees would have to be negotiated with each wholesaler separately.
25. Moreover, even if Olex had proposed any arrangement or understanding, Picken would not have entered into any such deal because he could not do so on behalf of Rexel. Rexel also could not guarantee that it would not reduce its cable purchases from Olex if the cutting or MOV charges increased without knowing the price Olex would charge for the cable. Further, he would not have wanted Rexel to be party to, or be seen to be a party to, any agreement, arrangement or understanding in relation to the new fees because this might have constrained Rexel’s ability to take its business elsewhere, including as a consequence of the new fees. If the overall cable prices Olex offered to Rexel increased (including because of the new fees), Rexel’s purchases from Olex would have declined accordingly. In fact, if overall prices stayed the same, Olex would remain uncompetitive and purchases would have declined in any event.
26. Picken also wanted Brochut to have the opportunity to negotiate with Olex in relation to the fees, which could have led to different fees for Rexel from those proposed by Olex at the meeting. Picken considered that the fees proposed by Olex were standard fees that would be imposed generally, rather than the fees that might be negotiated by an important customer such as Rexel.
27. I have no reason to doubt any of this evidence given by Picken. It accorded with the commercial realities. And it was also consistent with Moncrieff’s evidence.
28. At the 23 June 2011 meeting, Picken did not say that Rexel agreed to Olex’s announced fees or would support the fees. Picken did not comment at all on Olex’s announcement, and he did not indicate assent by any other means.
29. Picken considered that both the cutting charge increase and the MOV fee were initiated and designed by Olex to increase its cost recovery and efficiency. Picken regarded the suggestion that the cutting charge was proffered by Olex in return for the MOV fee to be absurd. There was, and is, in his mind no sense in which a cutting charge could be in return for a MOV fee. They were both proposals put forward by Olex for its benefit.
30. Thus far I have set out Moncrieff’s and Picken’s versions of events which are, in relation to the 23 June 2011 meeting, quite consistent.
31. At this point, I have not set out Davis’ version of events. It is not necessary to do so, for at the end of the day (after cross-examination) his version largely agreed with that of Moncrieff and Picken on the relevant *key* elements. Generally, Davis was, however, a less reliable witness than Moncrieff and Picken and I have discussed this aspect in more detail in Section C below.

## (l) Minutes of the 23 June 2011 meeting and other notes

1. In my view, the oral evidence adduced concerning the 23 June 2011 meeting is against the ACCC’s case thesis. Let me now deal with the various versions of the minutes of this meeting upon which the ACCC placed some reliance.
2. The following preliminary points can be made.
3. First, whatever the relevant version of the minutes that should be treated as the correct version, the minutes describe the meeting as “an Informal Meeting” of the EWAA’s “Members”. Thus it does not appear to be a meeting of the EWAA’s directors as such (cf the Minutes for the 8 March 2011 meeting). I note that the directors’ meeting of 14 September 2011 also treated the 23 June 2011 meeting as an “informal meeting”. The final signed version of the 23 June 2011 minutes did, however, omit the word “informal”.
4. Second, the minutes record that the members of the EWAA that were represented at the meeting were Gemcell (with its representatives, Webb and Murphy), L&H (with its representatives Haddon and Norris), MMEM (with its representatives, Davis and Lamond) and Rexel (with its representatives, Picken). Webb chaired the meeting.
5. What is apparent is that not all members of the EWAA were represented at the meeting. Further, the meeting was “informal”. Both of these dimensions are not as supportive of the relevant arrangement or understanding as they would have been if all members were present, the meeting was more formal and/or it was a proper meeting of an organ of the EWAA. But in any event, the case against the EWAA was one of accessorial liability only.
6. Before proceeding further, I would note that written evidence of Lemon was tendered with no cross-examination. His written evidence adds little, if anything, of significance to the contemporaneous documents and other evidence before me. It is also unnecessary to elaborate on why he was not available for cross-examination, except to say that this was not due to any fault on the part of the ACCC.
7. Let me now discuss each version of the Minutes in turn.

### The original version (the Lemon version)

1. The original version (incorrectly dated) was prepared by Lemon and sent to Webb at 10.07pm on 23 June 2011. This version indicates that the meeting commenced at 12.00pm, with Lemon being present from 12.30pm. From time to time I will refer to this as the Lemon version.
2. The minutes noted that representatives from Olex and Prysmian had been invited to join the meeting from 2pm.
3. Before those representatives attended, the members of the EWAA who were represented discussed three points noted in the minutes in the following terms:
4. (T)here are 4 major Australian cable manufacturers.
5. (T)he manufacturers cannot realise efficiencies in their operations whilst wholesalers order product from them as they are currently doing; and
6. (T)he manufacturers want wholesalers to buy in bulk to help them realise efficiencies.
7. A number of things may be noted at this point. First, these three dot points appeared in an unaltered form in all versions of the minutes thereafter (save a version later prepared which deleted all reference to the cable manufacturers attending the meeting, which I have put to one side). They appear in the signed version signed on or around 10 November 2011. Second, these three dot points are supportive of a mindset by the wholesalers present that the manufacturers wanted to realise efficiencies, with it being perceived that one way to do that was for wholesalers to buy in bulk. It is also supportive of the proposition that this is what the manufacturers had told wholesalers prior to the 23 June 2011 meeting. It may be said that this mindset does not support the relevant arrangement or understanding contended for by the ACCC or the relevant purpose(s) contended for by the ACCC. Third, reference is made to “4 major Australian cable manufacturers”. But only two were to attend. Moreover, it is not suggested that the two represented all four. It may be said that the relevant arrangement or understanding was less likely to have been made or reached with only two out of the four manufacturers.
8. At 2.10pm, Moncrieff and Dunstan for Olex and Roberts for Prysmian joined the meeting.
9. What is apparent from all versions of the minutes is that Roberts said nothing and did not table any document. The ACCC faces a considerable hurdle, in the circumstances, of establishing that Prysmian was a party to the relevant arrangement or understanding. Moreover, if Prysmian was not such a party, then the ACCC faces a considerable hurdle in establishing that Olex was a party to the relevant arrangement or understanding given the reduced commerciality of an arrangement involving *one* manufacturer only. I will return to these matters later.
10. Shortly after Moncrieff, Dunstan and Roberts joined the meeting, Moncrieff tabled a document titled “Low Voltage Cable Reform Proposals”, ie the Moncrieff proposal. Now a number of points may be noted at this point concerning this written proposal, although I will elaborate further on this later:
	1. First, this was an *Olex* proposal only. The document on its face so indicates and the minutes record that it was so understood, viz, “proposals from Olex to EWAA”. All versions of the minutes are consistent therewith (hereafter “all versions” should be taken as excluding one of the versions prepared by Geddes (see later discussion) which excluded any reference to the cable manufacturers). The evidence also establishes that Prysmian had not previously seen this document.
	2. Second, it was Olex’s proposal to the *EWAA*, not a proposal to the wholesalers individually or separately. Indeed, all versions of the minutes stated that “Olex must deal with wholesalers individually”. What is well apparent is that the EWAA was not purporting to act as an agent or to bind any wholesaler. Moreover, the meeting was “informal”. Moreover, not all wholesalers were present. Most importantly, it was recognised by those present that any arrangement Olex was to enter into had to be with each wholesaler individually.
	3. Third, the proposal dealt with *low* voltage cable (cf the ACCC’s allegations concerning the relevant arrangement or understanding, which was not so limited and dealt with all electrical cable).
	4. Fourth, Olex’s proposal had two options for the cutting charge. The proposal for the cutting charge was said to be “based on a truer ‘fee for service’ scale”. Further, this was said to benefit EWAA members by “[creating] an opportunity for increasing revenue from value added services” and “[delivering] a lower unit price of cable to those who purchase [standard] lengths”. There are several important points to be noted. The way this proposal was expressed is supportive of Olex’s efficiencies argument. More importantly, the proposal did not seek or ask for any quid pro quo or commitment from the EWAA or its members. In particular, it did not seek any quid pro quo of the type asserted by the ACCC that the Wholesalers would not reduce the volume or value of electrical cable that the Wholesalers acquired from Olex (or Olex and Prysmian).
	5. Fifth, the proposal for the minimum order value likewise did not seek any quid pro quo or commitment. Equally, on the face of the proposal it was designed to address the problem of “a very inefficient industry supply chain” by reason of, apparently, the low median order value. The benefits to EWAA members were described in efficiency terms.
11. After the Moncrieff proposal was tabled, the minutes noted the following:

BN [sic] [Webb] advised [Moncrieff] that EWAA is prepared to support in principle a trade price list and minimum order quantities in return for price cuts, but that Olex must deal with wholesalers individually.

1. Now the phrase, “in return for price cuts”, went through a number of modifications in later minutes as I will later explain. What is important to note is that neither the original minutes nor indeed any other versions of the minutes referred to any statement by the EWAA or the wholesalers present that they would not reduce the volume or value of electrical cable that the wholesalers acquired from the manufacturers by reason of the cutting service fee increase or the MOV fee or indeed at all.
2. The minutes went on to record that:

It was noted that a clear demarcation between manufacturers and distributors in the cable manufacturing business is desirable.

1. This phrase did not ultimately appear in the signed minutes.
2. The minutes then made reference to cutting charges being discussed. It is said that Moncrieff:

… advised that it is essential for Olex to increase cutting charges because it is currently losing money on cutting.

1. This statement supports Olex’s case that its proposal was based upon efficiency considerations. This statement appeared in the signed version of the minutes.
2. The minutes then went on to record that:

It was noted that a minimum order quantity of $2,500 would be acceptable.

1. The word “acceptable” was later changed to “levied”. The difference was significant. The word “acceptable” tended to suggest, as one interpretation, “acceptable to the wholesalers”. The word “levied” suggested a unilateral stance to be taken by Olex. I will return to this later, although I would note at this point that there is some support for this being a unilateral position. Moncrieff’s one page proposal refers to “will implement” and “will incur”. Moreover, the word “acceptable” where it appears in the minutes appears before the three “resolutions”, suggesting that it is a statement of Olex’s unilateral position.
2. The minutes went on to record:

GM advised that the introduction of minimum order quantities will cut paperwork and reduce inefficiencies.

1. This is supportive of Olex’s case that the purpose of its proposal all concerning efficiencies.
2. Other matters were then noted in the minutes and it was then recorded:

It was RESOLVED to:

1. agree to support minimum order values;
2. agree to support a cutting charge of $85; and
3. defer minimum quotation orders.
4. Roberts, Dunstan and Moncrieff then left the meeting. I will return later to the question of whether these were in truth resolutions and by whom. Undoubtedly they are an important part of the foundation of the ACCC’s case. The final signed version of the minutes had these resolutions, but had inserted the words “in principle” at the end of 1 and 2 and had deleted “of $85” in 2.
5. Before discussing later versions of the minutes, four important points can be made.
6. First, there is no reference to Roberts doing or saying anything at the meeting.
7. Second, there is no reference to the principal support provision that the ACCC has alleged, which:
	1. in its form prior to trial was that “the Wholesalers would maintain or increase the volume and/or value of electrical cable that they acquired from the Manufacturers”;
	2. in its final form was that the Wholesalers would support the Manufacturers (or Olex) by “not reducing the volume and/or value of electrical cable that the Wholesalers acquired from the Manufacturers” (or Olex).
8. Third, there was an acceptance that Olex had to “deal with wholesalers individually”.
9. Fourth, Olex sought to justify its proposals for the MOV and the increased cutting fee based upon efficiencies, which is contrary to the ACCC’s “purpose” case.

### The second version (the Symons version)

1. On 27 June 2011 at 9.13am, Adrian Symons (Symons) of the BGW Group, who was not at the meeting, sent a revised version of the minutes back to Lemon after apparently speaking with Webb and Murphy. Changes were highlighted in green. From time to time I will refer to this as the “Symons version”.
2. There were only two changes of note.
3. First, after the Moncrieff proposal was tabled, the amended minutes record:

BM [sic] advised GM that EWAA is prepared to support in principle a trade price list and minimum order quantities in return for a cable cutting charge but that Olex must deal with wholesalers individually.

1. So, from the original minutes, “price cuts” was replaced with “cable cutting charge”. Now, the asserted reciprocity has been altered. I will discuss later whether this reciprocity makes any commercial sense.
2. The other relevant change was to rephrase the functional demarcation in terms:

It was noted that a clear demarcation between the role of manufacturers and distributors in the cable business is desirable.

1. On 8 September 2011 at 9.45am, Geddes circulated to the board members of the EWAA a clean version of the second version of the minutes to be considered at the directors’ meeting on 14 September 2011. The reference to “BM” in the extract set out above was corrected to “BW”.

### The third version (the Geddes version)

1. At the EWAA directors’ meeting on 14 September 2011 (September 2011 meeting), discussion ensued on the Symons version. Geddes, who did not attend the 23 June 2011 meeting, made handwritten changes on his copy of the Symons version to accord with what others, who had attended on 23 June 2011, had said to him on 14 September 2011. I elaborate on the September 2011 meeting later.
2. Geddes prepared two sets of amended minutes. One version deleted all reference to the manufacturers and their attendance. I will put this version to one side. The other version made changes to the Symons version to accord with Geddes’ handwritten notes.
3. This third version made the following significant alterations:

(a) First, the words “in return for a cable cutting charge” were deleted. The reference was said not to be correct. The amended paragraph read:

BW advised GM that EWAA is prepared to support in principle a trade price list and minimum order quantities but that Olex must deal with wholesalers individually.

(b) Second, the following paragraph was deleted:

It was noted that a minimum order quantity of $2,500 would be acceptable. GM advised that the introduction of minimum order quantities will cut paper work and reduce inefficiencies. He advised that other charges would apply if wholesalers failed to purchase a minimum of $2,500 worth of stock.

(c) Third, the three “resolutions” were deleted. There were also other deletions that I do not need to elaborate on.

1. This third version was circulated by Geddes to the directors of the EWAA on 25 October 2011.

### The fourth version (the Picken version)

1. On 8 November 2011 at 12.30pm, Picken forwarded to Lamond, Webb and Robin Norris (L&H) a further version of the draft 23 June 2011 meeting minutes. By this time, Geddes was no longer company secretary of the EWAA.
2. In this version, Picken made a number of corrections to the draft minutes that had been circulated by Geddes on 8 September 2011. Picken did not work from the most recent version of the draft minutes he had been sent, being the version attached to Geddes’ 25 October 2011 email. Picken did not take Geddes’ version sent on 25 October 2011 and did not type back in the matters that Geddes had deleted. Rather, Picken made modifications to the earlier version of the minutes, being the 8 September 2011 version (essentially the second version or Symons version). Picken gave evidence that if he received the 25 October 2011 version of the minutes, he believes that the reason he did not use this version was because the task of reviewing the revised minutes was initially given to Lamond, and Picken was therefore not aware that he had already received a revised version from Geddes. When Picken took over that task he failed to notice Geddes’ revised version and used the earlier version of the minutes he had received on 8 September 2011.
3. In making the corrections to the minutes, Picken gave evidence that he was not seeking to sanitise the minutes so as to reduce the risk of the ACCC being concerned about what had occurred. Rather, he understood that the discussion at the September 2011 meeting had identified inaccuracies in the minutes of the 23 June 2011 meeting and he was attempting to make the minutes more accurate.
4. In any event, Picken’s understanding at the time of making corrections was that the ACCC was only concerned about the possibility that Prysmian and Olex had discussed pricing together, as opposed to the possibility that the EWAA or Rexel had been involved in any wrongdoing. In my view, his understanding accorded with the letter from the ACCC to the EWAA that Geddes had forwarded to Picken on 18 October 2011. The changes Picken made to the minutes were not concerned with this subject, but with making the changes that he could recall had been agreed should be made to the minutes during the September 2011 meeting and so as to correct any fundamental errors. That is, Picken was not seeking to revise the minutes to represent verbatim all that he recalled had occurred at the 23 June 2011 meeting. In particular:
	1. Picken amended the paragraph relating to the discussion of trade price lists, which was the second paragraph in the section relating to “Cable Manufacturers” in accordance with his recollection of the inaccuracy in that section discussed at the September 2011 meeting.
	2. Picken amended the statement on page 2 of the draft minutes that “BW advised GM that EWAA is prepared to support in principle a trade price list and minimum order quantities in return for a cable cutting charge” because it was incorrect based on his recollection of the discussion. He therefore amended this paragraph to make clear that Webb advised Moncrieff that the EWAA was prepared to support in principle a trade price list, minimum order quantities and a cable cutting charge. Further, he recalled that Moncrieff announced the increased cable cutting charge and MOV fee, and that in response Webb said that it sounded reasonable and that Olex needed to discuss it individually with each of the wholesalers.
	3. Picken deleted the phrase “It was noted that a clear demarcation between the roles of manufacturers and distributors in the cable business is desirable” because this was not discussed at the 23 June 2011 meeting.
	4. At the end of the paragraph that stated, “Cutting charges were discussed. GM advised that it was essential for Olex to increase cutting charges because it is currently losing money on cutting”, in accordance with his recollection that Moncrieff discussed the value chain mapping that he had undertaken in order to understand Olex’s costs, and where Olex was “bleeding”, and that the increased cable cutting charge was how Olex was going to fix its problem, Picken added the sentence “He noted their charge was still less than his real cost”.
	5. Picken amended the statement, “It was noted that a minimum order quantity of $2,500 would be acceptable”, to “It was noted that a minimum order quantity of $2,500 would be levied”, in accordance with the inaccuracy discussed above, which was to the effect that Moncrieff had announced a MOV fee; it was not that anyone had agreed to it. Picken recalls that Webb said that it sounded reasonable and Olex needed to discuss it individually with each of the wholesalers.
	6. Picken amended the “It was RESOLVED to” statements in the minutes in accordance with his recollection of the inaccuracy discussed above. However, Picken did not change or remove the reference to “RESOLVED” even though he can recall thinking that those were not the words he would have used given that no formal resolution had been made at the meeting. In this regard, Picken was again trying to record the amendments that had been agreed at the September 2011 meeting. He amended that portion of the draft minutes by adding the phrase “in [principle]” to the statements relating to minimum order values and a cutting charge, and deleted the reference to “$85” in relation to the cutting charge. Picken added the phrase “in [principle]” because Webb had said that the increased fees sounded reasonable, but this was a matter that Olex had to negotiate with each wholesaler separately. Picken deleted the reference to the “$85” because it was his understanding that since Olex had to negotiate the fee with each wholesaler separately, the ultimate fee imposed on each wholesaler may have changed from that figure.
5. In summary, as compared with the third version (Geddes version), Picken added back the following matters that Geddes had deleted and made the following other changes:

(a) First, he added back reference to the “cable cutting charge” in the paragraph that Geddes had modified so that it read:

BW advised GM that EWAA is prepared to support in principle a trade price list, minimum order quantities and a cable cutting charge, but that Olex must deal with wholesalers individually.

(b) But the incorrect reference, so it was asserted, to “in return for” remained deleted.

(c) Second, Picken added back and made an alteration which read:

Cutting charges were discussed. GM advised that it was essential for Olex to increase cutting charges because it is currently losing money on cutting. He noted their charge was still less than his real cost. It was noted that a minimum order quantity of $2,500 would be levied. GM advised that the introduction of minimum order quantities will cut paperwork and reduce inefficiencies. He advised that other charges would apply if wholesalers failed to purchase a minimum of $2,500 worth of stock.

(d) It will be appreciated that the first version of the minutes had much of this detail. But there were changes. In relation to the MOV, the reference to “would be acceptable” was changed to “would be levied”. In relation to the cutting charges, the sentence was added, “He noted their charge was still less than his real cost”.

(e) Third, the “resolutions” were added back as follows:

It was RESOLVED to:

1. Agree to support minimum order values in principal [sic]
2. Agree to support a cutting charge and in principal [sic]
3. Defer minimum quotation values discussions

(f) The words “in principal [sic]” had been added. Further, the reference to $85 had been deleted.

### The final version (signed)

1. On 10 November 2011, Symons forwarded a copy of the signed minutes to Lemon, which had been signed by Webb.
2. The final and signed version was in accordance with the fourth version (Picken version) save that handwritten changes were made to the “resolutions” to spell “principle” correctly. The final version was headed “Minutes of a Meeting…”, rather than “Minutes of an Informal Meeting”.

### Alterations to later minutes – ACCC’s contentions

1. The ACCC contends that the Symons minutes should be preferred to the Lemon minutes. Indeed it contends that later versions of the 23 June 2011 meeting minutes, including the signed version, are attempts to sanitise the Symons minutes due to trade practices concerns. In this regard, it says the following:
	1. First, in August 2011 the ACCC wrote to Olex and Prysmian requesting a range of information concerning the increase in the cutting fee.
	2. Second, at the September 2011 meeting Irwin said to Geddes that “the ACCC won’t like the content” of the version of the minutes circulated with the board papers.
	3. Third, concerns were only expressed about the accuracy of the minutes after Irwin raised this issue in the presence of the other EWAA directors.
	4. Fourth, later changes to the minutes were intended to remove aspects which caused concern, including removal of the reference to $85 in resolution 2, addition of the words “in principle” in resolutions 1 and 2, alteration to the sentence “[i]t was noted that a minimum order quantity of $2,500 would be acceptable” to “would be levied”, and the deletion of “in return for”.
2. The ACCC has asserted that the 23 June 2011 meeting minutes were altered by reason, inter alia, of or against the background of the ACCC’s interest and its letters dated 2 August 2011 and 26 August 2011 to Olex and Prysmian respectively. A difficulty with that thesis however is that its interest at that time concerned *only* an alleged price fixing between Olex and Prysmian, rather than the relevant arrangement or understanding contended for in the present context involving the wholesalers. The alterations made to the 23 June 2011 meeting minutes had a different focus. But at all events, I do not subscribe to the ACCC’s thesis.
3. Let me elaborate further on the September 2011 meeting.
4. Picken gave the following evidence concerning the September 2011 meeting.
5. He recalls that during the meeting, once everyone was seated, one of the topics of discussion was the form of the draft minutes of the 23 June 2011 meeting containing errors. He recalls that the substance of those discussions related to matters in the minutes which were clearly wrong because they made no sense commercially, or which were incorrect and directly contradicted other matters recorded in the minutes. This discussion occurred before any representatives of Olex and Prysmian joined the meeting. In particular, Picken recalls that there was discussion about aspects of the draft 23 June 2011 meeting minutes to the following effect:

(a) In relation to the second paragraph of the section relating to “Cable Manufacturers” which recorded the discussion of trade price lists, Picken recalls that the discussion was about:

* + 1. trade price lists being helpful in a context where cable prices fluctuate due to fluctuating copper prices and foreign-exchange rates; and
		2. trade price lists not being helpful because no one ever adhered to them. From Picken’s perspective, a trade price list was not like a recommended retail price. It is more like a benchmark price from which to give a discount to customers. Picken recalls that when there had been a trade price list, Rexel had at times offered a 90% discount.

(b) There was discussion that the statement in the draft 23 June 2011 meeting minutes that read “BW advised GM that EWAA is prepared to support in principle a trade price list and minimum order quantities in return for a cable cutting charge” was incorrect. This was because at no stage did the wholesalers suggest that Olex increase its cutting charge. It was also illogical that the wholesalers would want an increased cable cutting charge in return for minimum order quantities and a trade price list, because these matters could not be considered to be in return for each other they were not a quid pro quo. Rather, the cutting charge and minimum order quantities were both announced by Olex. Picken recalls that there was a specific discussion about this statement in the draft 23 June 2011 meeting minutes. Webb and Norris were vocal and adamant that the statement was incorrect and was not said. Picken said that he shared the same view as Webb and Norris. Picken also said that the statement was illogical and gave the same reasons as mentioned above. Murphy said that the statement was incorrect.

(c) Picken recalls that there was discussion about the fact that there was no discussion at the 23 June 2011 meeting which corresponded to the record in the draft 23 June 2011 meeting minutes that “[i]t was noted that a clear demarcation between the roles of manufacturers and distributors in the cable business is desirable”.

(d) In relation to the statement in the draft 23 June 2011 meeting minutes that “Cutting charges were discussed. GM advised that it was essential for Olex to increase cutting charges because it is currently losing money on cutting”, there was discussion that Moncrieff had announced the cutting fee increases as a cost recovery exercise, or a lessening of Olex’s previous subsidisation of cut cable.

(e) Further, there was discussion that the phrase in the draft 23 June 2011 meeting minutes that “It was noted that a minimum order quantity of $2,500 would be acceptable,” was not correct because Moncrieff had announced a MOV fee and that nobody had agreed to it. Picken recalls that at the 23 June 2011 meeting, Webb said that it sounded reasonable and Olex needed to discuss it individually with each of the wholesalers.

(f) Moreover, it was discussed that the “It was RESOLVED to” statements in the draft minutes were not correct because there had not been any formal resolution made at the 23 June 2011 meeting.

1. Finally, Irwin, who had not attended the 23 June 2011 meeting, expressed concern that the minutes disclosed a potential contravention of the Act. Irwin aired those concerns during the meeting. After he did so, one or more EWAA directors said that the minutes were inaccurate and Geddes was asked to arrange for them to be reviewed by a trade practices lawyer.
2. Dunstan and Roberts, who had been invited to attend the meeting, joined after the discussion regarding the minutes of the 23 June 2011 meeting. Roberts was accompanied by Klarich and at a certain point asked Dunstan to leave the room and informed the EWAA directors that Prysmian had received a letter from the ACCC concerning the cutting charge increases. Dunstan later informed the EWAA directors that Olex had also received a letter from the ACCC concerning the cutting charge increases.
3. The ACCC has made much of the amendments to the minutes of the 23 June 2011 meeting at the September 2011 meeting as demonstrating some consciousness of guilt. But I agree with the respondents that this contention is not made out. The first draft of the minutes had only been sent to the EWAA directors on 8 September 2011, six days before the meeting. Unsurprisingly, one of the matters to attend to at the September 2011 meeting was to consider the minutes of the previous meeting and make any necessary corrections. These were minutes taken by Lemon, who had no previous familiarity with any of the subject-matter of the discussions at the 23 June 2011 meeting or of any of the persons who were involved. It is not surprising that there were a few matters to correct. Further, the concern about trade practices issues that was raised at the September 2011 meeting was a concern that Olex and Prysmian, as competitors, should not be in the same room together. This is consistent with the ACCC’s concern at this time, which was a concern about a possible price fixing arrangement between manufacturers. No amendments to the minutes were made in this respect. There was no attempt to sanitise the presence of the two manufacturers and no amendments concerning their involvement.

### Dunstan’s notes

1. I agree with the ACCC that Dunstan’s notes of the 23 June 2011 meeting evidence that the Lemon/Symons minutes are not a complete record of everything discussed at the 23 June 2011 meeting, for example, “Does step 2 bc [become] a decision not to cut any product ≤ 25mm2 (Jan 2012?)”; “Incentive to deal with the charge so the volume can become a shift to the Wsalers”; “Min quote value as well? or buy from std price lists”. But where this takes the ACCC is another question.
2. First, the references “Engagement at an individual organisation level” and “Discuss TPL detail with each member” in the notes are attributed to Webb and are quite consistent with the minutes by suggesting that Webb observed that “Olex must deal with wholesalers individually”. The ACCC has sought to make a point about when Webb said this. It suggested that it was said at the start but superseded by the “resolutions”. But even if it was said at the start does not mean that the message was not reinforced at the end. Moreover, it makes little sense to suggest that the “resolutions” would supersede such a message. Moreover, there is no reference to “resolutions” being made whilst Dunstan was present.
3. Second, the ACCC has submitted that the Court should infer that “Olex appreciated that a cutting charge would achieve reallocation to the Wholesalers” from the following comment in Dunstan’s notes:

TD \* Incentive to deal with the charge so the volume can become a shift to the wsalers

1. In my view, the ACCC has an attribution problem. The statements attributed to “TD” are statements made by Davis, not Dunstan. A question mark appears next to one of the “TD” references, indicating that Dunstan, as the author of the notes, was unsure or could not recall whether the statement was made by Davis or someone else. It is also confirmed by the content of the statements. For example, the first “TD” note records a question about Olex’s future intentions with regard to cable cutting: “Does step 2 be [become] a decision not to cut any product < 25mm (Jan 2012?)”. I agree with Olex that the question makes no sense if it originated from Dunstan. The third “TD” note also records a question concerning minimum quote values, which seems to be a question whether Olex was proposing to introduce minimum quote values in addition to the MOV fee. Why would Dunstan record a question to himself?
2. The meaning of the second “TD” note is unclear. A likely interpretation is that it appears to record a statement by Davis that it will be up to wholesalers to deal with Olex’s cutting fee in a way that encourages business to be directed to wholesalers. This may relate to the decisions that wholesalers would need to make in the future whether to have Olex cut cable for them or to undertake cable cutting themselves. The notes record an earlier statement of Murphy querying whether the manufacturers should be cutting product less than 25mm2 at all.
3. I also agree with Mr Michael O’Bryan QC for Olex that there was no obligation on his part to cross-examine Davis about the contents of the notes. Davis had not given evidence in chief about such matters contained in the notes.

### Roberts’ note

1. The note prepared by Roberts of the 23 June 2011 meeting records general discussion about industry reform, the circulation of the Olex “memo/letter”, the increase in the cutting charge to $85 per cut described as “cable cutting charge *increased*” and “[n]o visible opposition from the wholesalers”. There is no reference to the MOV. There is no reference to Roberts agreeing or Prysmian’s position. This is all consistent with Olex unilaterally stating a position and the wholesalers not factually objecting. In my view, Roberts’ note hardly supports the ACCC’s case.

### Murphy’s diary entry for 23 June 2011

1. Murphy’s diary entry for 23 June 2011 records input from “Rod”, presumably, Rod Harvey, chairman of Gemcell, that a MOV at $2,500 is “workable” and that the cutting charge is “acceptable for below 25mm2”. The ACCC suggests that the note implies that Murphy was gathering information in order to communicate a response at the 23 June 2011 meeting. In my view, this is one of the more ambitious forensic assertions of the ACCC.

## (m) The Moncrieff proposal

1. As I have said earlier, the Moncrieff proposal was prepared by Dunstan and Moncrieff and was subsequently handed out by Moncrieff at the 23 June 2011 meeting.
2. The Moncrieff proposal was as follows:

**Low Voltage Cable Reform Proposals**

**EWAA Meeting**

**23 June 2011**

In Olex’s submission to the EWAA on Thursday May 26 2011, a number of initiatives for LV Power cable reform were proposed.

It is recognised that full implementation of these initiatives will take some time as behaviours and processes take effect along the full value chain.

In order to get some momentum for the reform agenda, Olex proposes the following implementation timeline for two high priority items:

**August 1**

* Restructure the fee scale for the cut to length service, based on a truer ‘fee for service’ scale than what currently exists. Two options:

(a) Split by product group, namely: $70 per cut for product <=25mm2 and $100 per cut for product > 25mm2; or

(b) One flat fee of $85 per cut, irrespective of cable product.

* Benefit to EWAA members:
* Creates an opportunity for increasing revenue from value added services
* Delivers a lower unit price of cable to those who purchases [sic] std lengths

**September 1**

* Based on Olex’s analysis, the median order value across its Wholesale custom is less than $1000. This leads to a very inefficient industry supply chain. As the initial step for reform, the first step to reforming this Olex will implement a revised Minimum Order Value (MOV) of $2500. Any orders which Olex processes which are less than $2500 will incur a combined handling/freight recovery fee of $250 per order.
* Benefit to EWAA members:
* More efficient utilisation of labour in the branch network
* Ability to utilise labour more on outbound selling, not internal processing
* Be seen to be acting as a true ‘Master Distributor’ by the Industry
* Provides for ‘staggered’ behaviour change, whereby all orders over $2500 will be delivered free of charge until further consultation
1. A number of propositions can be stated in elaboration of what I have said earlier.
2. First, this was a proposal of Olex only. It had not been circulated to or discussed with Prysmian prior to the 23 June 2011 meeting. Indeed, Roberts was not given a copy thereof at the 23 June 2011 meeting.
3. Second, as its heading suggested, it concerned *low* voltage cable and not all electrical cable.
4. Third, as is apparent from the document, there is no reference to any commitment being sought or extracted from the wholesalers by Olex. What the document makes plain is that Olex was putting a proposal for an increased cutting fee (with two options) and a minimum order value, both for its own interest. The document then explained, in my view as a selling point, the “benefits” of these proposals to the EWAA members. So the document could be characterised as unilateral proposals of Olex that it was announcing and selling to the wholesalers, an unremarkable commercial strategy for a manufacturer seeking to justify cost increases.
5. Fourth, again as is apparent from the document, from Olex’s perspective, the increased cutting fee was justified on a “truer ‘fee for service’”, ie it was justified on a costs basis. Further, the MOV was sought to be justified because of the then “very inefficient industry supply chain”, which presumably included costs efficiency (or lack thereof) considerations.
6. Fifth, in relation to the cutting fee increase, Olex put two options, either of which was satisfactory for its purposes. Again, it is difficult to see how it could be said that Prysmian as at 23 June 2011 could have been a party to or had the requisite infringing purpose in relation to the $85 cutting fee in circumstances where it had never seen the document and Olex was putting two proposals, and then with regard to its own position only.
7. Further, the benefits to EWAA members of the increased cutting fee were justified in ways that could ensure *costs* benefits to EWAA members. Now, it is accepted that Olex also sought to “sell” it on the basis of “increasing revenue from value added services”. But to suggest such a benefit does not entail that Olex’s sole or dominant purpose for the increased fee was to put this forward to divide up the end-user market.
8. Sixth, in relation to the MOV, the benefits that Olex sought to identify for the EWAA members were predominantly related to perceived costs benefit efficiencies for such members. Again, it is accepted that one benefit identified was to be “seen to be acting as a true ‘Master Distributor’ by the Industry”. But that does not entail that Olex’s sole or dominant purpose for the MOV was to put this forward to divide up the end-user market.
9. Seventh, the timelines for each proposal (1 August 2011 for the cutting fee and 1 September 2011 for the MOV) were to be discussed.
10. Finally, it is true that the proposal is about “two high priority items” that were represented to fit within the broader “reform agenda” and the broader set of “initiatives for LV Power cable reform”. Moreover, such items were described in the context of getting “some momentum for the reform agenda”. Now as to this, a number of matters may be observed. First, the broader agenda is *LV* cable reform. Second, the ACCC has not alleged a case that the broader initiatives constituted a proscribed arrangement or understanding or that the two items were a proscribed giving effect to such a proscribed broader arrangement or understanding. Third, the ACCC has sought to leverage off the broader setting the narrower relevant arrangement or understanding with the proscribed purpose for each of the narrower two items. But there are difficulties with this. Even if the broader agenda was to reform, in a general sense, a perceived inefficient industry supply chain, proposing *costs* efficiency measures, even if consistent with the broader agenda, does not establish the *proscribed* purpose. The immediate and operative purpose, cost efficiency, is not a proscribed purpose.

## (n) Cutting fee and MOV fee announcements

1. Immediately following the 23 June 2011 meeting, Moncrieff had a discussion with Dunstan. He said that Dunstan should commence the process to implement the cutting fee increase of $85 as well as the MOV fee.
2. Later that day at 4.42pm, Dunstan sent an email to Hueber and Stack, copied to Kay David, Olex’s National Customer Sales Manager. In that email, Dunstan noted that the cutting fee would be increased to $85 per cut with a target implementation date of 1 August 2011. Dunstan wrote in the email that Olex would be proceeding with the MOV from 1 September 2011 but that announcement would follow after he consulted further with customers.
3. Dunstan sent a further email to Stack that day at 10.19pm saying that the changes proposed at the 23 June 2011 meeting were “endorsed by [the EWAA] as a means to support Aust mftrs”. I will return to this email later.
4. On 27 June 2011, Olex announced to the market that it would increase the cutting fee to $85 per cut effective 1 August 2011.

### Prysmian’s consideration of the cutting fee increase

1. The sequence of events relating to Prysmian’s increase of its cutting fee is as follows.
2. On 24 June 2011 at 5.16pm, Susie Ilic of Olex sent an email to L&H, Rexel, MMEM and Gemcell attaching an Olex letter announcing its new cutting charge of $85 from 1 August 2011.
3. On 27 June 2011 at 6.47am, Shroff attached to an email to Bronwyn Cover at Gemcell “the current schedule of fees and charges which are subject to review”. Those charges included a $35 cutting charge. That was the current cutting charge.
4. Later that morning at 9.46am, Cover forwarded Shroff’s email to Murphy and asked, “Are you OK with these changes and the Fees and Charges?” At 12.52pm, Murphy responded to Cover’s email as follows: “As far as the cutting charge goes I believe we should see an increase in this fee to $85 in the not too distant future. We can discuss this on the phone hook up today”.
5. On 28 June 2011 at 8.54am, Robert Paterson of BGW (Paterson) emailed Shroff and asked, “Hama, will you be doing the same?”
6. Now the ACCC submits that Roberts committed Prysmian to “follow” Olex at the 23 June 2011 meeting because Murphy and Webb were at the meeting and were aware of Olex’s announcement of its cutting charge increase. But that submission does not explain the question posed to Shroff in Paterson’s email of 28 June 2011. The question is neutral. It does not proceed on any preconceived notion reported to Paterson from the 23 June 2011 meeting. The exchange of emails between Prysmian and BGW/Gemcell during this period indicates is that BGW/Gemcell could not be sure what Prysmian would do. The inference is that Prysmian had not committed to do anything in the 23 June 2011 meeting. It is consistent with Roberts indicating at the 23 June 2011 meeting that Prysmian would consider its position.
7. Further, Murphy in his 27 June 2011 email reflected some uncertainty in expressing his belief that “we should see an increase in this fee to $85”. In any event expressions such as this by Murphy are not evidence of the fact against other parties. Furthermore, Prysmian and Olex had followed each other previously on the cutting fee charge. That experience was reflected in a number of emails by persons (unrelated to the 23 June 2011 meeting) after the Olex announcement expecting all manufacturers to follow suit. Further, Murphy was aware of Prysmian’s response to the Geddes email which proposed cutting charge increases of greater than $85.
8. On 27 June 2011 at 6.47pm, Shroff sent an internal email to Mark Allingham, Martin Francis, Roberts and Haller saying, “I believe Olex has announced an increase in cutting charge to $85/cut. Could you please check on their website and if confirmed then we need to follow”. On 28 June 2011 at 8.32am, Allingham emailed Shroff copied to Roberts, Haller and Francis a copy of the Olex announcement of its new cutting charge of $85.
9. On 28 June 2011 at 4.24pm Shroff emailed Roberts, Haller and Francis, the same three executives involved in setting the fees referred to in the Prysmian response to the Geddes email in the following terms: “Llyr, Martin, We need to send a letter out in the next day or couple, please confirm we are following the market lead and then Martin can draft the letter and get you both to approve and send it out into the market. According to Terry from MMEM we need to move quickly, which I agree”. That email makes no mention of an obligation arising out of the 23 June 2011 meeting. The reference to “market lead” is in one sense in tension with a consensus obligation.
10. On 28 June 2011 at 6.35pm in an email to Roberts, Haller and Francis, Shroff set out his reasons for following the lead. None of those reasons include a consensus reached at the 23 June 2011 meeting. Shroff appears to have been oblivious to any such consensus. His reasons were commercial. He referred to the Prysmian response to increase the cutting charge to $100 from 1 October and the provision of reasons for the change to the EWAA in that proposal. He continued: “The issue is – do we go our own way in line with what we worked out and eventually get to $100, or do we follow the market lead. We are better off having one rate in the market than causing confusion. My view is – given the cost of cutting service is much higher than what we charge, there is no reason why we can’t follow the lead. It is ultimately up to Llyr and Stephen, yes we will have some pushback etc etc from the branches but I am happy to follow Olex”. That email contradicts the suggestion that Shroff believed that a consensus had been reached at the 23 June 2011 meeting to which Prysmian was a party.
11. Roberts’ email of 29 June 2011 at 8.38am which responded to Shroff’s email is also inconsistent with any prior commitment by Roberts at the meeting. He made no reference to the 23 June 2011 meeting. He referred to the Prysmian response and stated: “An increase to $85 from 1st August is therefore a reasonable compromise. Yes we will follow Olex (based on their attached letter to the market) but there is no law against being a follower”.
12. On 29 June 2011 at 8.47pm Shroff responded to Paterson’s email of 28 June 2011 and stated: “Reviewing at the moment, most probably will follow”. This is also inconsistent with a pre-commitment and reflected what was then being debated internally within Prysmian
13. After debate between the same persons involved in the setting of the Prysmian response fees, it was internally agreed to follow the Olex lead by Roberts’ confirmation on 29 June 2011 at 9.23am.
14. Prysmian made an announcement to the market on 1 July 2011 that it would increase the cutting charge to $85 per cut effective on 1 August 2011.
15. Generally, the above sequence of events is consistent with commercial reality. In all likelihood, Roberts would not have committed at the 23 June 2011 meeting to a cutting fee increase without consulting his executives. Indeed, he so consulted once the Olex market announcement had been issued. At that time, Prysmian had a pre-existing and documented 24 May 2011 desire to increase the cutting fee by a higher amount than $85. The fact that Olex had determined to raise its cutting price had the potential to suit Prysmian. But Prysmian did not need to agree to it at the 23 June 2011 meeting. Moreover, when Olex announced that increase to the market, it made commercial sense for Prysmian to follow. That did not require or entail any commitment on the part of Prysmian at the 23 June 2011 meeting.

### The wholesalers’ response

1. The wholesalers directed their staff to support Olex’s and Prysmian’s cutting fee increases. L&H staff were instructed to refrain from “attacking” and “beating up” Olex and Prysmian and to “support” them in implementing the increased cutting fee “and future changes”. L&H staff were also instructed that going to a supplier that did not charge for cuts was not an option. Rexel’s staff were instructed that Rexel fully supported Olex’s and Prysmian’s cutting fees and that they were part of a range of commercial changes coming to the cable industry.
2. Picken did not discuss Olex’s increased cutting charges and MOV fee with anyone at Rexel in the days following the 23 June 2011 meeting before Olex publicly announced increased cutting fees. He considered that the announced increases to the cutting charges and MOV fees were, in effect, increases in the standard fees to the entire market. He expected Brochut and her team to perform their job by negotiating with Olex in respect of those increases. He thought that the negotiations conducted by Brochut might possibly lead to a lower cutting charge being imposed on Rexel, and certainly expected it to lead to lower base prices for cable purchased by Rexel.
3. Picken was not directly involved in determining how Rexel’s branches would respond to the increased charges. He did not consider the increased charges to be a matter of great significance in the overall context of Rexel’s business, for which he was responsible. Given that it was not uncommon for a supplier to increase prices, it was not something that he would have had direct involvement in. Picken estimated that across all of Rexel’s product categories, there would be three to four price changes a week, which were matters Brochut’s team dealt with and negotiated to arrive at the best deal for Rexel. In any given year, Rexel typically received between one and two price rises of around 3 to 4% from each manufacturer. The increase in the cutting fee was a very small component of the overall cost of cable, and certainly less than 0.5%. Picken expected Brochut’s team to deal with a price rise of that magnitude as part of Rexel’s day-to-day business.
4. On 4 July 2011 at 5:06pm, Picken received an email from Brochut that forwarded an email from Alderson regarding Prysmian increasing its cable cutting charge. When Picken read this email, his view was that Alderson’s references to Rexel being “consulted” about the increased cutting charges, and that Rexel would be supporting this “initiative” provided it was “industry wide” were references to discussions either he, or someone else within Brochut’s team, had had with suppliers. He did not understand these references to be a reference to any discussion that he had had with any manufacturer, nor a reference to the 23 June 2011 meeting, including because the reference was to announcements having been made by four cable manufacturers in circumstances where:
	1. only one of those manufacturers (Olex) had made an announcement about increased cutting fees at the 23 June 2011 meeting;
	2. other than receiving the Prysmian response in May 2011, he had not seen or been part of any communication with Prysmian about any cutting fee increases; and
	3. he had not had any communications with General Cable or Electra about any cutting fee increases.
5. On 26 July 2011 at 5:38pm, Picken received an email from Brochut forwarding an email from Alderson regarding advancing Rexel’s strategy to invest in increased cable cutting capability. Picken did not know how Alderson came to understand that “other initiatives” would follow the increased cable cutting charges, and he did not know what “other initiatives” Alderson was referring to in this email. Picken did not say anything to Alderson to this effect, and nor did he say anything to this effect to anyone else within Rexel.
6. Between 26 July 2011 and 2 August 2011, Picken sent and received a number of emails regarding Rexel’s approach to certain cable matters, and increased cable cutting charges.
7. Picken sent an email to Alderson on 1 August 2011 at 9:29am in which he added comments to his email in bold red type. In relation to the comments he added to his email:

(a) In response to the comment described in the preceding paragraph, Picken said “How do we get the margin? By marking up the cable company’s charge or [by] buying in bulk and subdistributing meaning we don't incur any charges? If it is the latter have we planned for this? How is the Malaga cable warehouse progressing?” Picken made these comments because:

(i) At that time, he did not think that Rexel would receive rebates from cable suppliers on the cutting fees or MOV fees that would be added to Rexel’s purchases.

(ii) Prior to seeing this email, he had not considered that the cutting fee would lead to a significant impact on how Rexel did business. However, because Alderson was raising the prospect of obtaining an additional margin, he was querying with him whether Rexel had the warehouse capacity to buy significant amounts of additional cable in bulk, break it up and make some margin in the process. Picken thought that the only way Rexel could increase its margins in connection with cutting fees increasing would be to buy in bulk and receive the benefit of cheaper prices and no cutting fees, or to put a mark-up on the supplier’s cable cutting charge.

(iii) In relation to the comment “have we planned for this”, Picken knew that Rexel’s plans and strategy at that time were for Rexel to buy in bulk through distribution centres such that it would ultimately not incur the relevant charges. However, he was prompting Alderson to consider what other arrangements he could make until that strategy had been implemented by Rexel. This might have been for instance using the Big Boxes to buy cable in bulk for branches within the metropolitan areas in which the Big Boxes were located until such time as the distribution centre strategy was in place.

(b) In relation to Alderson’s answer to the question, “What position will EIW be taking on this point”, Picken said “You should be leading them here”. In this email to Alderson, Picken also told him that “as [the cutting fees affect] everyone I suggest we recommend a policy and lead the thought process on this”. In making these statements Picken was telling Alderson that it was his role to take the lead on formulating a company response to the cutting charges. Picken did not say anything to Alderson in relation to the direction in which Rexel’s cutting charges should go because it was not his intention that the manufacturers’ increased cutting charges would be used to channel direct supply to wholesaler branches. For this reason, Picken was happy with Alderson’s suggestion that Rexel should charge $85 for cuts performed in the branch network. He also considered that, if that increase was poorly received, then it would be a much easier task for Rexel to reduce its fee, as compared to increasing it after the fee had been increased to a lower level once before.

(c) In response to Alderson’s answer to the question, “Do we know what our opposition are doing on the eve of the introduction of the $85 cutting fee?”, Picken said “Paul – Remember this is not all suppliers”. Picken made this comment because he felt it was important to remind Alderson that other cable suppliers, including Rexel’s single largest supplier, Electra, may not increase their fees. The way that Rexel responded to the new fees would also depend on Electra’s response.

(d) Picken considered that Alderson’s statement in this paragraph that “The increased cutting charge was a part of the industry reform initiatives that The Electrical Wholesalres [sic] Association proposed to the cable makers so we know at a high level they support this” was factually incorrect, or at the very least ambiguous. Picken did not know the source for Alderson’s statement as he had not spoken to Alderson about any of the EWAA level discussions. However, he did not correct Alderson in his response, because he did not see any need to do so at the time. In his capacity as CEO of Rexel, he received a very large number of emails each day and he did not generally correct every error unless it had some consequence for the business. This error did not have such a consequence. There was nothing that Alderson was suggesting that caused Picken to have any concern for Rexel’s business. In particular, Alderson’s proposals in relation to the implementation of an $85 charge seemed logical, and Picken had no reason to suggest a different course of action.

(e) Regarding Alderson’s statement that, “[One] thing we have been [guaranteed] is that the manufacturers will be applying it without exception ...”, Picken was not aware of this, and he do not know how Alderson came to form this view.

1. On 28 July 2011, Electra informed their customers that it would increase their cable cutting charges for cable up to 50mm2 to $60 per cut and for cable above 50mm2 to $85 per cut, effective 15 August 2011.

### Prysmian setting the MOV fee

1. On 15 August 2011, Prysmian started informing its customers that it would be introducing the MOV fee of $250 for orders less than $2,500 in value effective from 3 October 2011. Olex made the same announcement on 24 August 2011.
2. Let me elaborate on some of the background. On 29 July 2011, Haller’s internal email to Roberts, Francis, Shroff and Worden reported a discussion and agreement with Francis in relation to the MOV. The fact that persons other than Roberts were involved in that decision again reflects the improbability that he would have committed to that charge at the 23 June 2011 meeting. The email makes no reference to the 23 June 2011 meeting or to any consensus with the Wholesalers or Olex. On the contrary it stated: “Our competitors to follow should they wish” and “Hamavand to advise, informally to the Key market stakeholders from Monday August 1st”.
3. This announcement was made *before* the Olex MOV announcement on 24 August 2011. As such, Prysmian’s decision to implement the MOV fee does not support the ACCC’s case that Roberts indicated at the meeting that if Olex introduced a fee of $250 for orders less than $2500, Prysmian “would follow”. On any view of the evidence, Prysmian did not “follow” Olex on MOV fees. Prysmian in fact was the leader.
4. The ACCC relies on the statement in Shroff’s email of 15 August 2011 email to MMEM: “As mentioned on the phone, this initiative is as per our discussions with EWAA and hopefully shouldn’t be an issue with MMEM”. However, that email does not refer to any commitment or consensus at the 23 June 2011 meeting. Further, the email expresses merely a hope that the measure will not be an issue. There would be no reason for such language if Roberts had reported a consensus to the measure to which both Prysmian and MMEM were parties. Further, the description “this initiative” reflects the description used by the Prysmian response which provided for a fee of $250 for orders below the value of $5000, effective from 1 October 2011. It stated “as discussed each member of the EWAA has reviewed and agreed the above initiatives” and included as one initiative “Under this proposal wholesalers will: Place orders on manufacturers for a minimum of $5K (ex GST) per order”. That initiative was also reflected in the draft minutes of the March 2011 meeting as part of “a summary of the EWAA agreed position” after “a lengthy discussion” being a summary “appended to” and forming “part of” the minutes. There was discussion of Olex’s MOV proposal at the 23 June 2011 meeting as well. Accordingly, by reason of both the March 2011 meeting discussions and the 23 June 2011 meeting discussions, Shroff and Prysmian hoped that a minimum order value less than what they and the wholesalers had proposed would not be an issue. But this does not establish a prior consensus or commitment.

### Other matters

1. Throughout August 2011, Rexel and Prysmian continued having discussions about a strategic partnership between the two entities. The draft strategic partnership framework proposal which had been circulating between Rexel and Prysmian identified a key initiative which was to roll-out major industry reform to increase the cutting charge, increase the minimum order value and to increase the non-cuttable charge. Another initiative was for Rexel to increase its cable cutting capability and increase the range and depth of its stock levels, and in turn, Prysmian would reduce its stock, potentially exit the distribution model and wind back its cut-to-length service. An internal Rexel cable strategy presentation also identified that Rexel should become a broad range cable distributor and share a major part of Prysmian’s higher value direct business.
2. On 18 August 2011, Dunstan and Stack attended a “Gemcell members’ meeting” at Twin Waters Resort. Under a heading “Tony Dunstan and Greg Stack from Olex attended the meeting from 3.15pm”, the minutes of the meeting contained a statement that “[a]im is to give the bulk of the <25mm business to the wholesaler, trade off is increasing the MOV to $2,500 to change ordering behaviour making the wholesale market the lowest cost to serve”. The statement is inconsistent with the presentation given by Dunstan and Stack on that day. Under the heading “Supply Chain”, the presentation lists “Top 4 priorities — supply chain objectives” as product availability, competitive lead time for projects, reduce cost-to-serve and ETDBW (easy to do business with). Under the heading “Current Olex business model”, the presentation refers to an average of three to four orders per week to branches, high inventory levels on both sides, and a median order value of less than $700 per purchase order. The message of the presentation is that Gemcell’s median order value was too low, the MOV fee was intended to change that behaviour so that the wholesalers would become the lowest cost-to-serve, which would increase their business.
3. On 24 August 2011, Olex released its market announcement that, effective 3 October 2011, all orders that did not meet the $2,500 MOV would be subject to a $250 fee.
4. On 14 September 2011, World Wide Cables, a cable manufacturer and distributor informed its customers by email that it would not increase its cutting fee and that it would only charge $25 per cut. Further, World Wide Cables would not enforce a minimum invoice value. In an internal Rexel email that was sent to Rexel’s branches in Cairns, forwarding World Wide Cables’ email, it was noted that the branches should “[k]eep this in mind when doing cable quotes or orders”.
5. Let me deal with one other matter.
6. The ACCC has referred to a plethora of material after 23 June 2011 dealing with the increase in the cutting fee and the wholesalers’ perceptions thereof, but I do not consider that such material greatly assists it.
7. For example, on 27 June 2011, Gemcell made reference to “[a]s far as the cutting charge goes I believe we should see an increase in this fee $85 in the not too distant future”, with reference to Prysmian. But this is supportive of an *anticipation* of conduct by Prysmian (and indeed others also) following Olex rather than that Prysmian so agreed to do so on 23 June 2011.
8. Further, some wholesalers / retailers were shocked by the jump in the cutting fee: for example, they expressed themselves in terms “They must be joking”, “This is not going to be [accepted] very well by our customer” and the like. But this adds little to the circumstantial case.
9. Further, the ACCC has tendered material produced by some wholesalers after 23 June 2011 which on its face refers to both manufacturers, “best friend” strategies, the “EWAA plan” and the like and may be said to be consistent with the arrangement alleged; see, for example, the L&H Group Bulletin dated 29 June 2011 of Ian Pannell, his email of 29 June 2011 at 3.07pm, Chris O’Brien’s (L&H) email of 1 July 2011 at 5.16pm, Paterson’s email of 4 August 2011. The difficulty with such material is that it does not show each manufacturer’s purpose. Moreover, one does not know the source of the state(s) of mind of the authors of these communications, let alone delve into the question of the accuracy of their perceptions. I will elaborate on this later.
10. The ACCC tendered an internal Olex presentation to its Sales Leadership Team dated 13 October 2011. But the presentation does not provide evidence that Olex had the purpose of restricting supply to contractors and end-users. On page two, the presentation describes contractors as a “key customer / market segment” and details various opportunities for growth. Further, the document also demonstrates that the “EWAA/LV cable reform initiatives” were being pursued in *bilateral* discussions between Olex and individual wholesalers. On page four, under the heading “EWAA/LV cable reform initiatives are front of mind with all major wholesale groups”, the presentation refers to various bilateral discussions with the wholesalers in North Queensland, Victoria and Western Australia. The ACCC has referred to the fourth bullet point under the same heading: “Wholesalers are now looking forward to next steps – our withdrawal from the commercial contracting market”. But the statement is not referring to the increased cutting fee or MOV fee that had already been implemented by Olex. The statement is forward looking. It is consistent with Olex’s strategy at that time which was to focus on increasing sales to large contractors and end-users and not seek to compete in the “small end” of the market.

## (o) General

1. Now to this point I have not expressly referred to all of the plethora of material tendered by the ACCC as constituting its circumstantial case although I have referred to some of the further material relied upon by the ACCC in Sections C and G. But I have considered all this material, including the material referred to in the ACCC’s Schedules 2 and 3 to its closing submissions. But I would make the following points.
2. First, I accept that before 23 June 2011 there is an abundance of material supporting the proposition that wholesalers wanted to reduce the competition they perceived that they faced from manufacturers in relation to direct sales.
3. Second, I accept that before 23 June 2011, there is material suggesting that wholesalers perceived it to be in their interests to support manufacturers and that such support might involve steps under which manufacturers might reduce their direct dealing.
4. Third, I accept that before 23 June 2011 manufacturers had had discussions with their major wholesalers concerning strategic partnerships and that opportunities were explored of mutual benefit.
5. But generally I would make several observations.
6. First, I am required to address the evidence in order to determine whether the relevant arrangement or understanding as at 23 June 2011 was made. The ACCC has not pleaded a case based upon a broader industry transformation that it suggested may have been informally reached.
7. Second, undoubtedly, discussions at an earlier time and in a broader setting must be considered as part of the relevant contextual setting, but they are less probative than specific communications closer to or on 23 June 2011 between the relevant respondents or internal considerations of a particular respondent closer to or on 23 June 2011. From February 2011 there were many discussions, many proposals and many internal musings. Moreover, positions evolved over time and earlier positions were superseded by later discussions and considerations. The most probative material, as I say, relates to communications and considerations closer to or on 23 June 2011.
8. Third, the ACCC tendered voluminous material concerning Gemcell and communications concerning Middendorp and Gemcell. But Gemcell is not alleged to be a party to the relevant arrangement or understanding. The tender of this material had little probative value concerning whether Olex, Prysmian or Rexel were parties to the relevant arrangement or their subjective purposes.
9. Fourth, the ACCC tendered substantial material after 23 June 2011 as part of its circumstantial case but much of it was not of substantial assistance. For example, what am I to make of, say, L&H’s internal ruminations after 23 June 2011? They could not in my view advance substantial evidence going to the purpose of Olex, Prysmian or Rexel and whether they made the relevant arrangement or understanding. Further, much of the material tendered after 23 June 2011 related to the internal musings of individuals who were not even present at the 23 June 2011 meeting and were speculating as to the background for why the fees were introduced. The ACCC on occasion attempted to fill this gap by suggesting that their beliefs were informed by information sourced from communications with those present at the 23 June 2011 meeting. This may be the case, but at the end of the day I cannot be so satisfied to the requisite standard of proof, particularly given the context (s 140(2) of the *Evidence Act*).
10. Examples of such material are Alderson’s email dated 27 June 2011 to Rexel’s branches, Alderson’s email dated 27 July 2011 at 9.19am (or the other time zone indicating 11.19am) to Wayne Williams and Alderson’s email dated 19 August 2011 to Darryl Millburn. Alderson’s expectation or beliefs, even if reasonable, at these times are part of the evidence relevant to the circumstantial case, but they are not significantly probative of the relevant arrangement or understanding either of themselves or when considered with all other material.
11. Let me focus for a moment on Alderson’s email sent on 27 July 2011 at 9.19am to Wayne Williams, the Executive General Manager of Electrical Industrial Wholesalers in which Alderson was responding to a number of questions that had been raised by Williams on 26 July 2011 about the strategy on cable cutting fees.
12. Picken was copied into that email from Alderson. Alderson’s response to Williams stated inter alia:

Ultimately the decision on what to charge for branch cuts lays with each division but we would recommend that as the $85 charge from the manufacturer becomes accepted as the industry norm that this is generally applied at branch level. I did a quick calculation on the effect that the $50 increase would have on cuts we purchase from the manufacturer and on charged to the customer at the same rate, this will add something in the region of $800,000 to the Group turnover, we usually retain the rebate so that means an extra $XXXXXX margin. We have no way of telling how many branch cuts we do but I'm pretty sure if we do implement the full cutting charge it will have an even great benefit to the margin.

1. The ACCC has submitted that the following statement in Alderson’s email of 27 July 2011 indicates that industry reform initiatives were discussed at 23 June 2011 meeting with Olex and Prysmian, and that Picken was the source of the information directly or indirectly via Brochut:

The increased cutting charge was part of industry reform initiatives that The Electrical Wholesalres [sic] Association proposed to the cable makers so we know at a high level they support this. This has been confirmed during our discussions with the suppliers. What will happen at branch level…

1. Relatedly, the ACCC has also referred to Picken’s email of 1 August 2011 to Alderson in which Picken provided some comments on Alderson’s email of 27 July 2011 to Williams. In the 1 August 2011 email, Picken’s comment on the above response from Alderson to Williams was “Paul – Remember this is not all suppliers”. Subsequently on 2 August 2011, Alderson responded to Picken’s email of 1 August 2011. Let me return to Alderson’s email of 27 July 2011.
2. First, the EWAA did not propose to the cable manufacturers a cutting charge of $85 at the 23 June 2011 meeting. That statement cannot be a reference to something that occurred at the 23 June 2011 meeting.
3. Second, the statement that “[t]his has been confirmed during our discussions with the suppliers” seems to be referring to discussions after the alleged proposal of the cutting charge, refers to more than one discussion and refers generally to suppliers. The expression “the suppliers” in terms is not limited to Olex and Prysmian. Indeed, Alderson’s 2 August 2011 email to Picken was, “The increased cutting charge has been confirmed by our 5 major cable suppliers plus others…”. Alderson was responding to Picken’s comment, “Paul – Remember this is not all suppliers” in Picken’s 1 August 2011 email. It would appear that Alderson regarded his 27 July 2011 email to Williams as referring to confirmatory discussions with suppliers other than only Olex and Prysmian. Accordingly, his reference in that email to discussion with suppliers could not have been to the 23 June 2011 meeting.
4. Alderson gave no evidence as to which suppliers he was intending to refer to in his email. There is evidence that by 27 July 2011, each of the following five suppliers had announced a proposed cutting charge of $85: Olex, Prysmian, General Cable, Australia Pacific Electric Cables and Advance Cables. That is further objective support for the proposition that Alderson was not referring to something that occurred in the 23 June 2011 meeting.
5. I will return to discussing some of the post 23 June 2011 meeting material in later sections of my reasons. At this point, it is convenient to now make some brief observations on the reliability of the witnesses.

# C. THE RELIABILITY OF WITNESSES

## (a) The reliability of Davis’ evidence

1. It is appropriate to examine in more detail the evidence given by Davis concerning the 23 June 2011 meeting.
2. Davis provided affidavit evidence as to what occurred at the meeting which in some respects was vague and unsatisfactory. It was also departed from during the course of cross-examination. But a number of themes are apparent from his evidence in totality which points against the relevant arrangement or understanding having been made.
3. First, in relation to the wholesalers, Davis only identified Webb as principally speaking, not other wholesaler representatives. Phraseology that Davis resorted to such as “No one objected to these proposals” makes that point good. Moreover, it seems plain that Webb did not have authority to bind the other wholesalers. For example, there is no direct evidence that at this meeting Rexel as such committed itself to any position in relation to Olex’s proposals.
4. Second, the reference to “resolution” in the minutes is not a reflection of a resolution in the ordinary sense or what occurred. Further, the “resolution” did not involve the manufacturers. Indeed, the minutes were never circulated to them. The “resolution” at most could only be of the representatives of the wholesalers / members of EWAA present at the meeting. Davis ultimately gave evidence consistent with such matters.
5. Third, on any view Davis confirmed that Webb specifically said that Olex would have to deal with each wholesaler separately in relation to getting agreement to Olex’s proposals.
6. Fourth, as Davis’ evidence confirms, there was nothing said at the meeting to support the proposition that there was some arrangement or quid pro quo on the part of the wholesalers to maintain or not reduce (let alone increase) their level of purchases from the manufacturers. Indeed Davis or Lamond could not have bound MMEM. Each MMEM branch was its own profit centre and each branch had its own discretion relating to purchasing decisions.
7. Fifth, in relation to what Roberts said, if anything, at the meeting, Davis gave evidence that after the discussion on cutting charges and MOV, all that Roberts said was that he would consider his position and that Prysmian would get back to the EWAA or its members later. In oral evidence, he agreed that [55] and [58] of his affidavit should be supplemented accordingly. His evidence in this respect is consistent with information he provided to MMEM for the purpose of answering a ss 155(1)(a) and 155(1)(b) notice.
8. Sixth, Davis also gave evidence consistent with the proposition that the Moncrieff proposal was only tabled at the 23 June 2011 meeting *after* Moncrieff had asked Lemon if it was acceptable for Roberts to be present at the time the content was being discussed. Further, Davis did not recall a copy of Olex’s proposal being given to Roberts. This evidence is perfectly consistent with no prior arrangement or understanding being reached between Olex and Prysmian before the meeting. And there is no probative evidence that Roberts reached any arrangement or understanding at the meeting. Quite the reverse in fact.
9. Mr Peter Collinson QC for the ACCC submitted that Davis, the ACCC’s own witness, was an unreliable witness and that his evidence had been “inconsistent and contradictory” on central questions. It was also said that he was unusually susceptible to suggestive questioning that, so it was said, produced ready agreement to directly inconsistent propositions. I have considered the ACCC’s criticisms as set out in the memorandum, “ACCC’s Position on the Reliability of Mr Davis’ Evidence”, which was primarily deployed in the context of the “no case” submission made by the respondents. Whilst some of its criticisms have force and there is no doubt that Davis was susceptible to suggestive questioning, I do consider that Davis’ evidence was sufficiently reliable on the above themes for it not to be significantly discounted. Indeed, his evidence was largely confirmed by the evidence of Moncrieff and Picken in relation to what occurred at the 23 June 2011 meeting. Moreover, many of the differences between his affidavit evidence and his oral evidence were more matters of elaboration. For example, his affidavit evidence was that Webb said that the manufacturers should speak to the wholesalers individually about the cutting fee increase, and his oral evidence was that Webb said the same thing in respect of both the cutting and MOV fees. Further, in his oral evidence he clarified that Roberts stated expressly that he would consider his position in relation to the fees. Further, at the end of the meeting, Davis expected Olex to increase the cutting fee because of what Moncrieff had said at the meeting and expected that Olex would revert to MMEM about the MOV fee. Further, his affidavit evidence was that there was no formal resolution passed by the EWAA members in support of the fees, and his oral evidence was that there was merely a “general discussion of acceptance” and that only encompassed the EWAA members. Further, his evidence was that MMEM had a large branch network that make their own buying decisions and Davis had no capacity to make a commitment that branches would buy cable in the future from Olex or Prysmian and neither Davis nor Lamond gave any such commitment to Olex at the meeting. Further, Davis did not hear anybody else from the wholesaler group say that they would buy cable from Olex.
10. I do agree with the ACCC that there was considerable confusion in Davis’ evidence concerning the source of information for MMEM’s response to the s 155 notice. Nevertheless, it is likely that he was the or a source of information concerning what occurred at the 23 June 2011 meeting.
11. I cannot leave this part of the case without making the point that if I were to accept the ACCC’s submissions concerning the unreliability of its own witness and put Davis’ evidence to one side concerning the 23 June 2011 meeting, that to do so would hardly provide *positive* reinforcement of the ACCC’s case.
12. Finally, the ACCC could have called but chose not to call Lamond, notwithstanding that it had prepared written evidence for him.
13. Mr Norman O’Bryan AM SC for L&H contended that I should draw a *Jones v Dunkel* inference against the ACCC for failing to call Lamond. The ACCC filed an affidavit of Lamond, the CEO of MMEM, and who was present at the 23 June 2011 meeting. No explanation was given as to why he was not called. L&H’s contention is that the proper inference to be drawn is that Lamond’s evidence would not have assisted the ACCC on any of the following matters:
	1. First, the alleged commitments given by the wholesalers jointly and severally at the 23 June 2011 meeting.
	2. Second, that Prysmian did anything other than indicate it would consider its position and negotiate with EWAA members individually concerning any proposed changes to its offer. This was in relation to both the cutting fee and MOV.
	3. Third, no resolution was made regarding a minimum order value. MMEM understood that this issue would be discussed by Olex with each of the wholesalers individually.
	4. Fourth, MMEM’s corporate structure and the impossibility of MMEM management committing any MMEM branch regarding the future purchase of Olex cable;
	5. Fifth, the fact that neither Davis nor Lamond would ever have sought to commit MMEM branches in any of their purchasing decisions.
14. But in all the circumstances, I am not inclined to draw such an inference against the ACCC. Such an inference cannot establish *positively* adverse evidence to the above effect. And in any event I am unclear as to the control that the ACCC had over this witness and his level of cooperation at the time of trial.

## (b) The reliability of Moncrieff’s evidence

1. The ACCC contends that Moncrieff was a defensive and evasive witness. It is said that the most significant example was his assertion that prior to the 23 June 2011 meeting he had made a decision to impose a single cutting fee and a MOV, and that he would announce the same at the 23 June 2011 meeting, in spite of being shown the Shanghai presentation which stated plans to introduce a split cutting charge and which did not mention a MOV. It is said that to the extent therefore that Moncrieff made any assertion in his evidence that was self-serving, that evidence should not be accepted unless it was corroborated by documentary evidence. Accordingly, so the ACCC contends, Moncrieff’s evidence that Roberts indicated that Prysmian would make up its own mind on the cutting fee and MOV fee should not be accepted.
2. In any event, it is said by the ACCC that the evidence of Moncrieff is not consistent with the attendees of the 23 June 2011 meeting having considered the Moncrieff proposal as a matter that needed to be negotiated further between the parties. It is said that Moncrieff did not consider there to be a need for further negotiation and the conduct of Olex in immediately announcing a single cutting charge after the 23 June 2011 meeting (as opposed to the alternative, a split cutting charge) is inconsistent with there being any ambivalence in the attendees about what Olex would do.
3. In summary, I accept the evidence of Moncrieff in large part. Most of it was not challenged. Most of his evidence was credible and supported by the contemporaneous documentary record.
4. As Olex has rightly contended, Moncrieff’s affidavit evidence was not substantially challenged by the ACCC on the following aspects:
	1. After July 2010, Moncrieff identified the commercial challenges facing Olex including its high “cost-to-serve” and inefficiencies in the supply chain. Moncrieff identified the large number of small purchase orders from the wholesalers as a contributing factor to Olex’s high cost-to-serve and supply chain inefficiencies.
	2. By October 2010, Moncrieff had developed a plan for Olex to address its challenges. The plan had the object of transforming Olex into a more strategic, customer-focused and market driven organisation with a lower cost-to-serve. The plan included an executive restructure including the creation of a General Manager – Supply Chain (Hueber), restructure of Olex’s business operations, product re-categorisation and rationalisation, warehousing restructure and reform of Olex’s supply chain with the wholesalers.
	3. By early 2011, Olex had engaged with each of its key wholesaler customers on the need for changes to the supply chain. This had the aim of reducing Olex’s high cost-to-serve. These discussions led to the introduction of VMI arrangements between Olex and L&H and Rexel. Moncrieff considered that Olex’s supply chain reforms were mutually beneficial in that it reduced costs for both parties.
	4. By early 2011, Olex, Prysmian and Advance Cables had lodged an anti-dumping action in respect of products being imported by Electra. On 7 February 2011, Moncrieff met with Picken. Moncrieff and Picken discussed the anti-dumping action. Moncrieff wanted the wholesalers to provide pricing information in order to support the anti-dumping action. Picken said to Moncrieff that the wholesalers could probably help them. He told him to come along to the March 2011 meeting of the EWAA and they could discuss this further. Moncrieff had not previously heard of the EWAA. Moncrieff sent an email to Picken the next day confirming that he could attend the March 2011 meeting and requesting an agenda and a list of attendees for the meeting. He received no response to this email.
5. Moncrieff’s evidence is largely consistent with Olex’s contemporaneous records. Olex’s internal business records confirm that the sole purpose of the steps taken by Olex in 2010 and 2011 in respect of the distribution of its products was to improve efficiency. As at 2011, Olex incurred substantial costs in cutting cable for its customers and those costs greatly exceeded Olex’s then current fee for cutting cable that was supplied to its customers. There was no statement in any of Olex’s documents that supported an allegation that Olex’s purpose was to prevent, restrict or limit supply of its products to persons other than wholesalers.
6. Further, in relation to the 23 June 2011 meeting, Moncrieff’s affidavit and oral evidence as to what occurred was not generally challenged, save that he was challenged on his evidence that Roberts said at the meeting words to the effect that Prysmian would consider its position. But contrary to the ACCC’s case thesis, the evidence of Moncrieff as to what Roberts said at the 23 June 2011 meeting is consistent with other evidence of what occurred at the meeting.
7. Let me deal with some other criticisms by the ACCC of Moncrieff’s evidence.
8. First, the ACCC criticises two aspects of Moncrieff’s evidence concerning his attendance at an annual supplier review with Rexel in February 2011.
9. The ACCC criticises Moncrieff’s “unwillingness to give evidence about whether Olex and Prysmian dominated the direct sales channel”. Moncrieff was cross-examined about a statement in the Rexel presentation given to Olex that “[T]he Australian market has been dominated by Olex and Prysmian with a share of direct business over 75%”. Moncrieff was asked to agree with the Rexel statement, assuming that “direct business” meant all customers other than wholesalers. Moncrieff’s evidence was that he would have to check Olex’s records but that Olex and Prysmian would have the majority share of those sales. The ACCC has provided little to support its assertion that Moncrieff was unwilling to give evidence on this point. Indeed, the ACCC has not adduced any detailed evidence to show that the Rexel statement was correct. The Rexel statement that Olex and Prysmian held 75% of direct business (ie across the entire market) cannot be confused with Olex’s analysis that contractors and end-users made up 75% of Olex’s business. They are different calculations. A draft Olex presentation dated 21 June 2011 estimated Olex’s market share of sales to wholesalers as 24% and Prysmian’s as 23%.
10. Further, the ACCC criticised Moncrieff’s evidence about whether he perceived that Rexel was concerned about Olex competing on direct sales. Moncrieff stated that he did not perceive Rexel as Olex’s competitor, but he accepted that Rexel held the opposite view. I found some aspects of this evidence to be a little problematic, but even accepting the ACCC’s criticisms on this aspect does not carry the day for it in relation to the cogent evidence given by Moncrieff as to the events closer to and on 23 June 2011.
11. Second, the ACCC criticised Moncrieff’s evidence concerning the March 2011 meeting. I must say that I found some of the ACCC’s criticisms to be justified.
12. The ACCC criticised Moncrieff’s answer to the question: “What did you understand the purpose of the EWAA meeting on 8 March to be *from your perspective*?” (emphasis added). I must say that I found Moncrieff’s evidence in part under cross-examination not to be that responsive on some aspects. But at the end of the day I do not consider that his answer to that question ought to lead me to reject large parts of his evidence, particularly relating to events closer to and on 23 June 2011.
13. The ACCC criticised Moncrieff’s answer to the question whether he discussed with Roberts, at a meeting immediately prior to the March 2011 meeting, “a supply chain restructure that would see manufacturers selling *only* to wholesalers” (emphasis added). Moncrieff answered “no”. The ACCC has purported to criticise that answer by reference to minutes of the meeting prepared by Klarich. But the minutes do not support the proposition that was put to Moncrieff by the ACCC. The minutes do not say that Moncrieff and Roberts discussed “a supply chain restructure that would see manufacturers selling only to wholesalers”. The minutes describe a restructure of the relationship between manufacturers and wholesalers whereby wholesalers would provide the customer interface (rather than that task falling back to manufacturers). But there is no suggestion that that would be the exclusive means by which manufacturers would supply their products to customers.
14. The ACCC has also criticised Moncrieff’s answer to the question whether he had “a discussion with the wholesalers about restructuring the industry such that Olex would only supply to wholesalers”. Moncrieff answered “no” and in response to a similar question he answered that he had no recollection of the wholesalers asking to be an exclusive channel. But there is nothing in the Geddes’ material to support a contention that at the March 2011 meeting the wholesalers asked Olex and Prysmian to supply the wholesalers exclusively, whether in respect of all cable (the ACCC’s case) or LV cable.
15. Third, the ACCC has criticised Moncrieff’s evidence concerning his attitude to the Geddes email when it was received. But I agree with Olex that the ACCC’s criticism elevates form over substance. The ACCC in essence put that when Moncrieff received the Geddes email, he perceived that it contained formal proposals from the EWAA for consideration by Olex. In essence, Moncrieff’s answers were that he did not view the email in that way. He considered the Geddes email to be a collection of ideas from his customers that Olex should look at. He did not believe it could lead to collective agreement about industry reform. He nonetheless wanted to respond to the email along the lines Olex had been talking to the wholesalers on their individual supply chains. He wanted to placate them to a certain extent. In my view, Moncrieff’s evidence is quite credible. The Geddes email is a short, high level document. It expressly provided to Olex a “framework” for its “feedback”. It was a starting point for further discussion. The Geddes email did not contain proposals for formal acceptance by Olex. Further, the evidence of Picken supports Moncrieff’s attitude to the Geddes email. Picken similarly viewed the Geddes email as providing no more than a general framework for further discussions that would then need to be pursued separately by each wholesaler with each manufacturer. Now the ACCC has asserted that there was “a mountain of business records showing how seriously Olex took the [Geddes email]”. I agree that Olex viewed its response to the Geddes email as an important customer-relations exercise and as an opportunity to further its discussions with the wholesalers. This explains why Olex took care in preparing its response. But that is not necessarily inconsistent with how Moncrieff (and indeed Picken) viewed the matter.
16. Fourth, the ACCC has criticised Moncrieff’s evidence that he had made a decision prior to the 23 June 2011 meeting to increase Olex’s cutting fee and MOV fee. But Moncrieff’s evidence is consistent with Olex’s internal records at least in relation to the cutting fee. Internally it analysed the need for it on cost efficiency terms and was intending to unilaterally introduce it anyway. In my view, Moncrieff in substance had made such a decision in relation to the cutting fee increase. The matter is less clear, admittedly, in relation to the MOV fee. But on balance, I am inclined to accept Moncrieff’s evidence.
17. The ACCC has submitted that Olex presented a document entitled “proposals” to the wholesalers at the 23 June 2011 meeting, not “decisions”. But that fact is not necessarily inconsistent with Moncrieff having in substance reached a decision shortly prior to the meeting that he would implement the fee increases. As Moncrieff indicated in evidence, a business person may dress up a decision as a proposal, to enable customers to perceive that they have been consulted. Further, the evidence is that at the 23 June 2011 meeting Moncrieff announced that Olex would be implementing the cutting fee increase. He did not present the matters as a proposal that required agreement from the wholesalers. Picken gave evidence that Moncrieff said that “Olex had decided to increase its cable cutting charge to $85”.
18. The ACCC has asserted that the draft Shanghai presentation circulated on 21 June 2011 is inconsistent with Moncrieff’s evidence because it contains the “split” cutting fee rather than the single fee that was implemented. But I agree with Olex that the presentation more supports Moncrieff’s evidence. An earlier draft of the presentation was circulated by Hueber on 1 June 2011. It described the “split” cutting fee as a “proposal to market”. That language reflected the fact that Olex had included the split fee in Olex’s response to the Geddes email. The language of the draft presentation as at 21 June 2011 differed from 1 June 2011. The presentation now referred to the cutting fee increase as one of a number of “Initiatives = Quick Wins Supply Chain” in Olex’s supply chain. It also contained a start date for the charges of August 2011. Accordingly, the 21 June 2011 draft supports the conclusion that a decision to increase the cutting fee had in substance been made by this date. Indeed, a cutting charge was to be introduced in New Zealand as well. Moreover, Moncrieff’s evidence was to the effect that the financial difference between the two cutting fee options was immaterial in the context of the presentation. Finally, the final version of the presentation, circulated after the June EWAA meeting, still referred to the “split” fee option.
19. I do however agree with the ACCC that there is little if any reference to the MOV fee in the Shanghai presentation material. Now Moncrieff said that this had been determined prior to 23 June 2011. I am prepared to accept this evidence. But even if it had not been so decided, that does not entail that it was agreed to on 23 June 2011.
20. Fifth, the ACCC criticises Moncrieff’s evidence that he was surprised when he learnt that Prysmian had followed Olex’s cutting fee increase in the market. In cross-examination, the ACCC put to Moncrieff that he was not surprised because “[Moncrieff] knew that Roberts had agreed to the cutting fee charge at the 23 June EWAA meeting”. In other words, Moncrieff was challenged on his answer by reference to the foundation of the alleged price fixing arrangement. But the question fails and falls with the false premise.
21. I would also note that Picken’s evidence corroborates Moncrieff’s evidence. Picken considered that Olex’s initiatives were “all about efficiency”. Picken gave evidence consistent with Moncrieff as to what occurred at the 23 June 2011 meeting concerning Webb’s statement about the need to negotiate with individual wholesalers and Roberts not saying anything about what Prysmian might do concerning fees. Moreover, Picken, like Moncrieff was surprised when Prysmian followed Olex’s cutting fee increase. Such surprise is not consistent with the suggestion that Prysmian had made a commitment at the 23 June 2011 meeting.
22. In summary, the ACCC’s criticisms of Moncrieff’s evidence for the most part lacked substance. I found his evidence to be reliable on key aspects going to the issues in the case, as I have explained.

## (c) The reliability of Picken’s evidence

1. The ACCC says that I should regard Picken’s evidence as not credible, inconsistent with the contemporaneous documents and propounding an unlikely explanation of the events of 23 June 2011 and the broader context.
2. Even accepting that I should adopt caution in relation to analysing evidence as to subjective purpose given by alleged cartel participants (whether Picken or Moncrieff in this case), no doubt in part due to the fact that such evidence may be tainted by retrospective rationalisation, nevertheless I found Picken to be a credible witness. I found him to be frank and smart.
3. The ACCC says that Picken was well-rehearsed, cognisant of the issues in the case, and had clearly familiarised himself with the principal documents. So he may have been. But this is hardly a basis for trenchant criticism or any substantial discounting of his evidence. No doubt Picken had a sophisticated awareness of where his and Rexel’s interests lay. And no doubt from time to time he was argumentative in answering some of the questions put to him. But none of these atmospherics go anywhere close to justify me in putting to one side or giving significantly reduced weight to his evidence on the central issues.
4. The ACCC says that much of his affidavit is a worked reconstruction rather than what he actually recollects. Unsurprisingly, that is true to some extent, and indeed is true for most witnesses giving evidence of conversations or meetings years after the relevant events. I did not detect an *inordinate* level of such reconstruction in Picken’s evidence.
5. I have analysed the ACCC’s written submissions dated 22 February 2016 on Picken’s evidence. But there are no, as I would describe it, “knock out” punches. And that is consistent with my impression when Picken was under cross-examination. Nuance, secondary details and in some cases debating points seemed to be the order of the day in relation to his cross-examination. Moreover, when one considers the ACCC’s submissions, they relate to criticisms concerning documents *after* 23 June 2011 and differences of interpretation reasonably open as to what was meant by various phraseology. I accept, of course, that documents after the event (particularly in a circumstantial case) can be used to infer or establish the alleged prior infringing arrangement or understanding. But when one considers the totality of Picken’s evidence on the central question of the existence of the relevant arrangement or understanding with the prescribed purpose, his evidence was clear and coherent. Equally importantly his evidence was consistent with both the evidence of Moncrieff and Davis and relevant documents.
6. Indeed, what is noticeably absent from the ACCC’s written submissions concerning Picken’s evidence is any detailed reference pointing out significant inconsistencies with the evidence of other witnesses or significant inconsistencies with contemporaneous documents created on or prior to 23 June 2011.
7. As I have said, the ACCC has made significant reference to documents after 23 June 2011 for the purposes of establishing that Picken gave “implausible and self-serving” evidence concerning the same. It is convenient to deal with some of these.
8. The ACCC has made reference to an email dated 4 July 2011 from Alderson to others within Rexel. A copy of this email was passed from Brochut to Picken. There are a number of points to make. First, Brochut and Alderson were not at the 23 June 2011 meeting. Accordingly, Alderson’s understanding of what occurred at the 23 June 2011 meeting has diminished weight. At best he had what Mr Cameron Moore SC for Rexel described as a “Chinese-whispers” understanding of what occurred. Further, the email refers to General Cable and Electra who were not at the meeting. Further, the reference to “our response was to fully support the initiative providing that it was industry wide” is not consistent with the direct evidence of what occurred at the 23 June 2011 meeting. No evidence was given to that effect in terms of what was said at the 23 June 2011 meeting. Further, Alderson did not give any evidence of a relevant conversation with Picken to the effect of the email. Generally, I do not consider that the ACCC’s criticisms of Picken for his explanation of the text of an email of which he was not the author takes the ACCC’s case forward.
9. The ACCC has made reference to an email dated 19 August 2011 from Murphy to Paul Bradshaw of CNW where Murphy wrote that “This is a very licit [sic] situation and because Brian [Webb] and I have committed at EWAA level we need to do everything to try and make it stick”. But again, this is not Picken’s document. I do not consider that it substantially impacts on the veracity of the evidence Picken gave as to the 23 June 2011 meeting. Picken gave evidence that Webb said at the 23 June 2011 meeting “I understand the concept. You have to go and negotiate it with each wholesaler individually, but we see your logic”. The ACCC says that that assertion should be rejected as it is inconsistent with documents such as the email of 19 August 2011. For my part, the use by the ACCC of such a document in order to try and attack Picken’s credit demonstrates the flimsiness of the attack.
10. The ACCC has made reference to an email dated 8 September 2011 from Brochut to Neary. It has three attachments one of which included a document entitled “Cable Options Aug 2011 extract.ppt”. There is a series of bullet points, the sixth of which states “Use industry reforms on cutting charges and MOV etc to pick up lower level business that flows directly to the manufacturers and competition how can’t provide the service level”. The ACCC contends that the inferences from that statement are that it refers to the industry reform and the wholesalers’ proposal to the manufacturers the subject of the discussions on 23 June 2011 and the flow of direct sales from manufacturers to the wholesalers arising from those reforms. It is said that contrary to Picken’s assertions, there is no evidence of other industry reforms being talked about at that time, and that I can infer, in a document dated “Aug 2011”, that Rexel was referring to the substance of the arrangement reached on 23 June 2011. A similar presentation sent from Alderson to Brochut on 19 August 2011 has the same bullet point.
11. The ACCC says that Picken’s evidence about this document was unimpressive. It is said that on the one hand, he accepted that the document contained references to “industry reforms” discussed at the 23 June 2011 meeting and that that position was inconsistent with his affidavit. However, when re-examined about why there might be such an inconsistency, Picken appeared to suggest that the context of the document being an exclusive agency for Prysmian changed things in some unspecified manner. When I sought to clarify the meaning of this evidence, Picken attempted to say that the bullet point was a reference to a different type of reform relating to medium voltage, distribution centres or to bigger bilateral arrangements. The ACCC says however that Picken struggled to do anything more than speculate when pressed further for any specific examples of what that other reform might be. The ACCC says that as the document referring to “industry reforms” is described as “Cable Options Aug 2011 extract” and August 2011 is shortly after the 23 June 2011 meeting, any suggestion that this refers to reforms other than those discussed at that meeting is untenable.
12. The ACCC has placed emphasis on references to “industry reform”. But that term is a very broad one. The evidence that Picken gave about the desirability of efficiency gains and thus cost savings was evidence about industry reform. The ACCC contends that the term is to be understood as “reducing direct supply”, but this does not follow. Some wholesaler representatives might well perceive that greater cost recovery (from cutting charges) and more efficient ordering (from the MOV fees, which is itself a form of industry reform) would lead to efficiencies that could drive down prices over time, and thus reform the industry, and may urge others to take a long term view and not regard a price increase in the short term as necessarily a bad outcome. I agree with Rexel that the term does not mean, “We reached an agreement on 23 June to restructure the industry by reducing direct supply”.
13. As I mentioned earlier, the ACCC has referred to an email of 1 August 2011 from Picken to Alderson in which Picken made some comments about the email Alderson had sent to Wayne Williams on 27 July 2011 regarding Rexel’s cable cutting strategy. Alderson had sent that email to Williams in response to various questions posed by Williams on 26 July 2011. In his 26 July 2011 email, Williams asked Alderson “Do we know what our opposition are doing on the eve of the introduction of the $85 cutting fee?” Alderson’s response to Williams’ question was, “The increased cutting charge was a part of the industry reform initiatives that The Electrical Wholesalres [sic] Association proposed to the cable makers so we know at a high level they support this. This has been confirmed during our discussions with the suppliers. What will happen at branch level…”. On 1 August 2011, Picken provided a comment to Alderson’s response to Williams’ question: “Paul – Remember this is not all suppliers”. The ACCC has submitted that: (a) Picken is the source of the information in Alderson’s 27 July 2011 email to Williams (either directly or indirectly via Brochut); (b) the email clearly refers to the industry reform initiatives discussed at the 23 June 2011 meeting with Olex and Prysmian; and (c) it evidences the Wholesalers’ support of those initiatives. It is said that Picken’s comment “Paul - Remember this is not all suppliers” is highly significant because it is intended to convey that not all manufacturers were involved in the EWAA industry reform initiatives during which the $85 cutting fee was proposed and despite taking the time to provide this comment, Picken failed to correct Alderson and explain that the wholesalers (including Rexel) had *not* supported the $85 cutting fee and that Rexel ought to negotiate that fee downwards. It is said therefore that I can more readily infer that Picken had supported the cutting charge.
14. Now the ACCC has contended that Picken tortured the plain language of this part of the 1 August 2011 email to suggest different meanings.
15. The ACCC has submitted that Picken’s interpretation of the email should not be accepted. It is said that as to the source of the information, Picken was the only Rexel attendee at the 23 June 2011 meeting and there were no other initiatives being discussed at the EWAA level. The ACCC contends that it is unlikely to be Alderson’s prediction as to what the wholesalers would do.
16. It is said that Picken chose specifically to correct Alderson’s references to the suppliers in his summary of what the competition were doing. It is said that the words “this is not all suppliers” do not convey any uncertainty about which suppliers would be imposing cutting charges, rather that they convey that he was aware that only Olex and Prysmian were imposing such charges and that they had been part of the industry reform referred to by Alderson. The ACCC contends that this is consistent with a similar correction made a number of times previously by Picken in March 2011 in the context of preparing what was to become the Geddes email.
17. It is said that in light of this, I may more readily reject Picken’s explanation. It is also said that I should reject Picken’s explanation about this email as self-serving.
18. Now the ACCC’s thesis is that when Picken said, “Paul - Remember this is not all suppliers”, he meant “Paul, remember, as we have discussed, there was an agreement on 23 June 2011 to impose cutting charges so as to bring about a reduction in direct supply, but it did not involve all suppliers”. But there are significant problems with the ACCC’s approach. First, Alderson did not understand the sentence in this way. He understood it as meaning “Not all suppliers have increased their charges”, and responded accordingly on 2 August 2011 in an email to Picken that the cutting charge had now been “confirmed by our 5 major suppliers”. Electra’s announcement was only received by Rexel after Picken’s comments were made. Alderson would not have responded in this way if Alderson and Picken were referring to earlier discussions about any agreement made on 23 June 2011. Second, on the ACCC’s thesis Picken had discussed with Alderson an agreement designed to drive direct business into branches. That could only be achieved if Rexel charged less than the manufacturers, and yet Alderson (who apparently was told all about this) recommended in the same email that branch cutting be charged at $85 per cut. Again, this is consistent with Picken’s evidence and inconsistent with the ACCC’s thesis. Further, Picken did not respond by saying that the proposed $85 charge would neutralise the purpose of the agreement. Third, Alderson was an ACCC witness, and yet the ACCC adduced no evidence about these matters from him. This attack on Picken’s credit in my view fails.
19. More generally, Alderson’s email of 27 July 2011 to Williams is not evidence of the alleged arrangement. On any view of the matter, the statement that the cutting charge was “a part of the industry reform initiatives that The Electrical Wholesalres [sic] Association proposed to the cable makers” was not correct. The cutting charge was not proposed by the EWAA. Further, if the statement is read in a broader sense, it is consistent with the idea that the Moncrieff proposal flowed out of the discussions between the EWAA and Prysmian and Olex on industry reform, initiated by the EWAA. Further, it is unsurprising that Alderson would have received information of this nature from the cable suppliers. Both Olex and Prysmian were most likely saying to wholesaler representatives that the price increases had been discussed at the EWAA level as a means of encouraging acceptance.
20. Further, the ACCC has contended that Picken’s evidence that he had an expectation that the cutting fees would be the subject of further negotiations by Brochut should be rejected because he failed to inform Brochut of that expectation and there is no evidence of such negotiations occurring.
21. The ACCC’s contention should not be accepted. Picken’s evidence was not that he was concerned about the negotiation of the cutting fees per se, but that he expected Brochut to negotiate on *overall price*. Rexel should have been negotiating a total price decrease of 5 to 10%, whether the fees stayed in or not (which were very modest). The cutting charge would be unlikely to be discussed in isolation. The relevant price was not the cutting charge but the overall price for cable. Picken’s expectation of Brochut was that she would do her job as a highly paid employee, which was to negotiate an overall cost of cable for Rexel that was competitive. Consistently with Picken’s expectations, Brochut and others within Rexel continued to have negotiations with Prysmian (as part of ongoing strategic partnership discussions) and Olex respectively about their overall cable prices after the 23 June 2011 meeting, and without Picken’s input. Those negotiations culminated in Rexel’s VMI arrangement with Olex through which Rexel secured competitive prices from Olex and a competitive advantage.
22. The ACCC has contended that if Picken intended to negotiate down the cost of cable, then the extensive discussions about cutting fees were futile and that, given that the overall cost of cable would not change, it would not have had any effect on the behaviour of manufacturers and wholesalers. As Rexel contended, this is incorrect. If an ancillary service is supplied well below cost, then consumers will be likely to consume lots of the service at great cost to the supplier, and the overall cost to the consumer of the products will be higher. If the supplier can send an appropriate price signal by increasing the fee for the ancillary service, then the consumer will consume less of the ancillary service, and only so much that is of value to the consumer. Accordingly, the overall cost to the supplier (and thus the price for the products) will be reduced. Picken explained why both the cutting charge and the MOV charge were efficiency measures, and why he thought they might assist in reducing the price.
23. The ACCC has criticised Picken’s evidence concerning the minutes of the 23 June 2011 meeting. The ACCC says that I should reject Picken’s denial that his amendments to the 23 June 2011 meeting minutes following the September 2011 meeting were not an attempt to sanitise the minutes, on the basis that such evidence was self-serving. It is said that Picken accepted that “chronologically” concerns were raised about the minutes from an ACCC perspective before the EWAA directors’ concerns about the accuracy of the 23 June 2011 meeting minutes were raised. Yet so it is said, his affidavit omits this important fact.
24. It is said that in cross-examination Picken gave evidence that he was attempting to reflect the directors’ agreed amendments to the 23 June 2011 meeting minutes rather than providing his own interpretation or recollection. It is said that this is implausible for the following reasons. First, the scale of the amendments made by Picken could hardly reflect personal recollection of agreed observations by the EWAA directors in the absence of a contemporaneous written note made by Picken of the suggested changes. Second, most of the changes made by him were not reflected in Geddes’ handwritten annotations on a copy of the Symons minutes of the 23 June 2011 meeting made at the September 2011 meeting. Third, Picken assumed the task more than six weeks after the discussions about the amendments had taken place, apparently solely based on his own memory of what was discussed at the September 2011 meeting. Fourth, Picken’s explanations for certain amendments were inherently not credible. It is said that I should infer that the amendments principally reflected Picken’s own attempt to amend the minutes in light of the competition or trade practices concerns he was then aware of.
25. For reasons that I have set out earlier, I reject the ACCC’s general thesis as to all of this. But let me address some further aspects at this point.
26. The ACCC contends that its new quid pro quo was edited out of the minutes by Picken to sanitise them. There are a number of problems with this contention. First, the original version of the minutes prepared by Lemon did not contain the quid pro quo. Second, on the ACCC’s theory, Picken would have had to have been aware of how these matters might be said to contravene s 44ZZRD or ss 45/4D, notwithstanding that the ACCC itself could not perceive this case until the final days of the hearing, and notwithstanding that the ACCC had not raised these issues at the earlier time. I agree with Rexel that the idea that Picken understood at the time he was amending the draft minutes that the ACCC would allege a quid pro quo involving a cutting fee for a MOV fee or some nebulous form of support is untenable. Third, Picken, on this theory being aware of the nature of the problem, decided not to remove the offending passages from the minutes, but rather to make subtle changes to them. That is unlikely. Fourth, notwithstanding that Picken at least understood that the ACCC might be concerned about two competitors engaging in price fixing, no amendments were made to the minutes to address the substance of what Olex had said at the meeting, or that Olex and Prysmian attended together. Accordingly, the proposition that Picken was “sanitising” the minutes is in tension with this. Picken explained that his understanding of what the ACCC’s concern might be related to a possible price fix between competitors, in light of both Olex and Prysmian charging an $85 cutting fee. That understanding was consistent with the correspondence from the ACCC at the time. It is also corroborated by what occurred at the September 2011 meeting. At that meeting, as recorded in the minutes, each of Olex and Prysmian left the meeting while the other discussed the fact that the ACCC had launched an investigation, and then all parties returned to the meeting and proceeded to hold a further discussion about the matters contained in the Geddes email.
27. In summary, I found Picken’s evidence to be reliable on the above matters.

## (d) The reliability of Alderson’s evidence and Geddes’ evidence

1. Alderson gave evidence both on the ACCC’s primary case and on the bid rigging case.
2. Alderson was not present at the 23 June 2011 meeting and there was no credit attack as to his evidence concerning his communications and involvement either side of that meeting. I do not need to say anything further at this point and will return to his evidence when I discuss the bid rigging case.
3. As to the evidence of Geddes, in my view his evidence was of secondary significance. I have already addressed the March 2011 meeting, the 23 June 2011 meeting and the September 2011 meeting and the minutes of those meetings. Geddes gave evidence as to his involvement in the preparation of minutes, particularly a version of the 23 June 2011 meeting minutes. Of course, Geddes was not present at the 23 June 2011 meeting. His affidavit and oral evidence added little to the contemporaneous documentary record.

# D. the pleaded case and its evolution

## (a) The start of the trial

1. The pleaded case at the start of the trial was in the following form (see the further amended statement of claim filed 9 October 2015 at [43] to [48]):

**Contract, arrangement or understanding**

43. By reason of the matters referred to in paragraph 42, on or about 23 June 2011 the Manufacturers and the Wholesalers made or arrived at a contract, arrangement or understanding containing provisions that:

a) the Manufacturers would increase their cutting services fees to $85 per cut for electrical cable, and the Wholesalers would not object to those fees (**cutting fee provision**);

b) the Manufacturers would introduce fees of $250 for orders of electrical cable less than $2,500 in value, and the Wholesalers would not object to those fees (**MOV provision**); and

c) the Wholesalers would maintain or increase the volume and/or value of electrical cable that they acquired from the Manufacturers (**support provision**).

44. The cutting fee provision had the purpose or a substantial purpose of directly or indirectly:

a) preventing, restricting or limiting the supply or likely supply of electrical cable by the Manufacturers to contractors and/or end-users within the meaning of:

i. section 4D(1) of the CCA; and

ii section 44ZZRD(3)(a)(iii) of the CCA; and/or

b) allocating contractors and/or end-users to the Wholesalers within the meaning of section 44ZZRD(3)(b)(i) of the CCA.

45. Further or alternatively, the cutting fee provision had the purpose or substantial purpose and/or effect or likely effect of directly or indirectly fixing, controlling or maintaining the price of cutting services supplied by the Manufacturers within the meaning of section 44ZZRD(2) of the CCA.

45A. If cutting services are not a “service” for the purpose of section 44ZZRD(2) of the CCA:

a) fees that the Manufacturers charged for cutting electrical cable were a component of the price of cut electrical cable supplied by the Manufacturers; and

b) the purpose and/or likely effect of the cutting fee provision was:

i. that cutting services fees imposed by the Manufacturers pursuant to the cutting fee provision would be in addition to the price at which the Manufacturers would, but for any cutting services fees, have supplied cut electrical cable; and

ii. to control the price of cut electrical cable supplied by the Manufacturers within the meaning of section 44ZZRD(2) of the CCA.

**Particulars**

Cut electrical cable means any electrical cable that the Manufacturers cut to a length specified by the customer.

The purpose and likely effect of the cutting fee provision are to be inferred from the matters referred to in paragraphs 16 to 43 above.

46. The MOV provision had the purpose or a substantial purpose of directly or indirectly:

a) preventing, restricting or limiting the supply or likely supply of electrical cable by the Manufacturers to contractors and/or end-users within the meaning of:

i. section 4D(1) of the CCA; and

ii. section 44ZZRD(3)(a)(iii) of the CCA; and/or

b) allocating contractors and/or end-users to the Wholesalers within the meaning of section 44ZZRD(3)(b)(i) of the CCA.

47. The support provision, together with the cutting fee provision and the MOV provision, had the purpose or a substantial purpose of directly or indirectly:

a) preventing, restricting or limiting the supply or likely supply of electrical cable by the Manufacturers to contractors and/or end-users within the meaning of:

i. section 4D(1) of the CCA; and

ii. section 44ZZRD(3)(a)(iii) of the CCA; and/or

b) allocating contractors and/or end-users to the Wholesalers within the meaning of section 44ZZRD(3)(b)(i) of the CCA.

48. Further, or alternatively, the support provision had the purpose or a substantial purpose of preventing, restricting or limiting the acquisition of electrical cable by the Wholesalers from persons other than the Manufacturers within the meaning of section 4D(1) of the CCA.

1. One can appreciate the following features in relation to the support provision:
	1. First, as pleaded in [43(c)], it was pleaded as in essence the quid pro quo for both the cutting fee provision and the MOV provision. In other words, the Wholesalers would agree to the increased or new fees, with the consideration given to the Manufacturers being that the Wholesalers would maintain or increase the volume and/or value of electrical cable acquired. One might ask why the Wholesalers would agree. That is explained by the purposes alleged in both [44] and [46]. It was alleged that the fees had the purpose of preventing, restricting or limiting the supply or likely supply of electrical cable by the Manufacturers to contractors or end-users and, in essence, allocating contractors or end-users to the Wholesalers; one can put to one side [45] for the moment.
	2. Second, much debate took place as to the “and” at the end of [43(b)]. It was suggested by the ACCC that it could still succeed on that pleaded case even if it did not establish that the support provision was part of the arrangement or understanding. That was correct. But of course the commercial rationale or logic for an arrangement or understanding that had the cutting fee provision and the MOV provision but not the support provision was suspect to say the least. The logic of the support provision was explained by the ACCC’s pleading in [42] which was in the following terms in the further amended statement of claim:

42. During the June 2011 meeting:

a) the representatives of the Manufacturers, namely Moncrieff (Olex), Dunstan (Olex) and Roberts (Prvsmian), sat together at one end of the table in the meeting room;

b) Moncrieff (Olex) tabled, and asked for the Wholesalers’ response to, the Olex Proposal which included:

i. as one of two options a proposal to increase Olex’s cutting services fees to $85 per cut; and

ii. a proposal to introduce a fee of $250 for orders of electrical cable less than $2,500 in value;

**Particulars**

Tabled means provided a copy of the revised response to the attendees at the meeting and orally explained its contents, including the proposals referred to in paragraphs 42(b)(i) and 42(b)(ii).

c) the Wholesalers indicated a preference for the second option in relation to the cutting services fee being a flat fee of $85 per cut;

**Particulars**

Following discussions at the meeting Webb (Gemcell) said words to the effect that they should keep it simple. None of the representatives of the Wholesalers disagreed with Webb.

Lamond (MMEM) crossed out the first option relating to the cutting services fee on his copy of the Olex Proposal.

d) Roberts (Prysmian) indicated that if Olex:

i. increased its cutting services fee to $85; and

ii. introduced a fee of $250 for orders of electrical cable less than $2,500 in value;

Prysmian would follow;

**Particulars**

The indication was partly oral and partly to be implied.

To the extent that it was oral, words to the effect of the indication were stated by Roberts.

To the extent that it was implied, it was implied from the facts, matters and circumstances referred to in paragraphs 28, 29, 31, 36, 37, 39, 41, 42(a)-(c) and (e).

e) Picken (Rexel respondents), Norris and Haddon (L&H), and Lamond and Davis (MMEM) indicated that the Wholesalers would support the Manufacturers by not objecting to the cutting services and MOV fees and maintaining or increasing the volume and/or value of electrical cable that the Wholesalers acquired from the Manufacturers, if the Manufacturers:

i. increased their cutting services fees to $85; and

ii. introduced fees of $250 for orders of electrical cable less than $2,500 in value.

**Particulars**

The indication was partly oral and partly to be implied.

To the extent that it was oral, it was comprised of the following:

- after some discussion Webb (Gemcell) said words to the effect that the EWAA would accept the fees but not a minimum quotation value. None of the representatives of the Wholesalers objected to what Webb said;

- after further discussion the representatives of the Wholesalers stated words to the effect that they agreed to support the proposed fees and to defer minimum quotation values discussions.

To the extent that it was implied, it was implied from the facts, matters and circumstances referred to in paragraphs 23-27, 29-41 and 42(a)-(d).

The absence of the support provision presented clear difficulties for the commerciality or the likelihood of the arrangement pleaded by the ACCC. I would also note that the plea in [42(e)] indicated clearly that the support provision was not an optional extra.

(c) Third, the support provision was pleaded in terms that the Wholesalers “would maintain or increase the volume and/or value of electrical cable that they acquired from” the Manufacturers. What did this mean? What base (or starting position would be used) and from when? Was this absolute volume or value or *relative* acquisitions (ie as compared with all other Manufacturers)? In other words, was this a promise to maintain or increase the *market shares* of the Manufacturers or was this talking about absolute growth? The latter seems counter-intuitive. The former has significant measurement difficulties. Further, how was value to be assessed?

1. There are some other observations to be made about the pleaded case at the start of the trial.
2. First, the further amended statement of claim asserted that the arrangement was with the *Manufacturers* rather than just one of Olex or Prysmian. This made commercial sense. On one view the arrangement was less likely to be efficacious if only made with *one* Manufacturer. Of course, there was still a problem with the commercial rationale for an arrangement with just the two pleaded Manufacturers, given that this left other manufacturers outside the relevant arrangement.
3. Second, the further amended statement of claim did not plead any separate reciprocity between the cutting fee provision and the MOV provision, that is, that one was given “in return for” the other (the ACCC’s final position at the close of trial). The pleading was to the effect that the cutting fee provision and the MOV provision were “on one side”, with the support provision on the “other side”. The allegation in the then [42(e)] made this plain. Likewise, the pleas of “purpose” in [45] and [46] made this plain; the ACCC’s case at the close of trial belied the purpose plea in [45] relating to the MOV provision.
4. Before discussing the amendment to the ACCC’s pleaded case during the trial, it is appropriate to observe the following:
	1. First, there was no evidence adduced by the ACCC, in terms of what occurred at the 23 June 2011 meeting, that supported the proposition that Roberts for Prysmian said or did anything at the 23 June 2011 meeting that could constitute Prysmian being a party to the relevant arrangement or understanding. The ACCC’s pleaded case at [42(d)] had no substance, certainly in relation to the assertion that Roberts’ indication was made orally. The only direct evidence of that meeting, in terms of what was said or done, was that Roberts attended the meeting (albeit that he sat near Olex’s representatives) but said little other than at the end to say that Prysmian would consider its position.
	2. Second, there was no evidence adduced by the ACCC in terms of what occurred at the 23 June 2011 meeting, which supported the support provision as it was then pleaded. On any view, this was a major difficulty for the ACCC and its then case thesis.
	3. Third, there was a significant gap in the ACCC’s case in terms of alleged collusion between Olex and Prysmian. Moncrieff tabled the Moncrieff proposal at the 23 June 2011 meeting, but there was no evidence that there had been any discussion between Olex and Prysmian about the Moncrieff proposal prior to the meeting. The question arises as to how likely it is that at the 23 June 2011 meeting, Roberts would or could collude on something that he had not seen. And how could he have had authority from Prysmian to do so if its Board had not seen it?
	4. Fourth, the third point is fortified by the fact that the Moncrieff proposal tabled *two* options for the increased cutting fee. Moncrieff was testing both with the Wholesalers to see which one they preferred.

## (b) The amended case

1. During the trial and over the respondents’ objections, I gave leave to the ACCC to file and serve a second further amended statement of claim on 1 December 2015.
2. Paragraphs 43 and 43A were amended in the following terms:

**Contract, arrangement or understanding**

43. By reason of the matters referred to in paragraph 42, on or about 23 June 2011 the Manufacturers and the Wholesalers (alternatively, Olex and the Wholesalers) made or arrived at a contract, arrangement or understanding containing provisions that:

a) the Manufacturers would increase their cutting services fees to $85 per cut for electrical cable, and the Wholesalers would not object to those fees (alternatively, Olex would increase its cutting service fee to $85 per cut for electrical cable, and the Wholesalers would not object to that fee) (**cutting fee provision**);

b) the Manufacturers would introduce fees of $250 for orders of electrical cable less than $2,500 in value, and the Wholesalers would not object to those fees (alternatively, Olex would introduce a fee of $250 for orders of electrical cable less than $2,500 in value, and the Wholesalers would not object to that fee) (**MOV provision**); and

c) the Wholesalers would ~~maintain or increase~~ not reduce the volume and/or value of electrical cable that they acquired from the Manufacturers (alternatively, the Wholesalers would not reduce the volume and/or value of electrical cable that they acquired from Olex) by reason of the increased cutting and/or MOV fees (**support provision**)~~.~~

and references below to the cutting fee provision, the MOV provision and the support provision in the context of Olex mean the alternative form of each of those provisions pleaded in this paragraph.

43A. In the alternative to paragraph 43, by reason of the matters referred to in paragraph 42, on or about 23 June 2011 the Manufacturers and the Wholesalers (alternatively, Olex and the Wholesalers) made or arrived at a contract, arrangement or understanding containing:

a) the cutting fee provision and the MOV provision;

b) the cutting fee provision and the support provision;

c) the MOV provision and the support provision;

d) the cutting fee provision; or

e) the MOV provision.

1. First, it will be apparent that the ACCC sought to put an alternative case based upon the relevant arrangement or understanding as being between the wholesalers and Olex only. Necessary amendments were also made to [44] to [48] to plead the alternative case. These do not need to be set out. The alternative case reflected a likely recognition by the ACCC that it had no direct evidence of Prysmian being a party to the relevant arrangement or understanding by reason of Roberts’ participation at the 23 June 2011 meeting. I have already dealt with the broader landscape of Prysmian’s conduct both before and after the 23 June 2011 meeting.
2. Second, it will be apparent that the ACCC changed the formulation of the support provision. Instead of “maintain or increase” the volume and/or value of electrical cable acquired, the formulation was amended to “not reduce” the volume and/or value of electrical cable acquired. The expression “not reduce” was similar to “maintain”, although it still had difficulties. But the more significant amendment was that the plea of “increase” had been dropped. The ACCC’s changes to its case in this respect hardly instilled confidence in the robustness of the ACCC’s case theory. There were also still the attendant difficulties with what metrics were to be used for value and volume and how the evaluation or enforceability of such a term could ever work.
3. Third, the ACCC by the new [43A] made it plain that the ACCC was running all possible combinations of one or more of the three provisions (ie the cutting fee provision, the MOV provision and the support provision) save for any stand-alone support provision. I must say that the commercial rationale that the ACCC was advancing for some of these combinations was suspect to say the least.
4. Fourth, the ACCC still did not plead in terms the position which it ultimately pursued at the close of trial, namely that the cutting fee provision was “in return” for the MOV provision. The former provision was said to be for the benefit of the Wholesalers. The latter provision was said to be for the benefit of the Manufacturers; I note that this was still at odds with the ACCC’s purpose plea in relation to the MOV provision. Indeed, the ACCC’s case by the close of trial became even more nuanced; I do not use that term pejoratively. Its “small steps” thesis that it closed with was that the cutting fee increase was a step along the way to a “no cuts” position. Neither the “in return for” thesis or the “small steps” thesis let alone their combination were pleaded in terms. But on balance, and assuming in the ACCC’s favour that such theories strictly fitted within the language of its final pleading, I am prepared to deal with and dispose of such theories.

# E. relevant legal principles

## (a) Relevant provisions of the Act

1. Section 44ZZRJ provides:

**Making a contract etc. containing a cartel provision**

A corporation contravenes this section if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

1. Section 44ZZRK(1) provides:

**Giving effect to a cartel provision**

(1) A corporation contravenes this section if:

(a) a contract, arrangement or understanding contains a cartel provision; and

(b) the corporation gives effect to the cartel provision.

1. In terms of what is meant by a cartel provision, s 44ZZRD provides:

**Cartel provisions**

(1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a *cartel provision* if:

(a) either of the following conditions is satisfied in relation to the provision:

(i) the purpose/effect condition set out in subsection (2);

(ii) the purpose condition set out in subsection (3); and

(b) the competition condition set out in subsection (4) is satisfied in relation to the provision.

*Purpose/effect condition*

(2) The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:

(a) fixing, controlling or maintaining; or

(b) providing for the fixing, controlling or maintaining of;

the price for, or a discount, allowance, rebate or credit in relation to:

(c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

(d) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

(e) goods or services re‑supplied, or likely to be re‑supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or

(f) goods or services likely to be re‑supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.

*Purpose condition*

(3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:

(a) preventing, restricting or limiting:

(i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or

(ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or

(iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or

(b) allocating between any or all of the parties to the contract, arrangement or understanding:

(i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or

(ii) the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or

(iii) the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

(iv) the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

(c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:

(i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or

(ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or

(iii) 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or

(iv) 2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or

(v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

*Competition condition*

(4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:

(a) are or are likely to be; or

(b) but for any contract, arrangement or understanding, would be or would be likely to be;

in competition with each other in relation to:

(c) if paragraph (2)(c) or (3)(b) applies in relation to a supply, or likely supply, of goods or services—the supply of those goods or services; or

(d) if paragraph (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services; or

(e) if paragraph (2)(e) or (f) applies in relation to a re‑supply, or likely re‑supply, of goods or services—the supply of those goods or services to that re‑supplier; or

(f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods—the production of those goods; or

(g) if subparagraph (3)(a)(ii) applies in relation to preventing, restricting or limiting the capacity, or likely capacity, to supply services—the supply of those services; or

(h) if subparagraph (3)(a)(iii) applies in relation to preventing, restricting or limiting the supply, or likely supply, of goods or services—the supply of those goods or services; or

(i) if paragraph (3)(c) applies in relation to a supply of goods or services—the supply of those goods or services; or

(j) if paragraph (3)(c) applies in relation to an acquisition of goods or services—the acquisition of those goods or services.

*Immaterial whether identities of persons can be ascertained*

(5) It is immaterial whether the identities of the persons referred to in paragraph (2)(e) or (f) or subparagraph (3)(a)(iii), (b)(i) or (ii) can be ascertained.

[…]

*Immaterial whether particular circumstances or particular conditions*

(7)  It is immaterial whether:

(a)  for the purposes of subsection (2), subparagraph (3)(a)(iii) and paragraphs (3)(b) and (c)—a supply or acquisition happens, or a likely supply or likely acquisition is to happen, in particular circumstances or on particular conditions; and

(b)  for the purposes of subparagraph (3)(a)(i)—the production happens, or the likely production is to happen, in particular circumstances or on particular conditions; and

(c)  for the purposes of subparagraph (3)(a)(ii)—the capacity exists, or the likely capacity is to exist, in particular circumstances or on particular conditions.

*Considering related provisions—purpose/effect condition*

(8)  For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, or to have or be likely to have the effect, mentioned in subsection (2) if the provision, when considered together with any or all of the following provisions:

(a)  the other provisions of the contract, arrangement or understanding;

(b)  the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first‑mentioned contract, arrangement or understanding;

has that purpose, or has or is likely to have that effect.

*Considering related provisions—purpose condition*

(9)  For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose mentioned in a paragraph of subsection (3) if the provision, when considered together with any or all of the following provisions:

(a)  the other provisions of the contract, arrangement or understanding;

(b)  the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first‑mentioned contract, arrangement or understanding;

has that purpose.

*Purpose/effect of a provision*

(10)  For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:

(a)  the form of the provision; or

(b)  the form of the contract, arrangement or understanding; or

(c)  any description given to the provision, or to the contract, arrangement or understanding, by the parties.

*Purpose of a provision*

(11)  For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose mentioned in a paragraph of subsection (3) by reason only of:

(a)  the form of the provision; or

(b)  the form of the contract, arrangement or understanding; or

(c)  any description given to the provision, or to the contract, arrangement or understanding, by the parties.

1. Relevant definitions are provided in s 44ZZRB:

***bid*** includes:

(a)  tender; and

(b)  the taking, by a potential bidder or tenderer, of a preliminary step in a bidding or tendering process.

***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

***likely***, in relation to any of the following:

(a)  a supply of goods or services;

(b)  an acquisition of goods or services;

(c)  the production of goods;

(d)  the capacity to supply services;

includes a possibility that is not remote.

1. Other relevant provisions are ss 44ZZRR and 44ZZRS which provide respectively:

**Resale price maintenance**

(1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision relates to:

(a) conduct that contravenes section 48; or

(b) conduct that would contravene section 48 but for the operation of subsection 88(8A); or

(c) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK bears an evidential burden in relation to that matter.

**Exclusive dealing**

(1)  Sections 44ZZRF and 44ZZRJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as giving effect to the cartel provision would, or would but for the operation of subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47.

(2)  Sections 44ZZRG and 44ZZRK do not apply in relation to the giving effect to a cartel provision by way of:

(a)  engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or

(b)  doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i)  an authorisation under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii)  by reason of subsection 93(7), conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii)  a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(3)  A person who wishes to rely on subsection (1) or (2) in relation to a contravention of section 44ZZRJ or 44ZZRK bears an evidential burden in relation to that matter.

1. Further, s 45(2) provides:

(2)  A corporation shall not:

(a)  make a contract or arrangement, or arrive at an understanding, if:

(i)  the proposed contract, arrangement or understanding contains an exclusionary provision; or

(ii)  a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b)  give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i)  is an exclusionary provision; or

(ii)  has the purpose, or has or is likely to have the effect, of substantially lessening competition.

1. Relevantly to ss 45(2)(a)(i) and 45(2)(b)(i), s 4D provides:

**Exclusionary provisions**

(1)  A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:

(a)  the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and

(b)  the provision has the purpose of preventing, restricting or limiting:

(i)  the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii)  the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

(2)  A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the first‑mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.

1. Section 4F is also relevant and provides:

**References to purpose or reason**

(1)  For the purposes of this Act:

(a)  a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:

(i)  the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and

(ii)  that purpose was or is a substantial purpose; and

(b)  a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:

(i)  the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii)  that purpose or reason was or is a substantial purpose or reason.

(2)  This section does not apply for the purposes of subsections 45D(1), 45DA(1), 45DB(1), 45E(2) and 45E(3).

1. Finally, I should also make reference to the definition of “services” in s 4(1) which provides:

***services*** includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

(a)  a contract for or in relation to:

(i)  the performance of work (including work of a professional nature), whether with or without the supply of goods;

(ii)  the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or

(iii)  the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(b)  a contract of insurance;

(c)  a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or

(d)  any contract for or in relation to the lending of moneys;

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

## (b) Relevant conceptual themes

1. First, an arrangement or understanding is something less than a binding contract or agreement (*Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at [26] to [30] per Gray J and *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183 at [54] per Merkel J). The concept of an understanding is a “broad and flexible” concept (*Norcast S.ár.L v Bradken Ltd (No 2)* (2013) 219 FCR 14 at [263] per Gordon J; *ACCC v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183 at [54] per Merkel J). An “understanding” may be a looser concept than an “arrangement” (*ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at [27]). An arrangement or understanding requires a consensus or a “meeting of the minds of the parties” under which parties assume obligations or give assurances or undertakings that they will act in a particular way. The “meeting of the minds” will usually embody a mutual obligation between the parties, but it is not required (*Norcast v Bradken* at [263]). Reciprocity of obligations is common but unnecessary. To establish such an arrangement or understanding it is sufficient that “the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct” (*Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286 at 291 per Smithers J). It is sufficient that an arrangement or understanding creates moral obligations or obligations binding in honour only (*Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (No 8)* (1999) 92 FCR 375 at [136]–[137]). An arrangement may be informal as well as unenforceable, with the parties free to withdraw from it or to act inconsistently with it notwithstanding their adoption of it (*Norcast v Bradken* at [263]). A mere expectation in a non-normative sense or a hope that something might be done or happen or that a party will act in a particular way is not of itself sufficient to found an arrangement or understanding (*Trade Practices Commission v Email Ltd* (1980) 43 FLR 383 at 385; *ACCC v CC (NSW) Pty Ltd (No 8)* at [141]). There will be no understanding where one party decides unilaterally to act in a particular way in response to a pricing manoeuvre by a competitor.
2. Second, as to the question of proof, an inference that an arrangement or understanding existed may be drawn from circumstantial evidence that the conduct of the parties exhibits “a concurrence of time, character, direction and result” (*R v Associated Northern Collieries* (1911) 14 CLR 387 at 400). Where competitors meet without any apparent legitimate purpose, then this may assist in proving the existence of an arrangement or understanding. Further, the presence of parallel conduct may be evidence of an arrangement or understanding, but it is not sufficient in and of itself to reach a conclusion one way or the other. Further, economically irrational behaviour can be indicative of the presence of a cartel. Further, the existence of a motive is a matter that can be taken into account in assessing whether an arrangement or understanding was entered into by parties.
3. A finding may be made in the absence of direct evidence. All that is necessary is that the more probable inference from the circumstances that sufficiently appear by evidence, left unexplained, justifies the conclusion. “More probable” means no more than that upon the balance of probabilities, such an inference has a greater degree of likelihood. A party who relies on circumstantial evidence must show that the circumstances raise the more probable inference in favour of what is alleged. It is not sufficient that the circumstances give rise to conflicting inferences of an equal degree of probability or plausibility or that the choice between them can only be made by conjecture. I accept though that the process of inference may involve an intuitive element that is not susceptible to detailed support or explanation.
4. There is a distinction between inference and conjecture even if the reasoning process occurs on a continuum in which there is no bright line division (*Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at [84] to [88]). A conjecture, even though plausible, is no more than a guess, whereas an inference is a deduction from the evidence. If the deduction is reasonable, the inference may rise to legal proof (*Jones v Great Western Railway Co* (1931) 144 LT 194 at 202). But there must be objective facts from which the inference could be drawn, otherwise what is left is mere speculation or conjecture (*Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169 and 170 per Lord Wright).
5. Generally, the proper inference to be drawn on the balance of probabilities depends upon a practical and reasonable assessment of the evidence as a whole (*BGC Residential Pty Ltd v Fairwater Pty Ltd* [2012] WASCA 268 at [51] per Pullin JA and *Siegwerk Australia Pty Ltd (In liq) v Nuplex Industries (Aust) Pty Ltd* (2016) 334 ALR 443; [2016] FCA 158 at [85] to [88] per Beach J).
6. Third, as to the question of the standard of proof on the balance of probabilities, the gravity of the matters alleged must be taken into account (s 140(2)(c) of the *Evidence Act 1995* (Cth)).
7. Fourth, as to the question of any *Jones v Dunkel* inference, the following may be noted. An unexplained failure by a party to call witnesses may lead to an inference that the uncalled evidence would not have assisted that party’s case or (more relevantly here) it may permit inferences to be more confidently drawn where a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called. *Jones v Dunkel* inferences are particularly appropriately drawn where the facts are peculiarly within the knowledge of the silent party. Further, it is no answer to the drawing of a *Jones v Dunkel* inference that an individual respondent has the benefit of penalty privilege. Further, the significance of the inference depends on the closeness of the relationship of the absent witness with the party who did not call the witness. Considerable significance may attach if the absent witness is either the party or a senior executive of a corporate party closely engaged in the transactions in question.
8. Now the rule in *Jones v Dunkel* permits but does not require me to infer that the evidence of an absent witness, if called, would not have assisted the party who failed to call that witness. However, the rule does not entitle me to speculate about what other evidence might possibly have been led. The rule does not enable the absence of a witness to make up any deficiency in the evidence and it will not support an adverse inference unless the evidence otherwise provides a basis upon which that unfavourable inference can be drawn. Moreover, the rule in *Jones v Dunkel* does not operate to require a party to give merely cumulative or corroborative evidence. No adverse inference will ordinarily arise in relation to evidence concerning a meeting if some of the participants are called. Similarly, if the senior officer responsible for making a decision gives evidence of the decision and his reasons for making it, the rule in *Jones v Dunkel* does not apply merely because a more junior officer has not been called, even if he contributed to the decision-making process. Accordingly, in my opinion no adverse inference arises from Dunstan’s failure to give evidence at trial on the two major factual issues in the case concerning Olex, viz what was Olex’s subjective purpose in increasing its cutting fees and introducing the MOV fee and what occurred at the 23 June 2011 meeting. The evidence that he could give on those matters would merely have been cumulative or corroborative to the evidence given by Moncrieff and the documentary evidence. Moncrieff was the Managing Director of Olex at all relevant times. He authorised the Olex Response to the Geddes email. Moncrieff also attended the 23 June 2011 meeting and gave evidence as to what occurred. Moreover, the unchallenged evidence is that Moncrieff was the person at Olex who made the decision to increase Olex’s cutting fee and introduce the MOV fee. Further, the ACCC’s cross-examination of Moncrieff proceeded on the basis that it was his decision (putting to one side when) to increase the cutting fee and to introduce the MOV fee. But in any event, even if I was to draw an adverse inference from the failure to call Dunstan, such an inference does not take the ACCC far. It cannot be used to create *positively* adverse evidence. Moreover, I have the direct evidence of Moncrieff that I have found to be reliable; the absence of Dunstan could hardly impact on that assessment.
9. As to the position of Prysmian and Roberts, Prysmian did not call any oral evidence let alone adduce evidence from Roberts of what occurred on 23 June 2011. But even if I were to draw the strongest inferences against Prysmian on every applicable feature of the case, that does not avail the ACCC. I cannot create *positively* adverse evidence against Prysmian by the use of such an inference. And indeed, for reasons that I will explain later, given the evidence of Picken and Moncrieff and the documentary material concerning the 23 June 2011 meeting, there was no evidence that Prysmian/Roberts needed to answer. I will return to this later.
10. Fifth, as to the question of competition, a number of propositions may be noted.
11. For the cutting fee, MOV and support provisions to be cartel or exclusionary provisions, any two or more of the Wholesalers and the Manufacturers must have been (or but for the provisions must have been) in “competition” for the purpose of s 44ZZRD(4) or “competitive” for the purpose of s 4D.
12. In respect of both s 4D and s 44ZZRD(4), it is not necessary to identify a precise market in respect of which the parties to the relevant arrangement or undertaking were in competition or competitive or that such competition was in respect of all customers or sales. What is required is that any two or more of the parties compete to supply the goods or services the subject of the restraint (for the purpose of s 44ZZRD(4)) or within the area of contractual restriction (for the purpose of s 4D); in respect of s 4D, see *News Limited v Australian Rugby Football League Limited* (1996) 64 FCR 410 at 560; *South Sydney District Rugby League Football Club v News Limited* (2000) 177 ALR 611; [2000] FCA 1541 at [195] to [198].
13. To be competitors, parties must be rivals or constrain each other in respect of the relevant acquisition or supply of goods or services. Parties constrain each other if they supply substitutable goods or services to the same class of customers or if they would do so given a sufficient price incentive (*Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 (*QCMA*) at 517). There are some authorities that suggest that no market needs to be established. In one sense this is conceptually incoherent as the *sphere* of actual or potential rivalry (competition) is the market; see generally *Australian Competition and Consumer Commission v Flight Centre Travel Group Pty Ltd* (2016) 339 ALR 242; [2016] HCA 49 at [66] to [70] per Kiefel and Gageler JJ. To have relevant rivalry in relation to the relevant goods or services, including their ready substitutes on the demand side and on the supply side, whether in terms of their type or supply source and depending upon the cross-elasticity of demand and the cross-elasticity of supply, presupposes the context in which such rivalry occurs. The rivalry is not in the ether. The space where it occurs is given the label of “market”. Its dimensions are also geographic, functional and temporal with one qualification; if one is talking about the temporal aspect, one is usually referring to the long run anyway in assessing substitution possibilities on either the demand side or the supply side, with any shorter timeframe moving into the realm of a conceptual discussion of sub-markets (as *QCMA* explains). But it is correct to say that no market needs to be identified or delineated in terms as an element of the statutory prescriptions or proscriptions that I am addressing and notwithstanding any *indirect* application of s 45(3) to an exclusionary provision.
14. It is sufficient that the parties or any two of them are actual or likely competitors. “Likely” for the purpose of s 44ZZRD(4) means a possibility that is not remote (s 44ZZRB; *Norcast v Bradken* at [14] and [259]). “Likely” for the purpose of s 4D means “real chance” (*News Limited v Australian Rugby Football League Limited* (1996) 64 FCR 410 at 564 to 565 per Lockhart, von Doussa and Sackville JJ)*.*
15. In my view, the Manufacturers and Wholesalers were actual or likely competitors for some of the same contractors and end-users. Moreover, the Manufacturers and Wholesalers competed to supply some of those customers with standard lengths (or “full packs”) of cable as well as shorter, irregular lengths that they would cut for the customer. The Manufacturers and Wholesalers were actual and likely competitors for sales of cable to contractors and end-users below $2,500 in value. While those sales may have been a relatively small part of the Manufacturers’ business, both Olex and Prysmian did in fact sell some cable to contractors and end-users for less than $2,500.
16. Competition between the Wholesalers also included competition to acquire electrical cable from the Manufacturers, including from importers of cable such as Electra and General Cable.
17. Sixth, as to the question of purpose, the provisions of the relevant arrangement or understanding between the Manufacturers and Wholesalers must have a proscribed purpose. The relevant question to consider is the purpose of the provision. In this regard, one is considering the subjective purpose of the parties to the relevant arrangement or understanding. Further, purpose focuses on the end sought to be accomplished by the conduct, rather than the reason for seeking that end, ie motive (*News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at [18] per Gleeson CJ).
18. Now the “manifest effect of a provision in an agreement, in a given case, may be the clearest indication of its purpose” (*News Ltd v South Sydney* at [18] per Gleeson CJ). But to consider objective effect or purpose ought not be given undue significance. After all one is considering the effect that the parties *sought to achieve* (*News Ltd v South Sydney* at [63] per Gummow J). But a consideration of the circumstances surrounding the relevant arrangement or understanding may inform the application of the subjective test. Further, although purpose is determined subjectively (*ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 474 per Lockhart, Gummow and von Doussa JJ; *News Ltd v South Sydney* at [41] per McHugh J, [62] to [63] per Gummow J and [212] per Callinan J), it can be identified using objective considerations and inferred from circumstantial evidence. Moreover, where conduct is part of a wider strategy, the purpose of that strategy can be relevant to determining the purpose of the conduct.
19. Further, it must be recognised that the application of a subjective test may have its difficulties where parties have different subjective purposes or have not turned their minds to the purpose of the relevant provision (cf McHugh J at [38]). But where multiple parties give rise to multiple subjective purposes, s 4F may have a role to play (*News Ltd v South Sydney* at [59] to [62] per Gummow J).
20. Further, a provision of a relevant arrangement or understanding will be deemed to have had a particular purpose if it was included in the relevant arrangement or understanding for multiple purposes, provided that the proscribed purpose was a substantial one. To be “substantial” it must be “considerable or large” or a “real purpose for the inclusion of the provision” (*Seven Network Limited v News Limited* (2009) 182 FCR 160 at [858] per Dowsett and Lander JJ).
21. Further, in the case of s 4D of the Act, a provision of a relevant arrangement or understanding will be taken to be an exclusionary provision if the provision has the purpose of preventing, restricting or limiting the supply of goods or services to (or the acquisition of goods or services from) particular persons or classes of persons by all or any of the parties to the relevant arrangement or understanding.
22. In the context of s 4D, the prohibited purpose of preventing, restricting or limiting supply must be directed toward particular persons or a particular class of persons. In other words, there must be identified persons or classes of persons as the object of the provision (*Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [8] per Gleeson CJ and Callinan J). That does not necessarily mean that the identity of all members of the defined class of persons must be readily ascertainable, but it is essential that the provision in question be directed toward specified persons or class of persons (*ASX Operations v Pont Data (No 1)* at 488; *Rural Press Limited v ACCC* at [8] per Gleeson CJ and Callinan J and [87] per Gummow, Hayne and Heydon JJ).
23. Further, in the case of s 44ZZRD of the Act, the purpose condition will be satisfied if, relevantly, a provision has the purpose of:
	1. preventing, restricting or limiting the supply or likely supply of goods or services to persons or classes of persons by all or any of the parties to the relevant arrangement or understanding (s 44ZZRD(3)(a)(iii)); or
	2. allocating between any or all of the parties to the relevant arrangement or understanding the person or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the relevant arrangement or understanding (s 44ZZRD(3)(b)(i)).
24. Subparagraphs 44ZZRD(3)(a)(iii) and (b)(i) refer to “persons or classes of persons” but omit the word “particular” that appears in s 4D. Subsection 44ZZRD(5) provides that it is immaterial whether the identities of the persons referred to in subparagraphs (3)(a)(iii) and (b)(i) can be ascertained. That subsection codifies the construction given to s 4D as I have described. This is confirmed by the explanatory memorandum to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth), which stated at [1.45]:

While three of the subparagraphs of the purpose condition refer to ‘persons or classes of persons’ that must be identified, the way in which a class of person is to be identified has not been finally settled. In *Rural Press Ltd v ACCC* [2003] HCA 75, the High Court decided that all that is necessary is to be able to define the class of persons to whom the exclusionary conduct applied. Consequently, where the purpose condition refers to a ‘class of person’ (in subparagraphs 44ZZRD(3)(a)(iii), (b)(i) and (ii)), the Bill clarifies that it is not material to identify the persons falling within the class for the purpose condition to be satisfied.

1. The omission of the word “particular” from subparagraphs 44ZZRD(3)(a)(iii) and (b)(i) does not mean that it is unnecessary to identify persons or classes of persons who are the object of the provision.
2. Seventh, as to the question of price fixing, the ACCC alleges that the cutting fee provision:
	1. had the purpose, effect or likely effect of directly or indirectly fixing, controlling or maintaining the price of cutting services; or
	2. if cutting services are not a “service” for the purpose of the Act, had the purpose or likely effect of controlling the price of electrical cable.
3. The ACCC submits that cutting services are a “service” for the purpose of the Act. The term “services” is defined in s 4 in the broadest possible terms. It includes but is not limited to any benefit provided in trade or commerce. The ACCC contends that cutting electrical cable for a customer provides such a benefit. The ACCC contends that it involves supplying cable in whatever lengths and variations are specified by the customer and obviates the need for the customer to acquire either its own cutting machinery or cutting services from another supplier. I will address these contentions later.
4. But at this point I would note that the definition of “services” excludes benefits that constitute the supply of goods (s 4 of the Act). So in *Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd* (1986) 162 CLR 395 at 403, Wilson J (with whom Dawson J agreed) found that an agreement to supply beer at the premises of a retailer did not include the supply of a service (the delivery of the beer) but just the supply of goods (the beer). But Wilson J found at 402 that “it may not always be easy to make the characterisation, the task being to identify from all the circumstances of the case, the precise legal obligation undertaken by the supplier of the goods”. I will return to this question later.
5. Alternatively, the ACCC has submitted that cutting fees are a component of the price of cut electrical cable and the cutting fee provision had the purpose or likely effect of directly or indirectly “controlling” the price of cut electrical cable. I will return to this question later, but at this point would note the following concepts.
6. The language “fixing, controlling or maintaining” in section 44ZZRD(2) is drawn from the predecessor prohibition of price fixing contained in section 45A (see the said explanatory memorandumat [1.26]).
7. The word “fix” has its ordinary dictionary meaning: to make fast, firm or stable (*Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 at [44] per Heerey, Hely and Gyles JJ). “Control” means “to exercise restraint or direction over” or “to exercise restraint or direction upon the free action of” a person or thing. An arrangement or understanding controls price “if it restrains a freedom that would otherwise exist as to a price to be charged” (*ACCC v CC (No 8)* at [168]; *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212 at [82] to [83] per Logan J). I do not need to address the word “maintain” in the present context, except to say that the word has a similar connotation to the word “fix”.

# F. NO CASE SUBMISSION

1. For completeness, I should say that various of the respondents sought to make a no case submission after the close of the ACCC’s case. I heard argument from the parties as to whether I should put the respondents to their election concerning going into evidence as the price for my entertaining their no case submission. I determined to put the respondents to their election. As a result, Olex determined that it did not want to pay the price and accordingly did not proceed with its no case submission. For obvious practical reasons, the other respondents withdrew their no case submissions. Olex’s position made their pursuit of such a submission redundant at that point at least (see, relatedly, *ACCC v Leahy Petroleum* (2004) 141 FCR 183 at [96] per Merkel J). It is appropriate that I state shortly my reasons for putting the respondents to their election.
2. First, the general rule in civil litigation is that I ought not entertain a no case submission unless the moving party elects to call no evidence. But special circumstances may justify departure from such a rule.
3. Second, special circumstances *may* exist by virtue of the nature and seriousness of allegations made and claims pursued by a regulator against alleged corporate miscreants and individual accessories for statutory contraventions that may entail or justify civil pecuniary penalties being imposed.
4. Third, notwithstanding the context just described, if a no case submission would require for its disposition:
	1. the assessment of the credit of a significant witness or more neutrally the evidentiary reliability of such a witness; or
	2. in a wholly or predominantly circumstantial case, the review of a large number of documents where there are reasonably open conflicting views as to how they should be assessed in the aggregate or the first level or second level inferences to be drawn therefrom;

it is not efficient or conducive to the interests of justice and in conformance with the purpose or objectives enshrined in s 37M of the *Federal Court of Australia Act 1976* (Cth) to entertain a no case submission without *all* respondents being put to their election *and* so electing. Simplistic forensic cases of the type exemplified in *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344; [2010] FCA 17 are the exception rather than the norm in this field.

1. Fourth, I would make one other general point. Whether a no case submission ought be entertained absent the moving party being put to its election is not to be decided by using epithets such as the regulator’s case is “weak” or the no case submission has “strong prospects” of success. To be able to confidently apply such labels first requires entertaining the no case submission in order to make such an assessment. But that is to do the very thing that either or both of factors (a) and (b) referred to above justify not doing, ie not entertaining the no case submission without an election first having been made.
2. In applying the above principles, I determined to put the respondents to their election. Both elements (a) and (b) referred to above were present. Indeed the substantial credit and reliability questions affecting Davis’ evidence were sufficient in and of themselves to justify the course that I took. Nothing more need be said.

# G. ALLEGED MAKING OF RELEVANT ARRANGEMENT OR UNDERSTANDING

## (a) Competition

1. The definitions of cartel conduct in s 44ZZRD and the exclusionary provision in s 4D both require that two or more of the parties to the arrangement be in competition with each other in relation to the supply of goods or services to which the provision relates. Olex and Prysmian competed with the Wholesalers to some extent. But their primary relationship was as a supplier to the Wholesalers.
2. Olex supplied electrical cable to a large number of customers in Australia and New Zealand including the Wholesalers, largely electrical contractors who purchased cable for installation in residential and non-residential markets, industrial applications, large infrastructure projects and large industrial projects, and large customers and industrial users such as Energex, Energy Australia, SP AusNet, and BHP Billiton. Prysmian appears to have had similar arrangements in Australia.
3. In addition to Olex and Prysmian, there were a number of other entities that manufactured and supplied electrical cable in Australia including Advance Cables, Tycab Australia Pty Ltd, Triangle Cables (Aust) Pty Ltd, Australia Pacific Electric Cables Pty Ltd and Bambach Wires and Cables Pty Ltd. There were also a number of firms that imported electrical cable into Australia including Electra, General Cable, Midland Metals Overseas Pte Ltd and World Wire Cables (Aust) Pty Ltd. These companies were competitors to Olex and Prysmian in the supply of cable to the Wholesalers.
4. As the respondents correctly contended, wholesalers’ businesses had a different structure to the cable manufacturers. For example, MMEM conducted an electrical wholesaling business supplying a range of electrical products. Electrical cable was a modest percentage of its overall sales. It conducted its business from 240 branches around Australia. MMEM marketed its geographical proximity to its customers and the broad range of products it provided. The branches were separate profit centres and made their own buying decisions. MMEM branches could undertake some cable cutting but they were limited by warehouse capacity and equipment available to them. A large proportion of the cable supplied by MMEM was thermoplastically sheathed with standard 1mm2 or 2.5mm2 flat twin and earth house wiring cable. MMEM supplied a large quantity of that cable to small to medium contractors in small order sizes under $2,500. Rexel also supplied a wide range of electrical products from about 200 branches located throughout Australia. A Rexel branch could do some cable cutting, but it needed a considerable amount of warehouse capacity, forklifts for moving reels and drums around the warehouse, specialised cutting machinery for cables with a cross-section of more than about 25mm2 and wooden drums and cardboard reels and machinery for winding the irregular length cable on to the reel or drum.
5. Moncrieff gave evidence that he did not consider that wholesalers were competitors of Olex except to a minor extent. By 2011, Olex was focused on increasing sales to large contractors and end-users and did not seek to compete in the “small end” of the market. Olex’s view was that wholesalers did not have the processes, systems and technical support which Olex had to compete for the supply to large contractors and end-users.
6. Davis considered that wholesalers competed with manufacturers in respect of large orders to major industrial contractors and end-users being orders well in excess of $2,500, but that wholesalers did not compete with the manufacturers for supply to small to medium contractors where the orders were frequent and generally in the range of $1,200 to $1,500. As he viewed it, to compete in that market it was necessary to have a branch network with a geographical reach that could serve the frequent requirements of small to medium contractors. The manufacturers did not have such networks.
7. Similarly, Picken and Alderson regarded Rexel’s competitors for the supply of electrical cable to be other wholesalers, but for the supply of larger volumes of cable, the competitors were manufacturers such as Olex and Prysmian.
8. The evidence on this aspect of the case was consistent. Olex, Prysmian and the Wholesalers competed to some extent to supply some of the same contractors and end-users with standard lengths or “full packs” of cable as well as shorter, irregular lengths that they would cut for the customer. But Olex and Prysmian focused principally on supplying larger contractors and end-users that acquired larger volumes of cable. Olex put less emphasis on the small contractor end of the market and concentrated on the bigger contractors, the bigger end-users and wholesalers. Prysmian made even fewer small value sales to contractors and end-users than Olex but still had some of those sales. Generally, it is well apparent to me on the evidence that Olex and Prysmian were less concerned about smaller value sales to smaller and medium contractors and end-users.
9. In summary, I am satisfied that the ACCC has shown the requisite competition condition. But it must be said that in relation to that part of the market for the supply to contractors and end-users where the cutting fee provision and the MOV provision would have bitten (if made and implemented), ie smaller contractors and smaller end-users, the competition between Olex and Prysmian on the one hand and the Wholesalers on the other hand for direct supply was very limited but nevertheless still apparent. As I say though, the focus of each of Olex and Prysmian in relation to direct supply was on larger contractors and end-users where there was more competition with the wholesalers.

## (b) Relevant arrangement or understanding

1. The ACCC’s case is that at the 23 June 2011 meeting, Olex, Prysmian and the Wholesalers, alternatively Olex and the Wholesalers, made the relevant arrangement or understanding containing one of various combinations of the cutting fee provision, the MOV provision and the support provision.

### Prysmian was not a party to any arrangement or understanding

1. In my opinion, the evidence does not establish that Prysmian was a party to the relevant arrangement or understanding.
2. The evidence adduced before me of what occurred at the 23 June 2011 meeting does not establish that Prysmian was a party to any relevant arrangement or understanding. Davis, a witness for the ACCC, gave evidence that Roberts stated expressly that he would consider Prysmian’s position in relation to the fees. Moncrieff gave evidence to the same effect. When he left the meeting, Moncrieff did not know what Prysmian would do and had no expectation about what it would do. Further, the relevant versions of the minutes of the meeting contained no reference to Prysmian making any statement. Further, Dunstan’s handwritten notes of the meeting made no reference to Prysmian. Moreover, Roberts’ handwritten notes of the meeting do not suggest that Roberts said anything of relevance or gave any commitment about Prysmian’s fees.
3. Further, Olex’s documents created after the 23 June 2011 meeting suggest that it did not know what Prysmian would do in respect of the cutting fee. This is consistent with Moncrieff’s evidence who was surprised when Prysmian followed Olex’s cutting fee increase. He thought that Prysmian would undercut and take the opportunity to gain a commercial advantage. Now Prysmian did follow Olex. But parallel conduct is not compelling evidence of collusion. Indeed, other cable suppliers, Advance and General Cable, also followed Olex’s increase but it was not suggested that they were parties to any collusion.
4. Further, Olex delayed its implementation of the MOV fee until after Prysmian. If an arrangement had been made at the 23 June 2011 meeting, one might have expected that Prysmian would have waited for Olex or communicate with Olex about such a delay. There is little, if any, evidence of such a communication. Indeed, Prysmian moved independently. Now I accept that after Prysmian announced an increase in its MOV fee, Gameau of Olex circulated an internal email on 16 August 2011 questioning whether Olex should delay any introduction of the MOV fee for a month because of the potential to arouse the ACCC’s attention. But that state of mind is readily explained by the fact that the ACCC had written to Olex on 2 August 2011 about the earlier cutting fee increase. Nevertheless, Olex pressed on with its decision in relation to the MOV fee. Olex wrote to customers announcing the MOV fee on 24 August 2011. None of this suggests let alone establishes cartel behaviour between Olex and Prysmian.
5. The ACCC has asked me to draw a *Jones v Dunkel* inference against Prysmian for not calling Roberts. I am not sure how far this takes the ACCC. Davis, Picken and Moncrieff gave consistent evidence that Roberts did not say at the 23 June 2011 meeting that Prysmian would follow, but rather said that Prysmian would consider its position. The failure to call Roberts cannot of itself justify any discounting of the evidence of such other witnesses. The failure to call Roberts cannot justify a conclusion that his evidence would have been *positively* adverse to Prysmian. In such circumstances any *Jones v Dunkel* inference that I might draw would be emasculated. The ACCC’s contention, even if I was to accept it, adds little, if anything, to the forensic landscape. I will draw the inference, but it is inutile.
6. I would make two other points concerning the position of Roberts.
7. First, I agree with Prysmian that it is inherently improbable that Roberts would have committed Prysmian to following a course set by Olex in relation to cutting charges and MOV fees of which he was not even aware until the meeting. Moreover, there was no commercial need for him to indicate support for Olex’s position in the meeting. Further, there is nothing in the evidence to suggest that the Moncrieff proposal was conditional upon Prysmian’s assent to the proposal. Further, there is nothing in the evidence to suggest that any lack of objection to the Moncrieff proposal on the part of the Wholesalers was conditional on the Prysmian response. Generally, there was no good commercial reason for Roberts to think anything other than that Prysmian’s position would require internal consideration by himself and his fellow executives. In such circumstances, a statement by Roberts at the meeting that Prysmian would need to consider its position plausible.
8. Second, the ACCC has invited me to conclude that Roberts was determined not to tell any fellow employee what really happened at the 23 June 2011 meeting and that after the event he engaged in the fabrication of a reasoning process in order to mislead Prysmian’s lawyers and his fellow employees, and thereby also lay a false paper trail to mislead the ACCC. Now no doubt this was submitted by the ACCC because some of the relevant Prysmian material after the 23 June 2011 meeting did not fit the ACCC’s case thesis. I reject the ACCC’s invitation. Rather, the documentation supports Prysmian’s position that it had not given any commitment or made any arrangement at the 23 June 2011 meeting.

### Olex was not a party to any arrangement or understanding

1. In my view, the ACCC has also failed to show that Olex was a party to the alleged relevant arrangement or understanding.
2. I accept Moncrieff’s evidence that he had in substance determined prior to the 23 June 2011 meeting to increase Olex’s cutting fee and introduce a MOV fee. At the meeting, he presented the Moncrieff proposal which described the increases and explained the efficiency benefits of the increased or new fees. Further, there was discussion about those changes. But the evidence is consistent with the proposition that it was stated expressly during the meeting that Olex would need to negotiate with each wholesaler individually. Now the representatives of the wholesalers present expressed their preference for a single cutting fee rather than a split fee and otherwise did not object to Olex’s increased fees. But I do not see that such behaviour constitutes the entry into of the relevant arrangement or understanding.
3. Moncrieff gave evidence that before the 23 June 2011 meeting he had decided that Olex would implement an increased cutting fee and a MOV fee. His decision took into account feedback provided by the wholesalers to Olex in respect of the Olex Response. He said that at the meeting he read from the Moncrieff proposal that contained the two fee increases. He said at the meeting that it was Olex’s decision to increase the cutting fee as part of its efforts to improve supply chain inefficiencies and to recover Olex’s costs of providing the cutting. All of the EWAA representatives that spoke expressed a preference for the single cutting fee option. Moncrieff also said that Olex was going to implement a fee of $250 for orders that fell below $2,500. He said that this measure would cut paper work and reduce inefficiencies. There was some discussion about how the MOV fee would be implemented in practice.
4. Now I accept that the use of the word “proposal” in the Moncrieff proposal is commercially understandable notwithstanding that Moncrieff had made up his own mind. Such a description was consistent with subtle customer management. Further, the fact that the document had two options for the cutting fee was also astute. As Moncrieff said, when people are given two options they focus on the options rather than the fact that the fee is being increased. None of this in my view denies the force of the point that Moncrieff had in substance made a prior decision about increasing the cutting fee.
5. Further, Olex implemented the cutting fee increase immediately after the meeting. This is consistent with a decision having been made by Olex prior to the meeting. Moreover, Olex also commenced preparation for the introduction of the MOV fee. But there was some delay in implementing the MOV fee because Olex intended to consult further with its customers and needed to make changes to Olex’s accounting system.
6. Generally, in my view Moncrieff’s evidence that he had in substance made a decision prior to the meeting was credible. Olex had engaged in substantial consultation with the individual wholesalers in May 2011 before sending its response to the Geddes email. Dunstan had recorded in an internal email on 19 May 2011 to Hueber that there was “resounding agreement” to the proposals. This supports Moncrieff’s evidence that the consultation enabled Olex to make its decision on the cutting fee and MOV fee. Moncrieff was challenged to consider what he would have done if the wholesalers at the meeting had expressed a preference for the split cutting fee. He said that he would have been shocked but said that he was not sure whether he would have changed from the single fee.
7. Further, Moncrieff was questioned about the contents of a draft “Strategic Plan Review” prepared on or about 21 June 2011 to be presented at an Olex conference in Shanghai on 29 June 2011. As I have already said, the draft document referred to the split fee option rather than the single fee. Moncrieff explained that the relevant slide in the presentation had been prepared by the supply chain manager and that a single fee or a split fee did not make any difference to the numbers. More significantly, the cutting fee was one small initiative in the range of initiatives that Moncrieff was presenting to Nexans in Shanghai. Indeed, even the presentation finalised on 24 June 2011 (ie after the 23 June 2011 meeting) continued to refer to the split fee option rather than the single fee. Now I accept that the presentation referred to the MOV fee perhaps much more obliquely. Amongst the business plans was an action to “reduce cost to serve”. Under that item, the presentation refers to “warehousing & logistics cost reduction opportunities”.
8. Now I accept that there is some material that throws doubt upon whether Moncrieff had made a prior decision; see for example the Dunstan email to Hanlon of 21 June 2011 at 10.23am and to Murphy at 10.25am and Murphy’s response on 23 June 2011 at 8.44am, which, though, are not Moncrieff’s documents. But on balance I accept Moncrieff’s evidence.
9. Further, Dunstan also recorded in an internal email sent on 23 June 2011 to Stack that “Graeme and I were with the EWAA today and these changes [fee increases] are endorsed by them as a means to support Aust mftrs”. This email is consistent with Dunstan’s earlier email on 19 May 2011: that feedback from wholesalers during individual consultation endorsed the proposed fee changes. I accept though that there is ambiguity in that email as to when the endorsement is said to have occurred. But even if it was endorsement at the meeting, it was to “support Aust mftrs”, which is a reference to their costs efficiencies rather than the ACCC’s new case thesis that the cutting fee increase was for the benefit of the *wholesalers*. In any event, the earlier support of the wholesalers remained the case as at the time of the 23 June 2011 meeting.
10. In general, Olex met with its major wholesale customers at the 23 June 2011 meeting and explained its intended fee increases to them. The wholesale customers expressed general acceptance of Olex’s decision to increase its fees. One can infer that they understood and accepted the reasons for the increases. Those facts in and of themselves do not establish that Olex was a party to the relevant arrangement or understanding.
11. Finally, on this aspect I should address one other point.
12. The ACCC contended that it would have been uncommercial for Moncrieff and Olex to have moved unilaterally and that, accordingly, Moncrieff’s purpose in putting the Moncrieff proposal to the 23 June 2011 meeting was to seek agreement from the Wholesalers and possibly Prysmian to the new fees and that absent this they would not have been implemented. In other words, so it is said, Moncrieff needed some assurance.
13. But Olex could have moved unilaterally with some anticipation that Prysmian and others may have followed. And such anticipation does not establish any infringing arrangement or understanding. And if they did not follow, it could have altered its strategy.
14. In summary, the true position is that Moncrieff had in substance determined to introduce the new fees, turned up to the 23 June 2011 meeting to announce what was being proposed, received in substance a non-objection generally speaking (no wholesaler representative committed their particular wholesaler to any particular course) and immediately after the meeting proceeded with the cutting fee increase with the MOV fee to follow.

### Wholesalers were not parties to any arrangement or understanding

1. In my view, the Wholesalers were not parties to the relevant arrangement or understanding. I say this for a number of reasons.
2. First, if neither Olex nor Prysmian were a party, then this conclusion necessarily follows. There was no case pleaded of an arrangement between the Wholesalers only. Further, no attempt case has been pleaded.
3. Second, the 23 June 2011 meeting was of the members of the EWAA. Further, an outcome of the meeting was that each individual wholesaler would have to negotiate separately. Indeed the ACCC does not allege that Gemcell was a party to the relevant arrangement or understanding, yet it was a member of the EWAA and several of Gemcell’s representatives were in attendance on 23 June 2011.
4. Third, on any view Webb had no authority to speak for or bind individual Wholesalers to any arrangement or understanding, notwithstanding the presence of some of their representatives.
5. Fourth, for the representatives of the Wholesalers at the 23 June 2011 meeting to *factually* not object does not in and of itself establish that they were parties to the relevant arrangement or understanding, as I will explain later.

### No evidence of support provision

1. There is no evidence that the Wholesalers gave a commitment to the Manufacturers, alternatively Olex, not to reduce their purchases of cable by reason of the increased fees. Yet this was the ACCC’s principal quid pro quo thesis until late in the trial.
2. The evidence of the communications that occurred at the 23 June 2011 meeting negates the ACCC’s case on this aspect. The Moncrieff proposal presented at the meeting proposed an increased cutting fee and MOV fee but said nothing about any commitment from the Wholesalers as to future purchases. Further, Davis gave evidence that MMEM had a large branch network that made their own buying decisions and he had no capacity to make a commitment that branches would buy cable in the future from Olex or Prysmian. Further, neither Davis nor Lamond gave any such commitment to Olex at the meeting. Davis also did not hear anybody else say that they would buy cable from Olex and did not hear them say that they would not either. Further, Moncrieff’s evidence of the discussions at the meeting make no reference to a commitment being sought from or given by the Wholesalers about their future cable purchases from Olex. Moreover, I would note at this point that there are no internal documents of Olex after 23 June 2011 that reflect any commitment of the Wholesalers not to reduce their future purchases. Further, the draft minutes of the meeting prepared by Lemon contain no reference to any such commitment. It is implausible that at the meeting the Wholesalers gave a commitment about future purchases without a reference to that effect in the draft minutes. Further, Dunstan’s handwritten notes of the meeting contain no reference to a commitment from the Wholesalers about future purchases. One might expect this to be of not insignificant interest to Olex and therefore recorded in writing if such a commitment had been given. Moreover and similarly, Roberts’ handwritten notes of the meeting contain no reference to a commitment from the Wholesalers about future purchases. One might also expect this to be of not insignificant interest to Prysmian and recorded in writing if such a commitment had been given.
3. But there are other difficulties with the ACCC’s case.
4. On the ACCC’s case, the alleged bargain refers to the “volumes and/or value” that the Wholesalers would “not reduce” as being for the collective volumes/values of the Wholesalers (plural). The ACCC does not allege that each Wholesaler committed to not reduce its individual volume/value. Further, the alleged bargain for the Manufacturers was the collective total supply by “the Manufacturers” (plural); I will put to one side for the moment the alternative case involving Olex. Again, in the ACCC’s primary case, the pleaded guarantee to “not reduce” is measured against the total volume and/or value of both Manufacturers. The ACCC’s case appeared to permit substantial deviations of volume/value by one Wholesaler or from one Manufacturer so long as the aggregate volumes/values were “not reduced”. But this is commercially implausible to say the least. Why would any rational manufacturer or wholesaler give or accept such a nebulous and unenforceable commitment? Moreover, even on an individual basis, that is, between one manufacturer and one wholesaler, such a commitment is improbable having regard to their separate and detailed individual trading arrangements and also the decentralised structure of the branches of the Wholesalers.
5. Further, the ACCC has not led evidence as to whether the commitment to “not reduce” purchases by the Wholesalers applied to the volume, value or both the volume and value of cable. Moreover, there are differences between volume and value. None of these matters were clarified by the ACCC’s nebulous case thesis. In summary, I reject the ACCC’s case on this aspect. There was no support provision. And so to find significantly undermines the commerciality and plausibility of what is left in the ACCC’s plea of the relevant arrangement or understanding. Let me now turn to what may be seen as the ACCC’s fall back of its “no objection” thesis.

### The ACCC’s “no objection” thesis

1. It is alleged that the cutting fee provision and MOV fee provision whether separately or together are provisions by which the Manufacturers *would* increase or introduce those fees and the Wholesalers *would* not object. It is a composite allegation for each of the fees.
2. The first part of the allegation for each fee is that the Manufacturers gave a *commitment* to increase or impose the fees. But there is no evidence that such a commitment was given by the Manufacturers or Olex alone. Moreover the allegation makes little commercial sense. Further, the ACCC did not put to Moncrieff that he gave a *commitment* to the Wholesalers to increase Olex’s fees. Indeed, Moncrieff’s evidence was that he had already decided to increase the fees. And even if Moncrieff might have changed his mind if there had been resistance from the Wholesalers, that still provides no support for the proposition that Moncrieff gave a commitment to increase the fees. Further, as Olex rightly contended, there would only be a need to give a commitment if the fee increases were requested by the *Wholesalers* but resisted by Olex. But in my view on the evidence, the fee increases were Olex’s initiative.
3. The second part of the allegation for each fee is that the Wholesalers gave a *commitment* not to object to the increases. But each of the Wholesalers had already indicated to Olex in bilateral discussions prior to the 23 June 2011 meeting that they accepted the need to increase the fees. Davis’ evidence is that he understood that Olex’s purpose in increasing the cutting fee was to reduce its costs by encouraging wholesalers to do more cutting and he understood that Olex’s purpose in introducing the MOV fee was to try and encourage the wholesalers to place larger orders which would reduce costs for both Olex and the wholesalers. In my view, the Wholesalers understood that there were inefficiencies in the supply chain caused by their inefficient ordering practices and that Olex’s increased cutting fee and the introduction of the MOV fee were appropriate measures to address such inefficiencies.
4. More generally, in my view the alleged “non-objection” conduct is not capable of being the subject of a relevant arrangement or understanding. The allegation is flimsy and ephemeral when divorced from any commitment by the Wholesalers in respect of their future purchases of cable. Indeed, the “non-objection” part seems to be an artificial putative quid pro quo to gloss over any difficulty in the ACCC’s case if I found that there was no support provision; I will put to one side for the moment the now new argument of the ACCC concerning the cutting fee being “in return” for the MOV fee.
5. In summary, as to that part of each alleged provision dealing with “not objecting”, all that the evidence established was that *factually* no one objected as distinct from any potentially infringing *commitment* to not object. An actual *commitment* to “not object” to a supplier’s announced fee increase is not established by “not objecting” audibly at a meeting, as the respondents correctly contended. Suppliers routinely increase their prices. Each time a customer fails to make or indicate any objection would not make them a party to an arrangement or understanding in which they have *committed* to not objecting to those price increases. When a customer does not object to an increase in price announced by its supplier, even if a statement was made to the effect of “I do not object”, that does not establish a meeting of the minds between those two parties that the recipient of the price increase is committed to anything. Indeed, there may well be instances where a purchaser faced with a potential price increase being announced by a supplier, such as the MOV fee, might consider this useful for its own business. Again, this is no basis for inferring an actual commitment to not objecting. Rather, there is simply no need to object. The party being notified of the increase can simply take advantage of the situation by saying nothing. I therefore reject the ACCC’s case that any *commitment* was given or understanding was reached by the Wholesalers that they *would* not object.
6. Before turning to the question of purpose, it is convenient to address two other matters at this point.

### Bilateral negotiations

1. In seeking to negate the ACCC’s thesis concerning the making of the relevant arrangement or understanding, the respondents from time to time placed emphasis on the fact that the manufacturers and wholesalers negotiated on a bilateral basis (individual manufacturer with an individual wholesaler). So much is plain from dealings and discussions between the various parties before 23 June 2011. So much is apparent from what Webb said at the 23 June 2011 meeting of the need for the manufacturers to negotiate with individual wholesalers.
2. But that is not to deny that a broader arrangement could nevertheless be struck between all the Manufacturers and the Wholesalers as alleged. Accepting the respondents’ point is not to deny that at the 23 June 2011 meeting, the relevant arrangement or understanding could have been made, even though separate negotiations with individual wholesalers might have been required. They are not mutually exclusive positions or propositions. But as I have said, on the totality of the evidence I am not satisfied that the relevant arrangement or understanding was made. What Webb said does not necessarily negate such an arrangement or understanding, but his statement at the 23 June 2011 meeting is generally unhelpful to the ACCC’s case thesis.

### Cable reform – general

1. As is well apparent from the more detailed chronology set out earlier, I accept that there is documentary material from time to time that supports the proposition that there were internal considerations and communications between the parties relating to broader topics such as:
	1. Cable reform and then LV cable reform. For example, see Alderson’s email to Stack of 1 June 2011 and Stack’s draft response prepared for Dunstan; Dunstan’s email to Hueber of 17 June 2011; Shroff’s email to Haller of 19 April 2011.
	2. Changing the face of distribution and the roles both manufacturers and wholesalers play and were to play, including customer sharing and the re-channelling of direct business. For example, see Alderson’s email to Stack of 1 June 2011 and Stack’s draft response prepared for Dunstan; Dunstan’s email to Lester dated 30 September 2011 (but referring to the *preferred* channel and dealing with LV product only); minutes of Gemcell members’ meeting on 18 August 2011; Murphy’s email to Bradshaw on 19 August 2011; Furlong’s (L&H) internal email of 23 August 2011; minutes of Gemcell’s directors’ meeting of 25 and 26 October 2011; Alderson’s draft cable strategy attached to an email to Brochut of 19 August 2011 (Option 4); Roberts’ email to Shroff of 30 March 2011; the “Road Map to T&I” attached to Shroff’s internal email of 19 April 2011; Prysmian’s “strategic partnership opportunity” attached to Allingham’s email of 10 May 2011; modified version of “RGA presentation” attached to Shroff’s email to Haller of 23 May 2011; Haller’s email to Hanlon (L&H) on 2 June 2011 with attachment; Prysmian slides (27 January 2011) referring to “What is RGA looking for?”; Roberts’ email to Hoegstedt of 2 March 2011; draft framework agreement attached to Allingham’s email to Shroff of 3 May 2011.
2. I also accept that there is material after the event where some industry players considered that the cutting fee increase was part of the broader cable reform. For example, the internal email chain of L&H on 30 June 2011 authored by McRae; Alderson’s draft cable strategy attached to an email to Brochut of 19 August 2011 (Option 4); the Rexel/Prysmian draft strategic partnership framework proposal of 26 August 2011 (paragraph 1 of “Initiatives” attached to Haller’s email to Brochut); Cable Workshop presentation of Brochut attached to an email to Neary of 8 September 2011 (slide “Become a Broad Range Cable Distributor) (I have discussed this earlier in the chronology); Shroff’s internal email of 16 August 2011; Shroff’s email of 15 August 2011 to MMEM; Shroff’s internal email of 24 August 2011; Shroff’s internal email of 25 August 2011; Prysmian’s presentation to Gemcell (attached to Shroff’s internal email of 25 August 2011); draft “Prysmian Excellence Program” of April 2012; Alderson’s email to Milburn/Edgar of 19 August 2011; Alderson’s email to Brochut/Williams of 27 July 2011; Alderson’s internal email of 4 July 2011.
3. But at the end of the day, I would note the following:
	1. First, the ACCC’s pleaded case is not at the level of attacking the broader cable reform. There is no pleaded arrangement or understanding dealing with the broader or holistic reforms discussed.
	2. Second, although there were numerous and diffuse discussions concerning cable reform, what was also apparent was that this was an evolving process.
	3. Third, observations or states of mind of individuals after the event attributing a linkage between the increased cutting charge or the introduction of the MOV fee to either broader industry reform or the 23 June 2011 meeting are not sufficiently probative and direct to undermine any conclusion that at the 23 June 2011 meeting, the ACCC has not established that the relevant arrangement or understanding was made. Of course I have viewed the events of 23 June 2011 in the context of the pre-meeting conduct (over many months) and the post-meeting conduct (over some months) and all in its totality. But my overall conclusion is as I have stated. The evidence does not establish to the requisite level that the relevant arrangement or understanding was made.

## (c) Alleged purpose of cutting charge and MOV provisions

### Summary

1. In relation to the ACCC’s case as pleaded and opened, there has always been a fundamental difficulty. The asserted purposes could not have applied to or been intended to apply to the major or large contractors and end-users to whom the Manufacturers supplied directly. The asserted purposes could not have applied to or been intended to apply to *all* cable (as distinct from LV cable).
2. There was no evidence whatsoever that the Manufacturers intended to or would want such a diversion. To do so would be uncommercial. Moreover, the suggestion becomes even more unrealistic once it is realised that there was no support provision (in its original form or as amended) as the substantive quid pro quo. Indeed, such a suggestion is still uncommercial even in relation to the diversion of smaller contractors or end-users unless the support provision was in place.
3. The ACCC now appears to contend that the provisions were a step towards the diversion of all direct customers. But if that is the contention, it is not strictly the pleaded purpose(s). In any event, it is not made out on the evidence. For example, the Geddes email, relevant to at least the Wholesalers’ purpose, only referred to “the exclusive channel for all *LV* power cable to the contractor market” (emphasis added).
4. The ACCC has contended for a purpose of preventing, restricting or limiting supply by the Manufacturers (or Olex alone) to contractors and end-users or allocating such customers to the Wholesalers.
5. In summary, I reject that “purpose” case.
6. First, the level of cutting fee imposed by the Manufacturers and the small size of the minimum order value ($2,500) would not impact on the market for cable supply for which the Manufacturers and Wholesalers competed. Competition between wholesalers and manufacturers for the supply of cable was during the relevant period largely for the supply to major or industrial contractors or end-users, and typically for major projects or large volumes of cable well in excess of $2,500. During the relevant period, there was effective competition between wholesalers and manufacturers in relation to such supply. Contrastingly, the wholesalers and manufacturers did not generally compete for supply to small and medium contractors who typically acquired cable in order values of around $1,200 to $1,500. Due to their frequent (even daily) placement of small orders, these customers required the geographic proximity of a widespread branch or retail network of branches. For example, MMEM’s competitors for those customers were the other wholesaler branches, as well as retailers like Bunnings and Masters. Olex and Prysmian were not MMEM’s close competitors because they lacked the required branch network.
7. Second, in relation to the cutting fee, it was for the purpose of cost recovery. Moreover, Olex could not, by imposing a fee, attract additional business from the other manufacturers who were its competitors. This suggests that the purpose of the fee was to improve cost recovery and efficiency. Further, the measures were unlikely to impact upon the direct supply segment that the Manufacturers engaged with, ie large contractors and end-users.
8. Third, in relation to the MOV fee, Davis said that, as discussed with Olex and Prysmian representatives in the first half of 2011 and consistently with Moncrieff’s statements at the 23 June 2011 meeting, the median value of orders from wholesalers was around $1,000 and that wholesalers had been placing frequent and small orders with the manufacturers. That had caused the manufacturers to be uncompetitive given the significant costs incurred by them to service the small orders placed by the wholesalers, including by virtue of additional staffing and vehicle costs.
9. Davis also accepted that if the MOV fee was successful in reducing the number of orders made by wholesaler branches, there would be a corresponding reduction in MMEM’s own costs of raising orders. That result flowing from an efficiency purpose provides a basis for why Davis and the other wholesaler representatives were prepared not to object to the MOV fee.
10. The ACCC has contended that where conduct is part of a broader strategy, the purpose of the broader strategy can be relevant to determining the purpose of the conduct. I accept that proposition in the generality with which it has been expressed. But where it takes the ACCC is another matter.
11. The ACCC has also contended that a purpose was to prevent, restrict or limit the acquisition of electrical cable by the Wholesalers from persons other than the Manufacturers (or just Olex). Again, the evidence does not establish such a purpose. There is no evidence of the ACCC’s support provision whether in its original or evolved form.
12. What then was the purpose of the cutting fee increase and the MOV fee?
13. In relation to the cutting fee provision, which is also pleaded by the ACCC on a stand-alone basis, in the absence of a support provision, its relevant purpose in my view was that of Olex in relation to producing costs efficiencies and to encourage the wholesalers to be efficient. If the cutting fee had stayed below cost, it operated as a disincentive to wholesalers to cut more. If the cutting charge stayed low, it was cheaper for wholesalers to get the manufacturer to cut at a cheaper price than the wholesalers could.
14. In relation to the MOV provision, which is also pleaded by the ACCC on a stand-alone basis, there is no probative evidence that any arrangement was made concerning it at the 23 June 2011 meeting.
15. As to its purpose, it was to be addressed to small orders and in a way that was addressing cost efficiencies. Moreover, its focus was addressed to the practice of wholesalers. The manufacturers were not transacting any substantial amount of small order direct dealings. The wholesalers could, of course, avoid such a fee by adopting efficient practices, ie aggregating orders.

### ACCC’s final case theory

1. In the last evolutionary phase of the ACCC’s case, it contended that it was clear from the course of negotiations between Olex, Prysmian and the EWAA that a high cutting charge was a concession to the Wholesalers (as a transitional step to “no cuts”) and that this was “in return for” the MOV (which was of benefit to Olex and Prysmian). Thus, so it was said, the cutting fee provision and the MOV provision were intended to work together and provide the benefits that the manufacturers and wholesalers each wanted.
2. The ACCC contended that one of the issues that was discussed during the March 2011 meeting was how the manufacturers’ direct dealing could be reduced. In the course of that discussion, one of the options that was identified was for the manufacturers to cease cutting cable.
3. It is said that Middendorp incorporated this suggestion into the draft proposal that he circulated to the EWAA directors the next day. He suggested proposing to the manufacturers that they “[o]nly supply full pack quantities of these cables (ie: no cuts)”. The measure was proposed to help achieve the EWAA’s objective of reducing the manufacturers’ direct dealing. The EWAA directors agreed to include the measure in the final version of the proposal in the Geddes email.
4. It is said that Olex then adopted this measure as one of the “initiatives” in its draft response to the EWAA proposal that it began circulating to EWAA members on 4 May 2011. As the draft response stated, Olex proposed to supply only “full pack quantities” to help make wholesalers the “preferred” channel for LV cable sales.
5. It is said that however, Olex recognised that if the manufacturers supplied full packs only, some EWAA members would need to invest in further warehousing and cutting facilities (so that they could adequately store and cut cable for all contractors and end-users). Accordingly, so it is said, Olex proposed that there would be a “period of transition” in which Olex would continue to cut cable but increase its fee for that service.
6. The ACCC contends that this makes clear that the purpose of this cutting fee increase was not cost recovery. It was to assist in the reduction of the manufacturers’ direct dealing. It was intended to be an interim measure to facilitate the smooth re-channelling of customers during a “period of transition” in which the EWAA members would invest in warehousing capacity and cutting machinery.
7. The ACCC contends that the amount of the fee may have been intended to better reflect Olex’s costs. Olex, like all businesses, would have wanted to recover its costs and earn some profit. But the ACCC contends that the increased fee was not designed, put forward or intended as a costs recovery measure. It is said that there is no evidence of Olex having performed or considered performing any analysis of its costs of cutting electrical cable until after it had sent this draft proposal to its customers.
8. Further, it is said that the decision to analyse its cutting costs arose from Moncrieff’s desire to “provide more definitive values” in the final version of Olex’s response to the EWAA. It is said that that desire appears to have arisen because Moncrieff wanted the proposal that he took to the 23 June 2011 meeting to be more precise so that it would be easier to reach agreement on the figure with the EWAA.
9. Similarly, so it is said, the Moncrieff proposal tabled during the 23 June 2011 meeting was not advanced as a measure that would assist Olex in recovering its costs. It was advanced on the basis that “full implementation” of Olex’s more detailed proposal “will take some time” and Olex wanted to “get some momentum for the reform agenda”. In other words, the purpose had not changed. It was still put forward and was intended to be one of the measures that could be agreed by the Wholesalers and manufacturers to push sales to wholesalers.
10. It is said that this is confirmed by Dunstan’s notes of the 23 June 2011 meeting which records “[s]hould we be cutting product ≤25mm2 at all?”, “[d]oes step 2 [become] a decision not to cut any product ≤25mm2 (Jan 2012?)” and “[i]ncentive to deal with the charge so the volume can become a shift to the wsalers”. But as I have already explained, such a submission seems to proceed from the ACCC’s flawed foundation as to attribution.
11. The ACCC has contended the following concerning the purpose of the MOV provision.
12. It is said that Shroff stated, “[t]he basic philosophy is to channel day-to-day direct business thro wholesalers”. Similarly, Olex considered that a MOV would “push activity to distributors”. Thus the MOV was intended to promote re-channelling because contractors and end-users could not avoid the MOV by aggregating orders in the same way as wholesalers. In addition, however, the MOV provided a benefit to the manufacturers in return for the cutting charge. Together with the cutting fee provision, the overarching purpose of the MOV provision was to bring about a reduction in the manufacturers’ direct dealing. It is said that the EWAA suggested a MOV to help achieve the stated objective of “bring[ing] about structural change to cable distribution”. It is said that Olex also proposed a MOV to help make wholesalers the “preferred” channel to market for LV cable. Similarly, it is said that Prysmian proposed a MOV “to bring reform and structure” to the market. The ACCC contends that when it was proposed and formed part of the arrangement or understanding on 23 June 2011, it was intended to help achieve the overall purpose of the industry reform which included reducing the manufacturers’ direct dealing.
13. Now the ACCC accepts that the MOV provision may not have substantially affected the buying decisions of certain large contractors and end-users when they bought large amounts of cable. But the ACCC contends that this is not to the point. It was intended as a measure that would begin the industry reform, not complete it.
14. In that context, the ACCC contends that the requirement that the wholesalers “not object” to the cutting charge and MOV provisions was an ancillary but nevertheless significant provision for the manufacturers (and indeed the wholesalers) to make the cutting fee and MOV provisions workable. The “not object” provision was intended to protect as far as possible Olex and Prysmian from a deterioration in their relationships with wholesaler branches who might otherwise have been angered by their unwillingness to negotiate reductions to those charges but who did not understand why they had been agreed. Further, it is said that the provision of the arrangement or understanding that the wholesalers not object must be understood in the context of the wider purposes of those discussions, namely, restructuring the industry such that manufacturers and wholesalers moved towards distinct functional levels. Were the wholesalers to comply with the provision that they not object to the cutting charge and MOV, it would have provided the necessary level of trust to allow the manufacturers and wholesalers to progress restructuring discussions further. Thus, the “not object” provision had commercial significance that extended far beyond the immediate benefits that would enure to Olex and Prysmian from the relevant cutting and MOV charges.
15. Accordingly, so the ACCC contends, even if I conclude that Prysmian did not go far enough at the 23 June 2011 meeting to commit to impose the cutting charge and MOV, then it is clear that Olex and the wholesalers made an arrangement or understanding in the terms alleged.
16. Further, it is said that even if I were to conclude that Prysmian did not make a commitment to impose the cutting fee or MOV fee, it would not enable Olex to avoid the same conclusion. Roberts was at the 23 June 2011 meeting and so it is said, had been a strong advocate for engaging with the EWAA about industry restructure including at the March 2011 meeting. It was said that Roberts had made it clear that Prysmian was in a parlous commercial position and needed the industry to be restructured with the assistance of the EWAA to ensure Prysmian’s viability. The ACCC contends that it would have been unthinkable in those circumstances for Prysmian to have sought short term commercial gain by undercutting Olex on cutting charges and the MOV fee, and thereby ending any prospect of acting collectively to achieve the “reforms” that Roberts considered necessary for Prysmian’s survival. It is said by the ACCC that it may be inferred that Dunstan and Moncrieff knew this. In those circumstances, so it is said, it cannot be concluded that without Prysmian’s express assurance that it would follow, Olex would not have made an arrangement or understanding about its own cutting charge and MOV fee.
17. Now much of the ACCC’s final case thesis is inconsistent with my factual findings, but there are other points necessary to make.

### Alleged quid pro quo

1. There has been considerable evolution in the ACCC’s “quid pro quo” case theory and it is convenient to step through this at this point.
2. The “quid pro quo” theory at the start of the trial involved the originally pleaded “maintain or increase the volume and/or value of electrical cable…” support provision. It lacked any evidentiary foundation.
3. During the trial, the alleged support provision was amended by the ACCC to “would not reduce the volume and/or value of electrical cable…” support provision. This also lacked any evidentiary foundation.
4. The next “quid pro quo” theory was the “would not object to…” thesis in relation to each fee. This is a lawyer’s construct more than reflecting the reality of a commercial quid pro quo struck between commercial actors.
5. Finally, the ACCC settled on its last “quid pro quo” theory which was to the effect that the Wholesalers wanted an increase in the cutting fee in return for which they would agree or at least not object to the MOV fee.
6. So, it was said by the ACCC that the cutting fee increase was for the benefit of the Wholesalers because it would reduce direct dealing. It would be a transitional step to “no cuts” by the manufacturers. The MOV was for the benefit of the manufacturers which the Wholesalers would not object to and in essence would be the quid pro quo.
7. Now this final theory is not pleaded in terms. But I will put that nicety to one side for the moment and deal with the substance.
8. There are considerable difficulties with this case theory.
9. First, the new case theory is at odds with the pleaded case in relation to the cutting fee increase, which was to the effect that Olex and Prysmian were seeking an assurance of “support” from the Wholesalers not to object to the increase. If the Wholesalers *wanted* the increase, there was no need for Olex and Prysmian to seek such an assurance. Moreover and relatedly, the theory is inconsistent with the notion that the internal quid pro quo to be given by the Wholesalers for the cutting fee increase was their assurance that they would not object. The new case theory has the quid pro quo being the Wholesalers not objecting to the MOV.
10. Second, it is not consistent with how the ACCC led its evidence from Davis.
11. Third, it is inconsistent with how the ACCC cross-examined Moncrieff. It was put, in effect, to Moncrieff in cross-examination that he was in doubt about obtaining support for the cutting fee increase at the 23 June 2011 meeting, rather than that he knew that the Wholesalers wanted it because they perceived it to be to their benefit (or as a step along the way to no cuts).
12. Fourth, the new case theory is at odds with the evidence of Moncrieff that the purpose of *both* fees was all to do with Olex’s costs base and achieving costs efficiencies. The ACCC’s final attempt to glide over such evidence is unconvincing.
13. Fifth, if the cutting fee increase was what the Wholesalers wanted and to their benefit, there is little evidence going to the subjective purpose of the Wholesalers to that effect at the time of the 23 June 2011 meeting.
14. As part of the ACCC’s thesis, it is suggested that the cutting fee increase was a transitional step to no cuts, which the Wholesalers ultimately wanted.
15. I agree with the respondents that no such case has been pleaded in terms. Further, it is in tension with how the case was opened by the ACCC. Further, it is problematic in its conception and in any event is not made out on the evidence.
16. In the ACCC’s oral closing submissions, the small steps theory was described to comprise the introduction of a cutting fee as a step forward to ultimately making no cuts and, as a second step, the introduction of no cuts, which is said to have a purpose of “having a push effect on the direct business”. No explanation was given as to when, how, on what terms (eg volume) or with what parties the alleged end reform would be realised.
17. It is not clear whether the ACCC contended that the application of the cutting fee and MOV to electrical cables of less than 25mm2 was itself a small step towards the introduction of similar fees for electrical cable of *all* sizes. Similarly, it is unclear whether one or more further small step(s) would be required to then extend the cutting fee to cables of all sizes before the objective of no cuts was achieved.
18. There are further differences between the “transitional” steps alleged in the ACCC’s opening when compared to its closing. In the ACCC’s case as closed, the “transitional” steps had as the end goal merely “reducing” direct dealing. In the case it opened, the end step involved the Manufacturers only selling through the Wholesalers and not directly to “contractors” (being the entire class of contractors for all products) with the result of a complete restructure.
19. Now the foundation of the ACCC’s final case theory is that the cutting fee increase was sought by the Wholesalers. But there is no evidence that the Wholesalers ever requested a cutting fee. Second, the Moncrieff proposal itself indicated that Olex did not regard it as something sought by the Wholesalers. His proposal contained statements (under the heading “Benefit to EWAA members”) trying to persuade Wholesalers that it had a benefit for them. Third, the ACCC’s proposition emerges from a misunderstanding of the Geddes email and the surrounding commercial circumstances.
20. The ACCC’s new case theory is that: (a) the quid pro quo in the Geddes email was full pack quantities (ie no cutting) in return for a MOV; (b) the cutting charge was merely a lesser version (in transition to the full version) of no cutting; and (c) the purpose of the cutting charge was to reduce direct supply. But Picken explained why these propositions were incorrect. In relation to the quid pro quo proposition, Picken explained that the Geddes email was grouped by acts to be undertaken by the Manufacturers and the Wholesalers, and not grouped by who was requesting what. For example, he explained that “not quote LV power cable up to and including 25mm” was not desired by the wholesalers as their branches disliked it and considered it an impost on them. Further, Picken considered that Rexel would accept the MOV if it made the manufacturers more efficient and similarly, it would force the wholesalers to be more efficient given that 95% of the orders of ≤25mm cable would be from wholesalers.
21. Likewise, as the Geddes email stated upfront, if the Wholesalers were to be the exclusive channel for LV cable up to 25mm2, the supply of “full pack” quantities by the Manufacturers could only be an efficiency benefit for Manufacturers, because there would be no need to have mechanisms that would drive direct sales to Wholesalers under that scenario.
22. Further, Picken explained why a cutting charge was not of the same nature as “no cutting” and why he did not consider a cutting charge to promote a reduction in direct supply. As Picken explained, cutting fees would primarily be borne by the Wholesalers and were directed at the Wholesalers (to improve efficiency and allow Olex greater cost recovery). They were not designed to reduce business, but to lower overall prices. For example, a budget airline does not impose a checked baggage fee to reduce its business, but to reduce overall ticket prices and to ensure that there is an appropriate price signal for the costs of ancillary services. Further, the cutting charge was a very small component of the overall cable price. Any customer large enough to buy direct from Olex could avoid the fee by cutting itself or purchasing from another manufacturer. Olex was only one of numerous manufacturers.
23. Moreover, as the respondents correctly contended, a significant problem with the ACCC’s new case was that on its theory, the Wholesalers entered into an agreement with Olex the point of which was to reduce direct business by permitting Wholesalers to buy cable in bulk and charge less for cutting, thus driving business to the Wholesalers. But when Rexel first considered cutting charges in response to the cutting charge announcements by the wholesalers, Rexel proposed the same $85 fee, which would defeat the ACCC’s suggested purpose. Picken responded to Alderson’s email where the $85 fee was proposed, but did not suggest that the $85 fee should be lower. Indeed, Picken’s comments indicate that he was having difficulty understanding how Rexel would obtain any additional margin. He was not sure that Rexel would have the immediate capability to buy cable in bulk and sub-distribute it (“How do we get the margin? By marking up the cable company’s charge or by buying in bulk and subdistributing meaning we don’t incur any charges? If it is the latter have we planned for this?”). Rexel’s proposal to charge $85 and Picken’s response to it are at odds with the ACCC’s case theory.
24. Further, as Picken explained, if his concern had been about direct supply, then he could have shifted Rexel’s purchasing to Electra who did not supply direct to any extent, to the disadvantage of Olex.
25. A further and not insignificant difficulty with the ACCC’s alternative case is that it was also not put to Moncrieff in terms in cross-examination. It was not put in terms to Moncrieff that Olex was intending to reduce its level of direct business in return merely for a MOV fee.

### Commercial context and the alleged “class of persons”

1. As I have already said, the prohibited purpose of preventing, restricting or limiting supply must be directed toward specified persons or a specified class of persons. But that does not necessarily require that the identity of all members of the defined class of persons must be readily ascertainable.
2. The ACCC has alleged that the relevant provisions had the purpose of preventing, restricting or limiting supply to “contractors and end-users”. They are the alleged “class of persons”. On the ACCC’s pleaded case, contractors and end-users are all acquirers of electrical cable other than wholesalers. Accordingly, the ACCC’s allegation is that the cutting fee provision, the MOV provision and the support provision had a substantial purpose of preventing, restricting or limiting supply to the following categories of contractors and end-users: small to medium contractors which were generally served through the wholesalers’ branch networks, major or industrial contractors, industrial end-users such as mining companies and rail companies and the utilities in the electrical supply industry.
3. Now the assertion that Olex had a substantial purpose of preventing, restricting or limiting supply to contractors and end-users is in tension with the following evidence and is commercially unlikely, as I have already indicated. The supply by Olex of cable to contractors and end-users was a substantial part of its business. Olex’s internal documents such as its Strategic Plan Review as at June 2011 showed the importance to Olex of supplying contractors and end-users. Olex’s business objective was to grow the supply of cable to contractors and end-users, not restrict or limit supply. Moreover, as Olex rightly contends, the insignificance of the discussions with the EWAA to Olex’s overall business plans is illustrated by the fact that no mention of those discussions is made in the Strategic Plan presentation. Further, Moncrieff did not consider that the wholesalers had the capability to supply large contractors and end-users. Further, the primary source of small orders to Olex was not contractors and end-users, but wholesalers.
4. Further, the suggestion that Olex’s purpose was to drive away business from its largest contractors and end-users including the large utilities, mining companies and contracting companies, and to do this by implementing an increased fee of $85 for cutting and a $250 fee for small orders is unlikely. In 2010 (before the implementation of the fee increases):
	1. approximately 75% of Olex’s business came from sales to contractors and end-users, and only 25% came from wholesalers;
	2. approximately 68% of Olex’s cutting fee revenue came from wholesalers, 29% from contractors and only 3% from end-users (in other words, wholesalers paid Olex more than twice the amount in cutting fees than was paid by contractors and end-users combined);
	3. approximately 81% of Olex’s purchase orders below $2,500 came from wholesalers, only 9% from contractors and 9% from end-users (in other words, wholesalers made more than four times the number of orders below $2,500 than were made by contractors and end-users combined);
	4. cutting fee revenue comprised a mere 0.3% of Olex’s revenue from the supply of cables to customers.
5. The fee increases were not imposed on contractors and end-users in a discriminatory manner. The largest burden of the fee increases necessarily fell on wholesalers. Although purpose is distinct from effect, the manifest effect of a provision may be a good indication of its purpose. The manifest effect of the fee increases was to recover costs predominantly from wholesalers.
6. Further, the fee increases originated from Olex and therefore the relevant purpose is that of Olex. But the ACCC’s purpose allegation depends upon first, characterising the fee increases as part of the EWAA’s proposal in the Geddes email, and second, transposing the alleged purpose of the provisions of the Geddes email to the purpose of Olex’s fee increases. Both steps are problematic to say the least. But even if regard was had to the purposes of the provisions of the Geddes email, there was no purpose of restricting supply of cable to contractors and end-users as defined in the pleading. The following points can be noted. The purpose of the provisions of the Geddes email was expressly stated to be the eradication of inefficiency, which was identified as the duplication of facilities and inefficient practices in quoting and distribution in supplying the contractor market. For that reason, the Geddes email was confined to LV cable supplied to the contractor market. Picken explained, which is supported by the Geddes email, that the EWAA discussions were confined to the small contractor market, not the contractor market generally and not end-users such as the mining and utility sector. Accordingly, the Geddes email cannot support the ACCC’s purpose allegation. It does not extend to the class of persons that is the subject of the ACCC’s pleaded allegation. Further, the purpose of the “supply full pack quantity” provision, said by the ACCC to be the forerunner of the cutting fee increase, was not to benefit wholesalers by restricting supply to contractors and end-users. The provision followed an “exclusive supply” provision. It was that provision, if it was implemented (which it was not) that would have restricted supply. The “supply full pack quantities” provision was concerned with supply to the wholesalers (it refers to “these” cables), and was intended to assist the manufacturers generate efficiencies by not cutting cable supplied to wholesalers under the exclusive supply arrangement. That was confirmed by Picken.

### Cost efficiency and recovery

1. In my view, the evidence more readily establishes that Olex’s purpose as the proponent of the cutting fee was to recover its costs, which would also generate efficiencies within the supply chain. Further, Olex’s purpose as the proponent of the MOV fee was to recover the costs of administering small orders and thereby encourage all of its customers, particularly wholesalers, to increase their order sizes.
2. As I have previously discussed, the Moncrieff proposal discussed at the 23 June 2011 meeting stated that the restructured fees were based on a truer “fee for service” than had existed at that time. The proposal stated that the fee would have two benefits to EWAA members: it would create an opportunity for increasing revenue from value added services and it would deliver a lower unit price of cable to those who purchased standard lengths. These two potential benefits were not unrelated. A more cost-reflective cutting fee would enable Olex to reduce the base price of cable. This would enable wholesalers to choose whether to have Olex cut the cable or to do the cutting themselves and so value add. Further, in relation to the MOV fee, the Moncrieff proposal stated that based on Olex’s analysis, the median order value of the wholesalers was less than $1,000 which resulted in an inefficient supply chain. The MOV fee was a first step to reforming this. The Moncrieff proposal stated that the benefits to the wholesalers of the MOV fee were more efficient utilisation of labour in the branch network and the ability to utilise labour more on the outbound selling not internal processing. This referred to the inefficiencies associated with wholesalers placing and handling too many orders instead of consolidating their ordering practices. Further, the wholesalers could be seen to be acting as a true “Master Distributor” by the industry. The wholesalers wanted to be seen in the industry as providing wholesale distribution services which meant holding greater quantities of stock and being able to satisfy customer requirements from their stock holdings.
3. Consistently with the Moncrieff proposal, Moncrieff gave evidence as to the purpose of the increased fees in the following terms. The purpose of the cutting fee was to “stop losing money”, to “recover my costs”, to reduce costs to serve and to “recover the cost of cable cutting”. The purpose of the MOV fee was to get the wholesalers to aggregate their orders, try to reduce transactions between Olex and the wholesalers, and drive costs out of Olex’s business. Further, Moncrieff gave evidence to the effect that he believed that if Olex stopped cutting cable, contractors and end-users would be likely to purchase more cable from other manufacturers, not the wholesalers, because the wholesalers did not have a lot of cutting capacity.
4. Picken and Davis gave evidence concerning their understanding of Olex’s purpose which was consistent with the evidence given by Moncrieff.
5. Alderson also gave evidence that from his discussions he had with manufacturers, he understood that they were exploring ways of reducing their prices by reducing the manufacturers’ costs. He also perceived that the manufacturers had excessive delivery costs, excessive costs of having a large sales team, excessive cutting costs and excessive costs of warehousing and processing and filling orders.
6. Moreover, documentation created by Olex after the event is also consistent with such a purpose. I do not detect any suggestion in the evidence that such documents were designed or crafted to conceal Olex’s “true” purpose, ie the purpose contended for by the ACCC. For example, on 27 June 2011, Stack sent an internal email to staff explaining the purpose of the cutting fee increase, which explained that the sole purpose of the increase was for Olex to recover its costs. There was no reference to restricting supply to contractors and end-users. On 28 June 2011, Gameau of Olex sent an email to Stack with a copy of a guide he had prepared explaining why Olex was increasing its cutting fee. The stated principal reason was that Olex was not making a net profit. The other reason was that the actual cost to cut and send cable was close to $85 and Olex could not continue to make a $50 loss on every cut. The email contemplated that the *effect* of the fee increase might be some loss in orders. But purpose and effect are not to be confused. On 11 July 2011, Dunstan sent an internal email to Olex’s staff explaining the purpose of the MOV fee increase which in substance repeated that the purpose of the cutting fee increase was to recover a truer cost of the activity. The email explained that the median order value between Olex and its wholesale customers was less than $1,000 (although with contractors added in was slightly above $1000) which resulted in a very inefficient supply chain. The email stated that a “true MOV which drives the most efficient behaviour is probably a value in the order of $10,000” but a MOV of $2,500 was an “initial step”.
7. In summary, Olex’s purpose (if not also Prysmian’s purpose) was all about achieving costs efficiencies from their perspective.

### Other matters

1. As I have already indicated, much of the material tendered by the ACCC before me related to bilateral negotiations between Olex and its wholesale customers about their supply arrangements. But the commercial objectives underlying such bilateral negotiations cannot be superimposed over different commercial decisions.
2. Generally, the ACCC has adduced many documents relating to communications between the EWAA and Olex and Prysmian. It seeks to draw from those communications a common purpose of preventing, restricting or limiting supply to contractors and end-users. But the material does not support such a contention.
3. I reject the ACCC’s “purpose” case in its various permutations.

# H. ALLEGED PRICE FIXING

## (a) The ACCC’s case

1. The ACCC alleges that the cutting fee provision had:
	1. the purpose or a substantial purpose and/or likely effect of fixing, controlling or maintaining the price of cutting services supplied by the Manufacturers; or
	2. if cutting services were not a “service” for the purpose of the Act, the purpose or a substantial purpose and/or likely effect of controlling the price of cut electrical cable.
2. The ACCC submits that cutting services were a “service” for the purpose of the Act. The term “services” is defined in s 4 in broad terms. It includes but is not limited to any benefit provided in trade or commerce. Cutting electrical cable for a customer provides such a benefit. It involves supplying cable in whatever lengths and variations as specified by the customer and obviates the need for the customer to acquire either its own cutting machinery or cutting services from another supplier.
3. The ACCC submits that the definition of “services” excludes benefits that constitute the supply of goods, but cutting services do not constitute the supply of cable. Cutting cable to an irregular length is an additional “value add” service that a supplier may or may not choose to offer in addition to supplying electrical cable. For example, the EWAA’s proposal in the Geddes email provided for the manufacturers to cease supplying the service to the market in respect of 25mm LV cable so that the EWAA members could supply the service instead. Cutting services were viewed and described by the industry participants as a separate service and separately itemised on the Manufacturers’ invoices.
4. Alternatively, the ACCC submits that cutting fees are a component of the price of cut electrical cable and the cutting fee provision had the purpose or likely effect of directly or indirectly “controlling” the price of cut electrical cable.
5. The ACCC contends that “control” means “to exercise restraint or direction over” or “to exercise restraint or direction upon the free action of” a person or thing; an arrangement or understanding controls price “if it restrains a freedom that would otherwise exist as to a price to be charged”.
6. The ACCC contends that the purpose and/or likely effect of the cutting fee provision was to control the price of cut cable because Olex and Prysmian intended to charge the fee in addition to the price at which they would otherwise have supplied the cable concerned. That is to say, it was neither intended nor understood that the fee would be offset by way of a discount on the cable or a rebate or some other allowance.
7. The ACCC points to the fact that Olex and Prysmian issued invoices in which the price of cable and the price of cutting service in respect of that cable were itemised separately. It is said that had Olex and Prysmian intended to offset those additional charges by a reduction in the price of the cable, there would have been little cause for their nervousness about the potential loss of direct sales as a consequence of imposing the cutting charge without the support of the members of the EWAA, or indeed, any need to negotiate with the members of the EWAA about that issue at all.
8. The ACCC contends that the degree to which the cutting services fee would have controlled the overall price of cable would of course have varied depending on the amount of the fee relative to the value of cable that the customer purchased. But putting to one side de minimis cases, the ACCC contended that the degree of control was not relevant to the issue of contravention.
9. But in any event, so the ACCC contends, in many cases a cutting charge of $85 would not have been de minimis. For example, Olex charged the cutting fee on cable supplies as low as $75.60. The median value at which it supplied cable to Rexel and MMEM for the year to May 2011 was respectively $651 and $697. Similarly, during 2009 and 2010, 33% of Prysmian’s cable sales to Rexel and 29% of its quotes to L&H were for less than $1,000 of cable.
10. The ACCC contends that cutting fees were not a *de minimis* component of the overall price of cut electrical cable, at least in many cases. In 2010, for example, Olex received 48,549 purchase orders for cable that were less than $2,500 in value, many of which were from contractors and end-users. According to the supplementary affidavit of Weir, contractors made 4,487 purchase orders under $2,500, wholesalers made 39,459 purchase orders under $2,500 and “all other customers” made 4,603 such purchase orders. Further, many of those sales were well below $2,500 in value. While Prysmian made fewer low value sales, there is evidence that it too made a significant number of such sales.
11. Further, the ACCC contended that Rexel misunderstood the purpose of the fee increase when Rexel asserted that the cutting fee did not control the overall price of cable because Olex and Prysmian were free to adjust the other components of the overall price. It says that if it were not intended to increase the overall price of cut electrical cable, it would not have been introduced. It contended that increasing the cutting fee component of the overall price with the intent of then decreasing another component by a similar amount would make no sense.

## (b) Analysis

1. Now at the outset it should be said that the ACCC’s case fails for the reason that Prysmian was not a party to any relevant arrangement or understanding with, inter alia, Olex. The price fixing allegation is based upon the foundation of *both* Manufacturers being parties thereto. But in any event, the ACCC’s case fails for other reasons.
2. In my view, the ACCC’s analysis based upon cutting services being separate is flawed. The definition of “services” in s 4(1) excludes “rights or benefits being the supply of goods”. Section 4C(c) provides, relevantly, that a reference to the supply of goods includes a reference to the supply of goods together with other services. The effect of these provisions is that if services are supplied together with goods, the package is treated as one supply of goods for the purpose of the Act. It is impermissible to artificially disaggregate the supply into component parts and purport to apply the statutory provisions to each component of the product (see *Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd* (1986) 162 CLR 395 at 400 and 401 per Gibbs CJ and at 402 and 403 per Wilson J (Dawson J agreeing); *Paul Dainty Corporation Pty Ltd v National Tennis Centre Trust* (1990) 22 FCR 495 at 515 per Woodward, Northrop and Sheppard JJ; and *Australian Competition and Consumer Commission v IMB Group Pty Ltd (in liq)* [2002] FCA 402 at [90] per Drummond J).
3. As Olex contended, it supplied many services to its customers when supplying cable. Those services included stock availability, technical support, hedging currencies and hedging copper prices as well as cutting and storing cable. Olex might have chosen to charge a separate fee for any of those services, but any such service did not become disaggregated from the supply of cable merely because Olex charged a separate fee. Such a service was part of the supply of cable by Olex.
4. Further, the uncontested evidence demonstrated that Olex cut cable only as part of the supply of cable and did not supply a “cutting service” in respect of cable that was not supplied by it. If a customer required cable in a non-standard length, Olex had to cut the cable in order to supply the required length. The product supplied was cable, not a cutting service. As stipulated by s 4C(c), the supply of cable included the cutting “service”. As a consequence, the cutting activity was excluded from the definition of “services” within s 4(1).
5. As to the alternative assertion that the cutting fee provision had the purpose or a substantial purpose and/or likely effect of controlling the price of electrical cable supplied by the Manufacturers, the evidence does not support the allegation. The cutting fees were a modest component of the overall price of electrical cable. As such, there was no commercially realistic ability to control the price of electrical cable by controlling the price charged for cutting services. Moncrieff’s evidence was that Olex had to compete on the total price/service package offered to its customers. Moreover, the price of cable supplied by the Manufacturers was not visible to each other. Accordingly, there was no means by which they could assess whether the overall price of cable including cutting fees increased or decreased over time. The ACCC’s case on this aspect lacked commerciality.
6. There was no evidence adduced to suggest that the purpose was to control the price of cut cable, which is a composite. There was no restraint on either Olex or Prysmian in the amount it charged overall for cut cable. The only restraint, assuming in favour of the ACCC that there was a consensus, was that an item appeared in a bill for $85 for each cut. But it was not in doubt that customers bought by reference to the overall price.
7. Generally, more needs to be shown than merely that a provision has the likely effect of controlling a *component* of the price. It must have the likely effect of controlling the *overall* price, ie be a materially significant proportion of the price. Competition occurs for the total price of the cut cable. There was no evidence of discussions between any of the Wholesalers or Manufacturers of a commitment to exercise control over the price of cut cable.
8. Moreover, imposing a cutting fee is a means of rational demand management by proper cost recovery. For example, an airline might charge a fee for checked baggage. This allows the customer to choose not to incur the fee, and therefore save the airline the cost of processing and carrying the bag. But that does not mean that the overall cost of the ticket (including bag) is higher than it used to be. There was no purpose to fix, control or maintain the price of cable. The overall price was dependent upon market forces and competitive constraints.
9. Finally, the price fixing allegation assumes a purpose of a price fix for the sake of it which in some respects may be seen to be inconsistent with the ACCC’s primary case of a purpose of diverting customers from Olex and Prysmian. Moreover, there was no commercial rationality in a price fix per se, in circumstances where there were many other price competitive suppliers in the market who also cut and who were not alleged to be parties.

# I. ALLEGED GIVING EFFECT TO RELEVANT ARRANGEMENT OR UNDERSTANDING

1. If I had accepted that the relevant arrangement or understanding had been made, then in my view the conduct of the Manufacturers (or just Olex alone) in announcing and proceeding with the cutting fee increase and MOV fee constituted the giving effect to of that arrangement or understanding by them (or just Olex). But given my primary finding that the ACCC has not made out its case on the making thereof, I do not need to discuss this further.

# J. ASSERTED ANTI-OVERLAP DEFENCES

## (a) Exclusive dealing

1. The respondents assert that the giving effect to of the support provision in respect of the alternatively alleged arrangement between Olex (but not Prysmian) and the Wholesalers would, or would but for s 47(10) of the Act, constitute exclusive dealing within the meaning of s 47(2) and/or s 47(4) of the Act. Rexel also asserts that the giving effect to of the MOV provision and the cutting fee provision constitutes exclusive dealing. Accordingly, the respondents allege that by reason of s 44ZZRS and/or s 45(6), the pleaded contraventions involving the making of the support provision and in the case of Rexel, the making and giving effect to of the MOV provision and the cutting fee provision, do not amount to contraventions of ss 44ZZRJ, 44ZZRK and 45(2).
2. But I agree with the ACCC that the asserted defences have no application to any of the alleged contraventions. Giving effect to each of the provisions would not involve a relevant supply or acquisition on condition (as required by ss 47(2) and 47(4)). The support provision required that the Wholesalers not reduce the value and/or volume of electrical cable that they acquired from Olex by reason of the increased cutting and/or MOV fees. The alleged purpose of the provision can be distinguished from the conduct or commercial activities required to give effect to it. Nothing in the support provision involved Olex supplying cable to the Wholesalers on the condition that they not acquire (or not acquire except to a limited extent) cable from any competitor of Olex. In addition, nothing in the support provision involved the Wholesalers acquiring or offering to acquire cable from Olex on condition that Olex not supply (or not supply except to a limited extent) cable to contractors and/or end-users. All that was required to give effect to the support provision was that the Wholesalers not reduce the volume and/or value of electrical cable that they acquired from Olex by reason of the increased cutting and/or MOV fees. In relation to the MOV provision and the cutting fee provision, none of the conduct that the ACCC alleges the relevant respondents engaged in to give effect to those provisions involved a relevant supply or acquisition on condition as required by s 47(2) or s 47(4), nor would giving effect to the MOV provision and the cutting fee provision have required (in an objective sense) any conduct that would be captured by s 47(2) or s 47(4).
3. The defences contained in ss 44ZZRS and 45(6) do not apply to the present context.

## (b) Collective acquisition

1. Rexel asserts that the cutting fee provision relates to the price of cutting services (assuming for the moment that they can be conceptualised separately) to be collectively acquired by the Wholesalers from Olex. Rexel asserts that by reason of s 44ZZRV(1)(b)(i), ss 44ZZRJ and 44ZZRK do not apply to that provision.
2. But the cutting fee provision did not involve the collective acquisition of cutting services by the Wholesalers. The Wholesalers were not a buying group (unlike Gemcell). Each acquired cutting services from Olex separately under their own supply arrangements with Olex. The ACCC does not allege that the Wholesalers collectively acquired or negotiated to collectively acquire cutting services (or indeed any other good or service) and there is no evidence of such collective acquisition. In my view, the cutting fee provision does not relate to the price for cutting services to be “collectively acquired” by the Wholesalers. The contended application of the defence in s 44ZZRV(1)(b)(i) therefore fails.

# K. Individual respondents’ liability

1. The alleged liability of the individual respondents is said to arise by reason of their involvement in and knowledge of the various steps that preceded the 23 June 2011 meeting, their attendance and participation in the 23 June 2011 meeting, and their knowledge and authorisation of the steps taken by their respective organisations to implement the relevant arrangement or understanding made at that meeting.
2. As I have concluded that no such relevant arrangement or understanding was made, the foundation for the alleged individual respondents’ liability fails.

# L. BID RIGGING

1. On or around 13 May 2011, Caltex Refineries (NSW) Pty Ltd (Caltex) issued a request for proposals (RFP) for the supply of 11kV power cable to upgrade the Kurnell Refinery in Botany Bay, New South Wales. Caltex invited Rexel Electrical, Prysmian, General Cable and Olex to submit a bid.
2. Alderson (Rexel Electrical) and Shroff (Prysmian) were involved in preparing their respective companies’ bids; Alderson was not, however, the relevant decision maker for Rexel Electrical. Rexel Electrical planned to submit three bids in response to the RFP: one with cable supplied by General Cable, one with cable supplied by Olex, and one with cable supplied by Prysmian.
3. The ACCC’s principal case is that between 13 and 27 May 2011, Alderson and Shroff orally made or arrived at a contract, arrangement or understanding (the bidding agreement) which contained provisions that:
	1. Prysmian would provide a quote to Rexel Electrical for supplying to Rexel Electrical the cable required to be supplied under the RFP;
	2. Prysmian and Rexel Electrical would both submit bids to Caltex in response to the RFP; and
	3. Prysmian’s quote to Rexel Electrical, and Rexel Electrical’s bid to Caltex (using Prysmian’s cable) in response to the RFP would be lower than Prysmian’s bid to Caltex in response to the RFP (the relevant provision).
4. The ACCC alleges that the purpose of the relevant provision was to directly or indirectly ensure that Rexel Electrical’s bid in response to the RFP was more likely to be successful than Prysmian’s bid, within the meaning of s 44ZZRD(3)(c)(ii) of the Act and that the relevant provision was a cartel provision within the meaning of s 44ZZRD(1) of the Act. Accordingly, the ACCC alleges that the making of or arriving at the bidding agreement which contained the relevant provision constituted a contravention of s 44ZZRJ of the Act. Further, the ACCC alleges that Rexel Electrical and Prysmian gave effect to the relevant provision in contravention of s 44ZZRK by Rexel Electrical submitting a bid using Prysmian’s cable that was lower than Prysmian’s bid.
5. As matters turned out, Caltex did not accept Rexel Electrical’s bid to supply cable manufactured by Prysmian or Prysmian’s direct bid. In the result, it ultimately accepted Rexel Electrical’s bid to supply Caltex with cable manufactured by General Cable rather than Prysmian.
6. For the reasons that follow, I also reject this part of the ACCC’s case.

**(a) Legislative framework**

1. I have set out relevant provisions of the Act in an earlier section. For ease of reference, I will set out again some extracts relevant to this part of the ACCC’s case.
2. Section 44ZZRD(1) of the Act provides that a provision of a contract, arrangement or understanding is a “cartel provision” if:

(a) either of the following conditions is satisfied in relation to the provision:

[…]

(ii) the purpose condition set out in subsection (3); and

(b) the competition condition set out in subsection (4) is satisfied in relation the provision.

1. Section 44ZZRD(3)(c)(ii) relevantly provides:

(3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:

(c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:

[…]

(ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or

[…]

1. Section 44ZZRD(4) relevantly provides:

(4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:

(a) are or are likely to be; or

(b) but for any contract, arrangement or understanding, would be or would be likely to be;

in competition with each other in relation to:

[…]

(i) if paragraph (3)(c) applies in relation to a supply of goods or services – the supply of those goods or services; or

(j) if paragraph (3)(c) applies in relation to an acquisition of goods or services – the acquisition of those goods or services.

## (b) The pleaded case

1. In relation to the bidding agreement, the ACCC pleaded the following:

60. On about 13 May 2011, Caltex Refineries (NSW) Pty Ltd (***Caltex***) issued a Request for Proposals for the supply of “11kV Power cable” for an upgrade of the Kurnell Refinery in Botany Bay, New South Wales (***the RFP***).

61. On about 13 May 2011, Alderson (on behalf of Rexel) sent an email to Mr Hamavand Shroff (***Shroff***) (Prysmian) in relation to the RFP which stated:

a) we would like to work with you on this; and

b) once you’ve had a chance to digest the contents perhaps you would give me a call and we can work out the best way of doing so.

62. Between about 13 May 2011 and about 27 May 2011, Rexel and Prysmian made a contract or arrangement or arrived at an understanding in relation to bidding in response to the RFP (**bidding agreement**).

**Particulars**

The bidding agreement was made or arrived at orally during the course of discussions between Shroff on behalf of Prysmian and Alderson on behalf of Rexel. Further or alternatively it is to be inferred from the facts, matters and circumstances referred to in paragraphs 60 and 61 above, and 65 to 68 below. Further particulars may be provided following discovery.

63. The bidding agreement contained provisions that:

a) Prysmian would provide a quote to Rexel for supplying to Rexel the cable referred to in the RFP;

b) Prysmian and Rexel would both submit bids to Caltex in response to the RFP; and

c) Prysmian’s quote to Rexel, and Rexel’s bid in response to the RFP, would be lower than Prysmian’s bid in response to the RFP (**bidding provision**).

64. The purpose of the bidding provision was to directly or indirectly ensure that Rexel’s bid in response to the RFP was more likely to be successful than Prysmian’s bid, within the meaning of section 44ZZRD(3)(c)(ii) of the CCA.

65. On about 30 May 2011:

a) Shroff (Prysmian) sent an email to Alderson (Rexel) which:

i. attached a quote to Rexel for the cable referred to in the RFP of $1,093,655.00;

ii. stated that Prysmian’s bid in response to the RFP would be $1,251,677.40; and

iii. stated make sure your bid is back-to-back; and

b) Prysmian submitted its bid to Caltex in response to the RFP, in the amount of $1,259,842.40.

66. On about 8 June 2011, Caltex issued a clarification in respect of technical aspects of the RFP.

**Particulars**

Email from Mr Gordon Ristevski (Caltex) to Ms Irene Georgiades (Rexel) dated 8 June 2011. A copy may be inspected by appointment with the ACCC’s solicitors.

67. On or before about 17 June 2011, Rexel submitted a bid to Caltex in response to the clarified RFP with a total price of $1,311,496.80.

**Particulars**

The price of $1,311,496.80 was bid for cable manufactured by Prysmian. Rexel bid different prices for cable manufactured by Olex and General Cables. Further particulars may be provided following discovery.

68. On 17 June 2011:

a) Prysmian submitted a bid to Caltex in response to the clarified RFP with a total price of $1,325,830.00;

**Particulars**

The bid was submitted by email from Shroff (Prysmian) to Gordon Ristevski (Caltex) at 11.35am on 17 June 2011.

b) Shroff (Prysmian) sent an email to Alderson (Rexel) that:

i. attached Prysmian’s revised bid; and

ii. stated “for your eyes only”; and

**Particulars**

The email was sent at 11.37am on 17 June 2011.

c) Alderson (Rexel) sent an email to Shroff (Prysmian) that stated “[t]o complete the circle of trust I’ve attached our price sheet that we submitted to Caltex, similarly for your eyes only”.

**Particulars**

The email was sent at 4.49pm on 17 June 2011.

## (c) Relevant chronology

1. On or around 13 May 2011, Caltex issued the RFP for the supply of 11kV power cable including:
	1. 7.35km of 11kV single core 400mm2 cable;
	2. 2.44km of 11kV three core 300mm2 cable;
	3. 336m of 11kV single core 800mm2 cable;
	4. 1.32km of 11kV single core 400mm2 cable;
	5. 720m of 11kV single core 500mm2 cable; and
	6. 25m of 11kV three core 120mm2 cable.
2. Rexel Electrical had previously been appointed Caltex’s preferred supplier of electrical components and cable for both its Kurnell and Lytton refineries. Accordingly it was invited to submit a bid in response to the RFP.
3. In response, Greg Neary (Rexel Electrical’s National Sales Manager) asked Alderson to help Neary prepare Rexel Electrical’s response. At the time Alderson was no longer responsible for Rexel Electrical’s relationship with Caltex, but Alderson had secured Rexel Electrical’s appointment as preferred supplier for the Kurnell and Lytton refineries whilst Alderson was National Contracts Manager and he had a good relationship with Caltex.
4. Neary told Alderson that General Cable, Olex and Prysmian had also been invited to bid in response to the RFP. Neary also told Alderson that in Rexel Electrical’s response to the RFP he wanted to give Caltex the option of cable manufactured by different suppliers, and that Alderson should obtain quotes from General Cable, Olex and Prysmian to supply the required cable to Rexel Electrical, which Rexel Electrical would on-supply to Caltex.
5. When Alderson knew that Rexel Electrical was competing against one of its suppliers to supply that supplier’s cable to a contractor or end-user for a major project, Alderson’s practice was to try and ensure that the supplier’s direct bid was higher than Rexel Electrical’s direct bid so that Rexel Electrical was more likely to win the work. Alderson typically contacted the supplier and asked them to not undercut Rexel Electrical’s direct bid. Alderson’s practice was to rely on the importance of the supplier’s relationship with Rexel Electrical.
6. On 13 May 2011 at 1.09pm, Alderson received an email from David Bird (Rexel Electrical’s Sales Manager for the branch that received the RFP from Caltex) that on-forwarded an email from Mark Cheadle (the person responsible for managing the Caltex account at Rexel Electrical). Mark Cheadle’s email stated:

Hi David,

The site supply tender for Caltex has finally come out. I know that the 3 major cable manufacturers (Olex, General Cable and Prysmian) will be contacted direct to price. We managed to secure the last major project from Caltex “Sub D’ upgrade by using G.C. & using a net/net price from them. There was no RGA rebate at all. The branch managed to secure a 8.5% margin on a $440,000 cable order. This project was budget priced last October & was priced around $2.8 million dollars. I would like to do the same this time. We need to offer a competitive bid using G.C. or aligning ourselves with all suppliers if we are to win this bid. There is an incentive for Caltex to place the order with us as part of the contract is a rebate for hitting a 2 million dollar sales target. I believe that we can win this bid on the proviso that the RGA debate is not allowed for in the pricing.

I have spoken to Robert Brown from G.C & indicated that this the [sic] way I would like to go to tender with him. I need to get approval to send Rob an email stating this is what Rexel wants. Please give this some thought as these types of projects do not come up very often & we have an opportunity to supply a large industrial contract like Caltex, who given the right price are more than happy to place the order with us.

Regards,

Mark Cheadle

1. As I have said, Rexel Electrical had been a supplier to Caltex. Moreover, Rexel Electrical’s practice was to provide a rebate of 2% on goods supplied. Accordingly there was an incentive for Caltex to place an order with Rexel Electrical rather than accept a direct bid, because of the rebate. Moreover, Rexel Electrical could tender at a higher price and win over a direct bid, if only because of its rebate ceteris paribus. Rexel Electrical was also perceived by Caltex to be a reliable supplier.
2. At 1.23pm on 13 May 2011, Roger Edgar, Executive General Manager of Rexel Electrical, sent an email to David Bird, also copying in Alderson, stating:

David

Greg and Paul will be responsible to support you and the team in delivering our best offer.

Guys we need this order so let’s make it happen..

Paul this is a great opportunity for Prysmian.

Roger

1. Soon after Alderson received this email, Alderson sent an email at 2.52pm to Shroff regarding the RFP. Alderson said that Rexel Electrical would like to work with Prysmian on the RFP and asked Shroff to give Alderson a call so they could work out the best way of doing so. The email stated the following:

Afternoon Hamavand,

I spoke briefly to Stephen about this yesterday, here is the background.

Caltex appointed Rexel Electrical Supplies as the preferred supplier of electrical components and cable about 12 months ago for both Kernell and Lytton refineries and we’ve been working closely with them on several projects.

The first part of this particular project was installed over the Christmas shutdown last year and RES supplied all of the cable, this is the second and larger phase of the project which their engineering people have scheduled for the Christmas shutdown this year. This enquiry has gone out to yourselves, General Cables and Olex along with RES, we would like to work with you on this and once you’ve had a chance to digest the contents perhaps you would give me a call and we can work out the best way of doing so.

Regards

Paul Alderson

Market Development Manager – Cable

1. Alderson recalls that he also contacted Olex at around this time, but as far as Alderson recalls, he did not contact General Cable. Apparently, Mark Cheadle was responsible for dealing with General Cable in respect of the RFP.
2. In relation to Alderson’s dealings with Shroff, Alderson initially said in his evidence that he did not recall what was said in most of his discussions with Shroff regarding the RFP. It is appropriate at this point to set out some features of Alderson’s written evidence.
3. In his first affidavit, Alderson said at [66]:

I do not recall what was said in most of my discussions with Hamavand Shroff regarding the RFP. However, I had one discussion in which Hamavand Shroff gave me an indication of the price that Prysmian could offer to Rexel for the cable referred to in the RFP and then said words to the following effect: “what would be an acceptable profit margin for Rexel?” After this I asked Greg Neary what profit margin he thought would be acceptable for the RFP. I do not recall the specific answer Greg Neary gave but I recall him telling me what the acceptable margin was, and then me telling Hamavand Shroff what the acceptable margin was.

1. In his second affidavit, Alderson said at [2] to [4]:

In paragraph 66 of my First Affidavit, I refer to discussions that I had with Hamavand Shroff of Prysmian concerning the Caltex RFP. In addition to the discussions with Mr Shroff about margins that I refer to in paragraph 66 of my First Affidavit, I also recall talking to Mr Shroff about the bids that Rexel and Prysmian would each make to Caltex.

I recall, in particular, Mr Shroff telling me on more than one occasion that he would make sure that Prysmian’s bid to Caltex would be higher than Rexel’s bid to Caltex. My intention and understanding, when I informed Mr Shroff of an acceptable margin to Rexel (as referred to in paragraph 66 of my First Affidavit), was that Prysmian’s bid to Caltex would exceed Prysmian's quote to Rexel and that margin.

I also understood, when I had those conversations with Mr Shroff, that I had provided Prysmian with future business opportunities by assisting Prysmian to be added to Caltex’s approved supplier list (as I referred to in paragraph 72 of my First Affidavit). However, I understood from my conversations with Mr Shroff that Prysmian would not take advantage of that opportunity by undercutting Rexel in relation to the RFP. I certainly would have been surprised and disappointed if Prysmian had, in fact, ‘cut my grass’ by submitting a bid to Caltex that was lower than Rexel’s bid to Caltex.

1. I will return later to Alderson’s oral evidence on these aspects although I would note that notwithstanding the detail in Alderson’s second affidavit, his memory seems not to have extended beyond [66] of his first affidavit. I should also say at this point that at the same time that Rexel Electrical’s response to the RFP was being prepared, Alderson was continuing to negotiate the Strategic Partnership Framework Agreement (Framework Agreement) with Prysmian. On 17 May 2011 at 4.33pm, Alderson received an email from Mark Allingham of Prysmian that attached a further draft of the Framework Agreement. Prysmian inserted provisions into the draft Framework Agreement that stated that Rexel Electrical “commits to providing Prysmian greater than 50% of their annual cable spend” and “commits to not importing or purchasing cable from an importer”.
2. On 23 May 2011 at 11.14am, Shroff circulated an internal memorandum which stated: “As far as I am concerned, we should bid Caltex but manage it so that our bid to Rexel [Electrical] is more competitive (the difference to be determined at this stage)”.
3. On 27 May 2011 at 6.43pm, Alderson received an email from Shroff that attached a quote to Rexel Electrical for the electrical cable referred to in the RFP and said “[a]ttached please find our net net offer. We have no additional cover in the quoted pricing”. In Alderson’s experience a “net net offer” is an offer that assumes no further discounts or rebates will be provided. The total price referred to in the attached quote was $1,024,657.47.
4. On 28 May 2011 at 10.17am, Alderson received an email from Neary that stated (among other things), “Roger [Edgar] has a call in with Olex to see if we can confirm the a [sic] cover price”. Within Rexel Electrical the term “cover price” was often used when Rexel Electrical was submitting a bid or quote to a customer and one of its suppliers was submitting a direct bid or quote for the same work. The term “cover price” was used to describe the supplier’s direct bid or quote if it was lower than Rexel Electrical’s bid or quote. The precise terms of the email were:

Gents,

Tech sheets from General attached.

Roger has a call in with Olex to see if we can confirm the a [sic] cover price.

Given the Prysmian is $100k cheaper than General can we keep $40k give $40k back to Prysmian and still be cheaper than General? The gap with General is very large?

Paul,

Please can you check their offer that Prysmian are meeting the specification.

Regards

Greg Neary

1. On 30 May 2011 at 10.44am, Alderson received an email from Shroff that said “the girl who set-up the quote in our office made a mistake” and attached a revised quote (Prysmian to Rexel Electrical) that totalled $1,043,459.00. Later that day at 2.29pm, Alderson received an email from Shroff that attached a further revised quote (Prysmian to Rexel Electrical) of $1,093,655.00. The email also stated that Prysmian’s final direct bid to Caltex was $1,251,667.40 and “make sure your bid is back-to-back”. The full text of the email is the following:

Hi Paul,

Attached please find the revised quote for Rexel. Please note the base metal rate and do make sure your bid is back-to-back.

Our final bid to Caltex is at $1,251,667.40

with Item 10 $66/m

20 - $208/m

30 $153.41/m

40 $70/m

50 $87.42/m

60 $90/m

Regards and thanks

Hama

1. On the same day at 3.33pm, Rexel Electrical submitted its bid to Caltex using Prysmian cable, in the amount of $1,248,511.90. On the arithmetic, this reflected a 14.16% margin above Prysmian’s quote to Rexel Electrical. Rexel Electrical also submitted other bids to Caltex of $1,312,592.32 (using cable from General Cable) and $1,415,418.70 (using Olex cable).
2. Also about 20 minutes later, Prysmian submitted its direct bid to Caltex in response to the RFP, in the amount of $1,259,842.40, which differed slightly from the $1,251,667.40 figure in the 2.29pm email. Later that afternoon, Olex submitted its direct bid to Caltex of $1,312,479.30.
3. On 8 June 2011, Caltex issued a clarification in respect of technical aspects of the RFP.
4. On 9 June 2011 at 6.12am, Alderson received an email from Shroff that said, among other things, “[t]here are a few changes which will increase the price”. The text of the email is the following:

Hi Paul, Mark,

Attached clarification came through from Caltex yesterday and we have sent it to Prysmian Malaysia. There are a few changes which will increase the price – lead over screen (more lead), screen fault level increases to 10.1kA; steel drums.

In anycase [sic], as soon as I have the responses will get back to you.

Regards

Hamavand

1. On 14 June 2011 at 8.24pm, Alderson received an email from Shroff that enquired as to what technical specifications “our competitors” had offered to Rexel Electrical in relation to the RFP and stated that Shroff had received:

“… the revised offer from Prysmian Malaysia and the pricing to Rexel [Electrical] has gone up to a total value of $1.23 million which I am concerned could put us out of the ballpark if their screen rating is already at 10.1kA per 1 sec. against what we originally worked out as 5.6kA. I will give you a call in the morning to discuss.”

Alderson recalls that he had told Shroff that Rexel Electrical would be submitting bids based on quotes from each of Prysmian, Olex and General Cable and that Rexel Electrical would let Caltex choose which bid it preferred.

1. On 16 June 2011, Alderson received an email from Shroff that attached a draft quote (Prysmian to Rexel Electrical) that totalled $1,174,825.20 and said “[d]o let me know how we sit so that we can submit the quote by latest 1pm. Tomorrow”. The email also stated “I believe we do need to make sure that the Rexel [Electrical] bid with our cables is around 4-5% cheaper than the next best price they get”. The email also appears to have attached a copy of Prysmian’s draft quote to Caltex of $1,349,587.50.
2. On 17 June 2011 at 11.10am, Rexel Electrical submitted a bid to Caltex using Prysmian cable in response to the amended RFP with a total price of $1,311,496.80. At 11.13am, Rexel Electrical submitted a bid to Caltex of $1,366,804.86 using General Cable’s cable.
3. At 11.35am, Shroff sent an email to Caltex which attached Prysmian’s direct bid in response to the revised RFP with a total price of $1,325,830.00.
4. At 11.36am, Alderson received an email from Shroff that said “for your eyes only” which forwarded the email Shroff had sent to Caltex at 11.35am which attached Prysmian’s direct bid to Caltex concerning the revised RFP.
5. At 4.49pm, Alderson replied to Shroff and stated “[t]o complete the circle of trust I’ve attached our price sheet [$1,311,496.80] that we submitted to Caltex, similarly for your eyes only”. Shroff responded at 4.52pm stating “Cheers mate, have a great weekend. Figures crossed with this one, it will be a great win”. I am prepared to assume that this refers to Rexel Electrical’s bid to Caltex using Prysmian cable.
6. As I have said, Caltex ultimately awarded the contract to Rexel Electrical, but using the cable supplied by General Cable rather than Prysmian’s cable.

## (d) The ACCC’s case

1. The ACCC contends that Alderson had a conversation with Shroff sometime between 13 and 27 May 2011 in which Shroff gave Alderson an indication of the price that Prysmian could offer to Rexel Electrical for the cable referred to in the RFP. The ACCC refers to the fact that Alderson deposed that:
	1. Shroff said words to the following effect: “what would be an acceptable profit margin for Rexel?”; and
	2. Alderson asked Greg Neary of Rexel Electrical what profit margin he thought would be acceptable for Rexel Electrical. Although Alderson cannot recall the precise answer Neary gave, he recalls Neary telling him what the acceptable margin was and Alderson then telling that margin to Shroff.
2. The ACCC has asserted that the obvious purpose of Alderson telling Shroff the acceptable margin to Rexel Electrical for cable supplied by Prysmian for on-sale to Caltex was that each of Prysmian and Rexel Electrical would bid and Shroff would have the information required to ensure that Prysmian’s direct bid to Caltex was higher than Rexel Electrical’s direct bid to Caltex. I would also note at this point that this obvious purpose was contentious between the parties on a pleading point. Rexel Electrical and Prysmian alleged that it was contrary to the ACCC’s pleaded bidding purpose.
3. The ACCC says that having received the margin information, Shroff knew that if Prysmian’s direct bid price to Caltex exceeded Prysmian’s quote to Rexel Electrical plus that margin, Rexel Electrical would be more likely than Prysmian to win the bid.
4. The ACCC points to the fact that Alderson also gave evidence that Shroff told him on more than one occasion in conversations concerning the Caltex RFP that he would make sure that Prysmian’s direct bid to Caltex would be higher than Rexel Electrical’s direct bid to Caltex. The ACCC says that that evidence confirms the purpose for which the information about Rexel Electrical’s required margin was sought by Shroff and provided by Alderson.
5. The ACCC referred to the following matters which it said supported the conclusion that the conversations deposed to by Alderson occurred and had the purpose of ensuring that Prysmian’s direct bid to Caltex would be higher than Rexel Electrical’s direct bid to Caltex using Prysmian cable.
6. First, the ACCC placed significant emphasis on the context within which it was said that the bidding agreement was made.
7. The ACCC says that the conversations deposed to by Alderson occurred in a context which suggests that both he and Shroff were highly motivated to reach such an arrangement or understanding.
8. On 11 March 2011, Alderson and Brochut attended a meeting with Haller and Shroff to discuss a possible strategic partnership between Rexel Electrical and Prysmian in which it was agreed that Prysmian would tell Rexel Electrical “what they can do on direct business rechannelling”. The fact of this meeting and discussion may be accepted.
9. Further, in late March 2011, an issue arose between Prysmian and Rexel Electrical which highlighted the sensitivity between them about competing bids to the same customer. Rexel Electrical had received a quote from Prysmian which it used to provide a quote to Billiton Mitsubishi Alliance (BMA). Rexel Electrical later found out that Prysmian had issued a direct bid to BMA which was lower than the Rexel Electrical bid using Prysmian cable. Roberts of Prysmian was concerned to ensure that Prysmian’s strategic partnership negotiations with Rexel Electrical were not upset by this issue. Roberts considered it necessary to offer a small commission to Rexel Electrical because “we probably screwed-up as Prysmian”. The issue involved Alderson and Shroff. Not only did they exchange correspondence over the issue but as Roberts reported to Haller, “Hama told me that Paul Alderson was very upset with us so I think we have to do something”.
10. Negotiations involving Shroff and Alderson about a strategic partnership, which would result in customers being “re-channelled” so that they bought Prysmian cable from Rexel Electrical rather than direct from Prysmian, continued throughout April and May 2011. Shroff was also involved in developing a response to the EWAA’s proposal in the Geddes email. Roberts and Shroff considered these negotiations with Rexel Electrical, and parallel negotiations with the EWAA, to be “critical” to Prysmian.
11. In this overall context, the ACCC says that it is not surprising that the conversations deposed to by Alderson occurred. Indeed, given the sensitivities about Prysmian undercutting Rexel Electrical on the BMA quote and (as Roberts described it) the “delicate stage of our relationship right now” with Rexel Electrical, the ACCC says that it is very likely that the conversations Alderson deposed to did occur. The ACCC contends that it is “unthinkable” that Shroff would have wished to repeat the “screw up” of March 2011 where Prysmian’s direct bid undercut Rexel Electrical’s direct bid to the same customer using Prysmian cable.
12. But in contrast to the ACCC’s interpretation of the BMA quote event, it would seem that what occurred was the following. Prysmian’s bid to BMA was less than the Prysmian bid to Rexel Electrical for on-supply to BMA. In an email from Shroff to Prysmian’s commercial tender team dated 29 March 2011, it was noted that Prysmian’s price to BMA was significantly lower than “Rexel’s net net”, being Prysmian’s price to Rexel Electrical taking into account all volume rebates and other discounts. Unsurprisingly, this attracted Rexel Electrical’s concern as it was a significant ongoing customer of Prysmian. Its perception was that it should have been getting better pricing than the pricing offered by Prysmian to a one-off customer such as BMA, particularly in circumstances where Prysmian was looking to negotiate a strategic partnership with Rexel Electrical.
13. Indeed, Alderson gave evidence, which I accept, that Rexel Electrical would have expected to get a better deal from Prysmian than a one-off customer such as BMA for several reasons. Rexel Electrical was a large wholesale customer and should get a better price. Further, a direct bid by Prysmian to a customer and a Prysmian offer to Rexel Electrical were not comparable. If there was a Rexel Electrical/Prysmian bid, Rexel Electrical employees would be undertaking administrative supervision of the contract, rather than Prysmian employees on a direct bid, which would involve additional work and costs. Accordingly, any margin added by Rexel Electrical was not just a profit margin, but a margin to permit the costs of that additional activity. More generally, any price to Rexel Electrical would have needed to allow Rexel Electrical to on-sell to the end-user so as to permit Rexel Electrical to make a profit.
14. Second, the ACCC also contends that the conversations deposed to by Alderson are also consistent with contemporaneous business records that preceded the making of its alleged bidding agreement.
15. It is said that in an email chain forwarded to Alderson on 13 May 2011, which I have set out earlier, Mark Cheadle of Rexel Electrical stated a need to “[align] ourselves with all suppliers if we are to win this bid”. On 13 May 2011, Alderson sent an email to Shroff stating that the Caltex RFP had gone out to both Rexel Electrical and Prysmian and that “we would like to work with you on this”. The ACCC contends that in circumstances where Alderson referred to the fact that both Prysmian and Rexel Electrical had been asked to bid to Caltex, the reference to a desire to “work with you on this” is very unlikely to be confined to simply Prysmian providing Rexel Electrical with a low-priced quote. But I consider the ACCC’s contention to be speculative and a stretch.
16. The ACCC also says that the internal Prysmian correspondence suggests that Shroff understood that Prysmian should bid to Caltex but ensure that the Rexel Electrical bid to Caltex using Prysmian cable would win. The ACCC refers to the fact that on 23 May 2011 (after receiving Alderson’s email of 13 May 2011), Shroff wrote to Prysmian’s commercial tender team stating that “we should bid Caltex but manage it so that our bid to Rexel Electrical is more competitive”. Shroff also indicated on an internal Prysmian tender evaluation form that there was an opportunity “with RGA reinforcing the partnership” and that Prysmian should “support RGA [ie Rexel Electrical] on this tender”. In my view this material merely supports the contention that Prysmian’s offer to Rexel Electrical should be lower than Prysmian’s direct bid to Caltex.
17. Third, the ACCC also says that the contemporaneous business records after the alleged making of the bidding agreement also support its existence. On 30 May 2011 and 16 June 2011 (ie before Rexel Electrical and Prysmian had made their bids to Caltex), Shroff informed Alderson of Prysmian’s quote to Rexel Electrical and Prysmian’s intended direct bid to Caltex. The ACCC says that Shroff had no legitimate reason to be informing Alderson of Prysmian’s intended direct bids to Caltex before those bids were made. The ACCC says that Shroff was doing so in order to ensure that there was sufficient room between Prysmian’s quote to Rexel Electrical plus a margin, and Prysmian’s direct bid. It is said that this was consistent with the bidding agreement.
18. The ACCC also contends that that was made particularly clear in Shroff’s email dated 16 June 2011 to Alderson (the day before Rexel Electrical’s direct bid and Prysmian’s direct bid to Caltex). In that email, Shroff forwarded an earlier email he had sent to Ristevski of Caltex promising a “revised quote by latest 1.00pm tomorrow”. In his email to Alderson, Shroff provided both the Prysmian quote to Rexel Electrical and the Prysmian draft quote to Caltex. Shroff asked “[d]o let me know how we sit so that we can submit the quote by latest 1pm tomorrow”. The ACCC says that it is clear that Shroff was asking for confirmation that Prysmian’s draft quote to Caltex was sufficiently high before Prysmian’s bid was due to Caltex at 1.00pm the next day.
19. Finally, the ACCC points to the fact that after each of Rexel Electrical and Prysmian had submitted their bids to Caltex, Alderson and Shroff sent the 17 June 2011 bids to each other, using the expressions “for your eyes only” and “[t]o complete the circle of trust”. Shroff concluded with the words “Fingers crossed with this one, it will be a great win”; I should note that this is likely to be explicable as referring to a “great win” for Rexel Electrical using Prysmian cable. The ACCC says that these communications are consistent with the existence of the bidding agreement.

## (e) Was there a contract, arrangement or understanding to “bid”?

1. It is first necessary to deal with the ACCC’s contention that an element of the alleged bid rigging agreement was that Prysmian and Rexel Electrical would both submit bids to Caltex in response to the RFP. In my view, there was no such term.
2. Prysmian was invited to tender directly by Caltex on 12 May 2011 independently of any involvement on the part of Rexel Electrical. Alderson’s evidence was that it was a matter entirely for Prysmian as to whether it put in a direct bid. Alderson did not ask Prysmian to be a bidder and Prysmian did not promise that it would bid. Moreover, it did not make any difference to Alderson whether Prysmian did bid. Alderson explained that “[i]t made no difference to me whether they decided to bid directly or they didn’t. That was their choice”. He also agreed “so far as you were concerned, Prysmian could bid whatever it wanted as well? --- Yes. It was entitled to do so”.
3. Further, Alderson’s evidence was that it was up to Rexel Electrical whether it bid using the Prysmian quote or some other manufacturer’s quote for the supply of cable. It was Rexel Electrical’s decision as to how much it bid. Alderson was asked: “It felt no obligation as far as you were concerned as to any figure it should bid to anybody; it was entirely up to it, you agree? --- Yes. Yes”.
4. An exchange in the close cross-examination of Alderson by Mr Tony Bannon SC for Prysmian was as follows:

You’d agree with this at least, wouldn’t you: Prysmian’s decision to bid directly for the Caltex offer was an entirely Prysmian decision? ‑‑‑ Yes.

You had nothing to do with it? ‑‑‑ No.

You didn’t ask Prysmian to be a bidder? ‑‑‑ No.

Indeed, you probably preferred if they weren’t; do you agree? ‑‑‑ That was entirely a decision for Prysmian to make, not me.

I understand that. You didn’t ask them to do it? ‑‑‑ No.

But I’m just saying to you am I right in thinking you probably preferred if they weren’t? ‑‑‑ It didn’t really make much difference.

In any event, you certainly sought – obviously sought no commitment from Prysmian that they would bid direct, did you? ‑‑‑ No.

And certainly Prysmian offered no commitment to you that they would bid direct; do you agree? ‑‑‑ They told me they were going to bid direct.

They didn’t promise you that they would, did they? ‑‑‑ No.

And so far as you were concerned, it was a matter entirely up to them whether they did or didn’t? ‑‑‑ Correct.

1. Now the ACCC has submitted that it is a mischaracterisation of Alderson’s evidence to assert that Alderson accepted that Rexel Electrical and Prysmian were each free to bid what they liked, and that therefore there could be not be a bid rigging arrangement. The ACCC has submitted that when asked whether Prysmian could bid whatever it wished, Alderson answered in the affirmative, but then added that Prysmian was “entitled” to do so. The ACCC has contended that Alderson was apparently referring to there being no legal impediment to Prysmian putting in a bid at a level it chose. But the ACCC contends that Alderson regarded Prysmian to be at the very least under a moral obligation not to undercut Rexel Electrical. In this regard the ACCC has made reference to Alderson’s second affidavit of 23 November 2015 at [3] and [4] and that Alderson was not challenged about those paragraphs. But I agree with Rexel Electrical’s contention that the distinction between legal and moral obligations was not one drawn by Alderson. Moreover, in my view, paragraphs [3] and [4] of his second affidavit were effectively challenged.
2. Further, the ACCC has submitted that it is not necessary that Rexel Electrical should have given a commitment to Prysmian in order for me to conclude that there was an infringing arrangement or understanding. It says that it is sufficient that Prysmian assumed an obligation not to undercut Rexel Electrical’s bid. In my view, this is to understate the matter. But in any event, I agree with Prysmian’s submissions that there was no understanding of any commitment or any assumption of obligation. The 23 May 2011 email which stated “we should bid Caltex but manage it so that our bid to Rexel is more competitive” is only to be interpreted as saying that Prysmian would give a better price to Rexel Electrical than to Caltex.
3. Generally, in my view the evidence does not establish that there was an arrangement pursuant to which *each* of Prysmian and Rexel Electrical *would* bid to Caltex. Now the ACCC pleaded this aspect as an element of the bidding agreement. But is it an essential element of s 44ZZRD(3)(c)(ii)? The respondents have contended that it is an essential element of s 44ZZRD(3)(c)(ii) that one requires a provision with a purpose of “ensuring that in the event of a request for bids … 2 or more parties to the contract, arrangement or understanding bid …”. It is said that the essential nature of that element is apparent from the plain words of the Act. It is said that the requirement is essential to a bid rigging agreement namely to set up, in effect, a false market.
4. But in my view s 44ZZRD(3)(c)(ii) does not require that the agreement as an essential element itself requires each party to bid. Rather, s 44ZZRD(3)(c)(ii) is directed to the *purpose* of the relevant provision. There is no implication that a precondition to its operation is an obligation to bid. I agree with the ACCC’s contention that if the parties have agreed that one party’s bid to Caltex will be higher than the other, then it may be open to infer that the *purpose* of the provision is that the parties will bid and will do so on that basis. Logically, if parties agree (and with the purpose) that one of the bids will be higher than the other, this presupposes that they will both bid. But in my view, it is not necessary that there be a free-standing contract, arrangement or understanding for both to bid. Section 44ZZRD(3) is focused upon *purpose*.

## (f) Was there a bidding provision that Rexel Electrical’s bid (using Prysmian cable) would be less than Prysmian’s direct bid to Caltex?

1. Prysmian has submitted that there is no evidence that there was an agreement with a provision that the Rexel Electrical/Prysmian bid to Caltex would be lower than any Prysmian direct bid. It says that Alderson’s evidence was that as far as he was concerned, Rexel Electrical was free to put its Rexel Electrical/Prysmian bid at any price it wished. Prysmian submitted that the evidence was entirely antithetical to the alleged provision.
2. Further, it was contended that there was evidence that a Rexel Electrical/Prysmian bid would trigger a benefit for Caltex in terms of a percentage rebate not only on the amount of the bid but on all Caltex purchases. Consequently, no Rexel Electrical person responsible for pricing a Rexel Electrical bid to Caltex could fail to take account of the impact of the Caltex rebate and could not promise Prysmian that a Rexel Electrical/Prysmian or a Rexel Electrical/General Cable bid would be lower than a Prysmian direct bid to Caltex. Generally, Prysmian asserts that there was never any commitment or agreement that Rexel Electrical would bid at an amount less than any Prysmian direct bid.
3. Further, Prysmian points to the fact that the 30 May 2011 email from Shroff to Alderson which stated that the direct bid would be $1,251,677.40 was not copied or addressed to Neary or anyone other than Alderson. Alderson gave no evidence that he passed on to Neary or anyone else the Prysmian/Caltex quote or its substance. In other words, on the evidence, the person making the decision as to the amount of the Rexel Electrical/Prysmian bid on 30 May 2011 (ie Neary), was not made aware of the direct Prysmian quote on 30 May 2011. That is consistent with the provision to Rexel Electrical of Prysmian’s direct bid as being Shroff’s concern to demonstrate to Alderson that he was giving Rexel Electrical a good price compared to the price to Caltex. That is how Alderson understood Shroff’s provision to him of the final Prysmian direct bid to Caltex on 17 June 2011 after it had been lodged and after the Rexel Electrical/Prysmian bid had been lodged. I agree.
4. Similarly, the 16 June 2011 email from Shroff to Alderson attaching both the Prysmian quote to Rexel Electrical and the direct draft quote to Caltex was not copied or addressed to Neary. Alderson gave no evidence that he passed on to Neary Prysmian’s direct draft quote or its substance. In other words, the person making the decision as to the amount of the Rexel Electrical/Prysmian bid on 17 June 2011 was not made aware of the Prysmian’s direct draft quote on 16 June 2011. Prysmian contends that this is consistent with the provision of the Caltex quote as being Shroff’s concern to demonstrate to Alderson that he was giving Rexel Electrical a good price compared to the price to Caltex. That is how Alderson understood Shroff’s provision to him of the final Prysmian direct bid to Caltex on 17 June 2011 after it had been lodged and after the Rexel Electrical/Prysmian bid had been lodged. I agree with Prysmian’s contention.
5. Further, on 17 June 2011 Prysmian submitted a direct bid with Caltex in the amount of $1,325,830.00, which was less than Prysmian’s draft direct quote to Caltex of $1,349,587.50 sent by Shroff to Alderson on 16 June 2011. It is said that this is consistent with the provision of the Caltex quote to Rexel Electrical being for the purposes of affirming that Rexel Electrical was getting a good price, rather than a statement of the price that Prysmian would definitely bid to Caltex. I am inclined to agree.
6. Now the ACCC has made a number of responses to these contentions.
7. First, the ACCC submitted that whether Alderson was or was not the “decision maker” about the quantum of the bid ultimately made by Rexel Electrical to Caltex was beside the point. It says that Alderson did not need to be the decision maker in order to make the bidding agreement. It is said that the effect of Alderson informing Shroff of the minimum margin that Neary expected on the Rexel Electrical bid to Caltex using Prysmian cable was that Shroff would ensure that the Prysmian bid would be *higher*. It is said that Shroff was certainly in a position to ensure that occurred. Further, it is said that no evidence has been led to suggest otherwise. Further, it is said that neither Rexel Electrical nor Prysmian have pleaded a want of authority in Shroff. I must say that in one sense these submissions have an air of unreality. The fact is that Neary was the decision maker.
8. Second, the ACCC submitted that the fact that Shroff was not called to give evidence is highly significant. It is said that had Shroff been able to give evidence that he did not have the conversations deposed to by Alderson, or that his purpose was not to ensure that Prysmian’s bid to Caltex was higher than Rexel Electrical’s bid to Caltex, then it may be inferred that Prysmian would have called him. Further, it is said that it may be inferred that if Shroff could provide an explanation for the business records set out above that did not involve an attempt to rig the bid to Caltex, then Shroff would have been called by Prysmian to do so. I am prepared to draw an adverse inference against Prysmian for not calling Shroff, but at the end of the day this cannot rise so high as to amount to positive adverse evidence.
9. Third, the ACCC contended that in order to resist the implication that the bidding agreement was made, Rexel Electrical and Prysmian had to establish that Alderson’s account of his conversations with Shroff, including the conversation he deposed to at [3] of his second affidavit of 23 November 2015, should be disbelieved. The ACCC says that the conclusion that Alderson’s account should be disbelieved is against the weight of the contemporaneous documents. Further, it is said that it was not directly put to Alderson that that evidence about his conversations with Shroff was false. It says that this was particularly significant in a context where the issue having been raised with me, Prysmian’s counsel again cross-examined Alderson, and again did not directly put to Alderson that his evidence (particularly in his second affidavit) was false. It says that the falsity of that evidence cannot be assumed from open ended and elliptical cross-examination about what Alderson discussed with Shroff.
10. Let me make a number of observations.
11. First, I do not accept as reliable the conversations deposed to by Alderson. At [66] of his first affidavit of 17 July 2015, Alderson could only remember one conversation with Shroff which did not include any statement by Shroff as to the amount that Prysmian would bid. Yet at [3] of his second affidavit of 23 November 2015 he recalled “in particular” Shroff telling him “on more than one occasion he would make sure that Prysmian’s bid to Caltex would be higher than Rexel’s bid to Caltex”. In cross-examination, Alderson was asked:

“Is 66, at the time you swore your affidavit, the best recollection you had of any discussion with Mr Shroff in relation to the amount of either party’s bid? That’s the best you could do? --- Yes.

And your recollection hasn’t improved since that date, has it? --- No.

1. Alderson agreed that Shroff told him “on more than one occasion that the Prysmian price or bid direct to Caltex would be higher than the price that Prysmian gave to Rexel”. Alderson could not recall anything beyond conversations to that effect with Shroff. Moreover, to the extent that those conversations with Shroff were set out in his affidavit, he intended in cross-examination that they reflected only what he considered to be the gist of them. That is to say, to the extent he had a recollection, Shroff told Alderson that the Prysmian direct bid would be higher than the Prysmian quote to Rexel Electrical. Despite several opportunities Alderson could not recall the version of the conversation he had deposed at [3] of his second affidavit. In my view, the version in [3] is not reliable. Alderson’s oral version just reflected Shroff’s desire to show Alderson he was giving Rexel Electrical a good price. Moreover, the version in Alderson’s second affidavit also has another problem. Shroff was never given the Rexel Electrical bid price or the true Rexel Electrical bid margin. This also supports the probabilities, as Prysmian contended, that the only version that Alderson could remember in cross-examination was the more reliable version. I agree.
2. Second, it is convenient to deal at this point with whether the provision of margin information (which was incorrect) could affect a conclusion as to the making of the alleged bidding agreement.
3. Now later conduct can inform the question as to whether the bidding agreement was made at an earlier point in time. The ACCC has alleged that the bidding agreement was made between 13 and 27 May 2011. Prysmian and Rexel Electrical contend that the provision of incorrect margin information is inconsistent with the bidding agreement asserted. I agree. A number of observations can be made.
4. As Prysmian contends, the first Alderson affidavit at [66] says nothing about bids by either Rexel Electrical to Caltex or Prysmian to Caltex. That paragraph is directed to the price that Prysmian could offer to Rexel Electrical. It contains no undertaking by Prysmian to bid to Caltex at any particular price nor any acceptance by Rexel Electrical of any such undertaking. Further, as Prysmian contends, the asserted statements by Shroff are unilateral statements. The alleged statements by Shroff had little commercial significance on their own. Unless Shroff had a capacity to know what price Rexel Electrical would bid, he could not offer such an assurance. In order for any such statement to form part of a relevant consensus, there would need to have been a commitment from Rexel Electrical to provide its tender price to Prysmian *beforehand*. But Alderson’s evidence did not establish any agreement on his part to provide the Rexel Electrical price.
5. Further, it was Neary who determined what margin information was to be provided and instructed Alderson to provide it. But it is apparent that Neary had no intention of providing to Prysmian (or Alderson for that matter), information as to Rexel Electrical’s proposed *true* margin.
6. Further, the provision of *incorrect* margin information in response to the Shroff statement was in one sense inconsistent with the reaching of a consensus for the purpose of ensuring that the Prysmian direct bid was more than the Rexel Electrical direct bid. Prysmian could lodge a direct bid a fraction above the Rexel Electrical incorrect margin, but this would not ensure that the Prysmian direct bid would be above the true Rexel Electrical margin and therefore the Rexel Electrical direct bid.
7. Third, the evidence of Alderson in relation to the “for your eyes only” email was that the function of Shroff sending him a copy of the direct Prysmian bid was that Shroff was assuring Alderson that Prysmian had given Rexel Electrical, as preferred customer, a good price. Alderson said under cross-examination:

And by seeing what bid he had done directly, that confirmed that he could be trusted when he’s told you that he’s going to give you a good price, didn’t it?--- I think that's what he was trying to establish, yes.

1. Fourth, the ACCC has placed emphasis upon the email from Shroff to Alderson of 16 June 2011 in which Shroff stated: “[d]o let me know how we sit so that we can submit the quote by latest 1pm. tomorrow”. The ACCC says that the reference to “sit” is a reference to how the Prysmian quote “sits” vis-à-vis the Rexel Electrical quote. But I agree with Prysmian that the ACCC has failed to understand the commercial context.
2. Prysmian was concerned that a bid with its own cables should succeed over a bid from its competitors, Olex and General Cable. Prysmian wanted to win the business of supplying Caltex with cables for the project. In that context, on one view it was of secondary importance to Prysmian as to whether its winning bid was a direct bid or a bid through Rexel Electrical as either way it would be supplying Prysmian cable. To the extent that it had a preference, Prysmian’s preference was to supply through Rexel Electrical as Rexel Electrical had the existing relationship with Caltex. Moreover, a bid through Rexel Electrical would involve Rexel Electrical rather than Prysmian taking on the management of the contract and the associated costs.
3. Now the ACCC has argued that such a position, even if accepted, is not relevant to the legal test under s 44ZZRD(3)(c)(ii). It is said that the relevant inquiry is whether a (substantial) purpose of the provision in the pleaded arrangement or understanding is that one of the bids is more likely to be successful than the other. It is said that the fact that Prysmian’s overall commercial objective was to win the business of supplying cable to Caltex is beside the point. Its preference was to win the business through Rexel Electrical’s bid. It is said that the arrangement or understanding between Alderson and Shroff included a provision to give effect to that preference and so accordingly, Rexel Electrical and Prysmian contravened s 44ZZRD(3)(c)(ii). The ACCC accepts that no doubt, the bidding agreement occurred in a wider commercial context, namely, the overall desire by Prysmian to win the business of supplying Caltex with cables for the project, as well as Prysmian’s desire to maintain a good relationship with its significant wholesale customer, Rexel Electrical. But it is said that this commercial context does not strictly address the question of whether a contravention occurred.
4. Now all of this may be so, but in relation to the 16 June 2011 email, at this point I am dealing with its commercial context. The context was the following. On 8 June 2011, Caltex sought some “clarifications” in respect of the technical documents submitted as part of the Prysmian bids of 30 May 2011 (both direct and through Rexel Electrical). One of the clarifications changed the cost to Prysmian of sourcing the cable to meet the Caltex specification. This was pointed out to Rexel Electrical. On 14 June 2011, Shroff sent an email to Alderson, which provides context to the subsequent 16 June 2011 email. The 14 June 2011 email stated:

Can you please advise me what technical specification our competitors had offered particularly with the screen fault level and the position of the lead sheath (under or over the screen wires), have got the revised offer from Prysmian Malaysia and the pricing to Rexel [Electrical] has gone up to a total value of $1.23 million which I am concerned could put us out of the ballpark if their screen rating is already at 10.1kA per 1 sec. against what we originally worked out as 5.6kA.

1. Rexel Electrical was dealing with all three cable manufacturers. Shroff was seeking to understand whether his competitors would also have to revise their prices upwards, or whether this issue would only affect Prysmian and thus potentially cost Prysmian the business. Alderson did not respond by telling Shroff how Prysmian’s pricing or technical specifications compared to the other manufacturers. Therefore, Shroff repeated his request in the email of 16 June 2011. That email attached a copy of the technical response to the revised (or clarified) technical specifications, together with a draft quote to Caltex, and then said: “Do let me know how we sit so that we can submit the quote by latest 1 pm. tomorrow”. I agree with Prysmian’s submission that Shroff wanted to know how Prysmian was sitting against the *other* manufacturers. If he knew this, he could consider whether he needed to modify the Prysmian quotations whether direct or through Rexel Electrical. Prysmian wanted to win the business and this objective was reinforced by the next sentence of the email, which said:

I believe we do need to make sure that the Rexel bid with our cables is around 4-5% cheaper than the next best price they get.

1. Accordingly, the subject of the email is about how Prysmian “sat” vis-à-vis Olex and General Cable, rather than how the Prysmian direct bid “sat” vis-à-vis the Rexel Electrical bid using Prysmian cable.
2. Further, when Shroff in his email said “Fingers crossed with this one, it will be a great win”, what seems to have been contemplated would be a “great win” would be for Prysmian to get the business instead of Olex or General Cable. That was consistent with Rexel Electrical’s internal email of 13 May 2011 at 1.23pm getting Alderson involved, which noted that it was “a great opportunity for Prysmian”. In my view, Shroff was not suggesting that there would be a “great win” if bid rigging conduct was successful and Prysmian and Rexel Electrical managed to increase the bid price to Caltex by removing competitive tension. Prysmian was in competition with Olex and General Cable for the business. The real competition in the bidding process was between Prysmian and the other cable manufacturers, Olex and General Cable.
3. Now I agree with the ACCC that strictly a direct bid by Prysmian is treated for competition law purposes as distinct from, and as competing with, a bid made by Rexel Electrical, notwithstanding that Prysmian may have been supplying the product in Rexel Electrical’s bid. The bid rigging prohibition contains a carve-out for vertical supply relationships. It applies where the conduct falls within s 47 of the Act (see s 44ZZRS). But the conduct alleged against Prysmian and Rexel Electrical does not fall within the s 47 carve out and there is no other carve out for vertical supply situations. But even accepting all of this does not detract from the force of Prysmian’s submission concerning the commercial context of these emails and how they are to be construed in that light, which is a different emphasis.
4. Finally, Prysmian submitted that the competition condition required by s 44ZZRD(1)(b) was not satisfied. It contended that the Rexel Electrical/Prysmian bid was dependent on Prysmian agreeing to supply the particular type of cable specifically required for the bid. But Prysmian was not obliged to make an offer to Rexel Electrical. Prysmian had an interest in selling the cable required for the Caltex bid. But Prysmian was entitled to maximise its chances of succeeding by bidding directly. So, it is said that Prysmian had an interest in the Rexel Electrical/Prysmian bid as much as it had an interest in its direct bid. Accordingly, so it is said, Prysmian was not competing by its direct bid with Rexel Electrical’s Rexel Electrical/Prysmian bid. It is said that this would involve the proposition that Prysmian was competing with itself. It is said that there was competition between a wholesaler such as Rexel Electrical and an end-user such as Caltex to secure the best offer from Prysmian. But Prysmian did not regard Rexel Electrical as its competitor in the relevant tender evaluation form. I reject these submissions. In my view, both Prysmian for its direct bid and Rexel Electrical for its bid (using Prysmian cable) were competing for the supply *to Caltex*. And that is how the acquirer of the cable would have so perceived the matter. Moreover, there was strictly price competition vis-à-vis Caltex reflected in their different margins and costs structures; further, there were non-cable inputs into the costing of bids.

## (g) Bidding provision - change in ACCC’s case

1. The ACCC submitted that the purpose of Alderson telling Shroff the acceptable margin to Rexel Electrical for cable supplied by Prysmian for on-sale to Caltex was that each of Prysmian and Rexel Electrical would bid, and that Shroff would have the information required to ensure that Prysmian’s direct bid was *higher* than Rexel Electrical’s direct bid.
2. I am inclined to agree with Prysmian that the first time such a submission of the ACCC had been clearly advanced was in final submissions.
3. Prysmian submitted that it was contrary to the ACCC’s pleaded case to suggest that Alderson appeared to put forward from time to time that Prysmian would bid *higher* than the Rexel Electrical/Prysmian bid. Such an allegation was not pleaded and was not a case to which Prysmian submitted it had to respond or to provide evidence in response thereto. I agree.
4. Prysmian contended that the ACCC had abandoned its pleaded purpose of the alleged bid rigging agreement, namely of ensuring that the Rexel Electrical/Prysmian bid would be *lower* than the Prysmian bid. It says that as a result of the cross examination of Alderson, it became apparent that Rexel Electrical did not agree and could never have agreed to commit to putting in a bid lower than the Prysmian direct bid. It says that the Rexel Electrical/Caltex rebate precluded any such commitment. Prysmian argues that the existence of that rebate demonstrated that the ACCC’s unpleaded case, namely a purpose of ensuring that the Prysmian bid was higher than the Rexel Electrical/Prysmian bid, was a materially different case. It is said that there was no reference in the pleading to the specific conversations in the second Alderson affidavit which later became the “centrepiece” of the ACCC’s bid rigging case. In my view, these criticisms have some force.
5. Further, I would note that after the ACCC’s opening, the pleading point was taken by each of Prysmian and Rexel Electrical. No application to amend was made. And I accept that Prysmian chose not to call evidence based on the case as pleaded. Let me elaborate.
6. None of the pleadings or the two affidavits of Alderson indicated that the real alleged “central player” (as Prysmian described it) in the new bid rigging agreement was Neary. It was Neary who apparently directed Alderson to pass on incorrect margin information. I agree with the respondents that the pleadings did not alert either Prysmian or Rexel Electrical to his central significance.
7. Further and more generally, there is no pleading of an obligation that “Prysmian’s bid in response to the RFP would be higher than Rexel Electrical’s bid in response to the RFP”. And such a required pleading would not be the converse of the pleaded allegation. The existing pleading is an agreement that Rexel Electrical’s bid be less than the Prysmian direct bid. That necessarily required that Rexel Electrical be aware of the Prysmian bid and put no limits on the Prysmian bid. Contrastingly, the unpleaded allegation required that Prysmian be made aware of the Rexel Electrical bid in advance. There are no material facts pleaded to support any provision of such information or understanding.
8. In my view, the ACCC should not be permitted to pursue the unpleaded case.
9. But in any event, the unpleaded case would fail even if I had permitted it. First, Alderson’s evidence was that he was indifferent as to whether or not Prysmian would directly bid at all. Second, Alderson gave evidence that so far as he was concerned, Prysmian could bid at whatever price it wanted.
10. Moreover, there could not have been any such provision without some mechanism for its implementation. Without any means of pre-notification of the proposed Rexel Electrical/Prysmian bid, there could be no rational provision that the Prysmian direct bid would be higher or have the relevant purpose.
11. Alderson’s uncontested evidence is that he had no conversation with Shroff in which he told Shroff the amount of any proposed Rexel Electrical/Prysmian bid before it was put in. Moreover, Alderson was not the decision maker on the amount of any Rexel bid including any Rexel Electrical/Prysmian bid. That was Neary’s decision or his superiors. Moreover, Alderson was not even able to say that he had seen the amount of or was aware of the amount of any Rexel Electrical/Prysmian bid or other Rexel Electrical bid before it was lodged.
12. Now Alderson’s evidence was that he conveyed to Shroff a profit margin on the Prysmian quote to Rexel Electrical which Rexel Electrical considered “would be acceptable”. He said he recalled telling Shroff that the “acceptable margin … Rexel [Electrical] could accept was X per cent”. But he could not recall the precise margin.
13. Alderson said that he asked Neary “what he would accept as his minimum margin and he would have built that into his sales price”. He understood that it was the “minimum amount that Rexel would want”. His evidence was: “He told me the minimum margin he expected to make and I was asked to relay that on to Prysmian”.
14. Now although Alderson could not remember the precise margin that he obtained from Neary and conveyed to Shroff, the margin was less than the 8.5% margin referred to in the Cheadle email of 12 May 2011. But the Rexel Electrical/Prysmian 30 May 2011 bid of $1,248,511.90 reflected a margin of 14.16% on the Prysmian 30 May 2011 quote to Rexel Electrical of $1,093,655.00. But Neary never told Alderson a margin of 14.16% or anything like it. Alderson was surprised to learn under cross-examination for the first time that the actual margin was around this level. He agreed that if Neary had conveyed to him a margin which was much less than such a level with instructions to inform Shroff of that figure, conveying that margin to Prysmian would not give Prysmian an “accurate figure”. In response to the question: “… whatever Mr Neary’s reasons were, his reasons couldn’t have been to make sure that Prysmian came in at a higher bid than the Rexel bid?” Alderson said that he had “no idea what Mr Neary’s reasoning was”.
15. Accordingly, even accepting Alderson’s evidence, it amounts to him conveying to Shroff a single acceptable margin most likely less than 8.5% but certainly nothing like around 14%. In my view, conveying a margin of less than 8.5% is not significantly consistent with the existence of a provision with a purpose of ensuring that Prysmian bid at a higher price than the Rexel Electrical/Prysmian bid.
16. Similarly, the Rexel Electrical/Prysmian 17 June 2011 bid was $1,311,496.80. The 16 June 2011 quote from Prysmian to Rexel Electrical was $1,174,825.20. That represents a percentage margin on the Prysmian quote of 11.63%. Again that is a percentage margin well above the less than 8.5% said by Alderson to have been conveyed to Shroff. Similarly, the conveyance of such a low margin is not significantly consistent with the existence of a provision the purpose of which was to ensure that Prysmian bid higher than a Rexel Electrical/Prysmian bid.
17. I agree with Prysmian that it is not open on the evidence to conclude that Rexel Electrical provided Prysmian with the margin figure of 14.16% before Prysmian lodged its direct bid with Caltex on 17 June 2011. And if that assumption is made, the following arithmetic is interesting to observe. The Prysmian direct bid on 17 June 2011 was $1,325,830.00. A margin of 14.16% on the Prysmian draft quote to Rexel Electrical on 16 June 2011 of $1,174,825.20 produces a bid of around $1,341,180. On the arithmetic, Prysmian “undercut” the notional expected bid on the assumption, which is of course false, that Prysmian was aware of Rexel Electrical’s 14.16% margin.
18. More generally, to the extent that the purpose of any person at Rexel Electrical was relevant, Alderson’s purpose may arguably not be the relevant purpose. He was not a decision maker on the Rexel Electrical bid prices. And to the extent that the relevant person was Neary, the above evidence indicates that his purpose could not have been one which falls within the terms of s 44ZZRD(3)(c)(ii). First, there is no evidence that Alderson passed on to Neary the content of the proposed Prysmian bid. Alderson himself did not give that evidence. Further, there is no adverse inference to be drawn from Rexel Electrical’s failure to call Neary to respond to a speculative submission made towards the close of the trial. And in any event, Neary was not in Prysmian’s camp and so no adverse inference can be drawn against Prysmian in this respect. Second, Alderson never became aware of the 14.16% margin. The 14.16% margin was the margin on the 30 May 2011 bid. The margin was lower on the 17 June 2011 bid at around 11.63%. The effect of the ACCC’s submission is that Neary told Alderson a low margin to pass on to Shroff so Prysmian’s bid could be higher. But if it was Neary’s purpose to give Shroff information to ensure that the Prysmian bid was *higher* than the Rexel Electrical/Prysmian bid, there is no reason why, after the 30 May 2011 bid, he would not have told Alderson the change in margin to pass on to Shroff to ensure that Prysmian could bid above that margin. Yet that did not happen.

## (h) Other bidders

1. Let me now deal with another matter. Prysmian has argued that where s 44ZZRD(3)(c)(ii) requires that “one of those bids is more likely to be successful than the others”, the “others” incorporates *all* bids made by the parties to the relevant arrangement or understanding. The other bids of Rexel Electrical included as at 30 May 2011 a Rexel Electrical/General Cable bid and a Rexel Electrical/Olex bid, and as at 17 June 2011 a Rexel Electrical/General Cable bid. There is no suggestion that the alleged bidding agreement encompassed the Rexel Electrical/General Cable bid of 17 June 2011 which was ultimately successful at $1,366,804.86 being a price higher than both the Rexel Electrical/Prysmian bid of $1,311,496.80 and the Prysmian direct bid of $1,325,830.00. Accordingly, so it is contended, because Rexel Electrical made other bids such as a Rexel Electrical/General Cable bid and a Rexel Electrical/Olex bid and these bids were not part of the arrangement, the proscribed purpose is not made out.
2. But in my view, this is an artificial limitation not required by the text or policy of the Act. Section 44ZZRD(3)(c)(ii) applies to “two more parties” to a contract, arrangement or understanding. The reference to “others” is intended to encompass the range of possibilities where multiple parties to the arrangement or understanding are bidding, rather than to permit bid rigging provided that the parties rig only some of the bids they submit, not all of them. Further, s 44ZZRD(3)(c)(ii) is directed at a “bid” being more successful than another bid, rather than one “party” being more successful than the other party.
3. It is said that the mischief targeted by the bid rigging provisions is the reduction in competition in the bidding process (see [1.40] of the explanatory memorandum to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth)). Prysmian argued that the Rexel Electrical/Prysmian bid was the lowest bid and undercut the real competition, General Cable and Olex. Caltex chose a higher bid and was aware of the amount of the Prysmian direct bid. Prysmian says that this conduct is therefore not bid rigging. But this argument is without substance. There is nothing in the language of the Act, the underlying objective of the bid rigging prohibition or the explanatory memorandum that carves out an agreement between competitors as to whose bid is more likely to be successful on the basis that the tenderer is aware of the bids made to it and chooses a less attractive bid.

## (i) Resale price maintenace

1. Prysmian has raised one other point that it is convenient to briefly address.
2. Rexel Electrical and Prysmian allege that s 44ZZRR(1)(c) is an answer to the ACCC’s pleaded case. Section 44ZZRR provides:

**Resale price maintenance**

(1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision relates to:

(a) conduct that contravenes section 48; or

(b) conduct that would contravene section 48 but for the operation of subsection 88(8A); or

(c) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the Criminal Code and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK bears an evidential burden in relation to that matter.

1. It is contended that even if the ACCC could prove its pleaded allegation, the effect of any such proof would be to satisfy the elements of s 44ZZRR(1)(c) insofar as Prysmian as the supplier to Rexel Electrical would have induced Rexel Electrical not to sell to Caltex at a price more than a specified price (s 96(3)(b)); or agreed to supply Rexel Electrical goods on terms that Rexel Electrical would not sell the goods to Caltex at more than a specified price (s 96(3)(c)); or Prysmian using in relation to goods supplied to Rexel Electrical a statement of price that is likely to be understood by Rexel Electrical as the price above which the goods are not to be sold to Caltex.
2. It is said that the alleged bidding agreement between Rexel Electrical and Prysmian cannot contravene ss 44ZZRJ or 44ZZRK because even if the ACCC could establish the alleged bidding agreement, it would amount to “maximum” resale price maintenance conduct within the meaning of s 44ZZRR(1)(c).
3. According to the ACCC’s alleged bidding agreement, Prysmian was obliged to make its quote to Rexel Electrical, and Rexel Electrical was obliged to make its price to Caltex with Prysmian’s cable, lower than Prysmian’s direct price to Caltex. It is said that this conduct constitutes maximum resale price maintenance, because it involves Prysmian inducing, or by agreement requiring, Rexel Electrical not to sell Prysmian cable to Caltex at a price higher than a price just below Prysmian’s direct price (see ss 96(3)(b) and 96(3)(c)), or using a statement of price that is likely to be understood by Rexel Electrical as the price above which its cable is not to be sold (s 96(3)(f)). It is said that the requirement that Rexel Electrical not price higher than a price just below Prysmian’s direct price is sufficient to constitute a “price specified” within the meaning of ss 96(3)(b) and 96(3)(c), because the specified price can be within a range of a particular figure, or an approximate figure, such as the supplier’s prices from time to time: *Trade Practices Commission v Bata Shoe Company of Australia Pty Ltd (No 2)* (1980) 44 FLR 149 at 159 to 160*; Trade Practices Commission v Penfolds Wines Pty Ltd* (1991) 104 ALR 601 at 612.
4. But in my view, Prysmian’s and Rexel Electrical’s contention leads to perverse outcomes. If accepted, it would mean that manufacturers and suppliers could evade the intention of the Act to prohibit bid rigging by the particular price fixing mechanism they agree upon, for example, by agreeing that one party’s bid should not exceed a particular amount, rather than agreeing that the other party’s bid should be greater than a certain amount. The rationale for allowing maximum resale price maintenance, which is that it can be pro-competitive and consumer welfare enhancing for a supplier to prevent distributors reselling its product above a certain price, cannot apply to a bid rigging scenario where the outcome is not lower prices for consumers but rather an intentionally uncompetitive price offered to the acquirer. The legislature cannot have so intended in relation to s 44ZZRR(1)(c).
5. Further, I also agree with the ACCC that the carve out in s 44ZZRR(1)(c) does not apply because the corollary of the pleaded provision (Rexel Electrical’s bid price to be lower than Prysmian’s direct bid) is that the parties also agreed that Prysmian’s direct bid price would be higher than Rexel Electrical’s bid price. So, it is implicit in the pleaded allegation that the parties agreed that Prysmian’s direct bid price would not be less than Rexel Electrical’s bid price. Accordingly, even if the carve out was to apply to a provision of a bid rigging agreement that related to the maximum price one of the parties would bid, it would not apply to a provision that related to the minimum price that the other party would bid.
6. Prysmian also argues that the ACCC’s “unpleaded” allegation is answered by s 44ZZRR(1)(c) in any event. I do not need to address this.
7. In my view, Prysmian’s and Rexel Electrical’s reliance on s 44ZZRR(1)(c) is artificial and should be rejected.

## (j) Summary

1. In summary, the ACCC’s bid rigging case fails.
2. First, it was a matter for Prysmian as to whether it made a direct bid and in what amount. It was not obliged to do so. Likewise it was up to Rexel Electrical as to whether it made a bid and in what amount.
3. Second, Alderson did not give any direct evidence that there was a contract, arrangement or understanding even to bid.
4. Third, the ACCC’s case depended upon acceptance of Alderson’s evidence of a conversation with Shroff as deposed in paragraph [3] of his second affidavit, rather than the form he recalled in oral evidence and further, the proposition that there could be no explanation for providing a margin figure other than the existence of a bid rigging arrangement. As to the first point, I accept Alderson’s oral evidence. As to the second point, it is incorrect for the reasons that I have already dealt with.
5. Fourth, the reason for Prysmian providing a copy of the Prysmian direct bid and the “for your eyes only” email, was so that Prysmian could demonstrate that Rexel Electrical was getting a good price. This is inconsistent with the ACCC’s theory. The ACCC submitted that if it was directed to demonstrating that Rexel Electrical was getting a good price, there would be no reason to provide this information before the event because it could be demonstrated after the event. But I agree with the respondents that that point goes nowhere. There is likewise no reason why it could not be provided before the event, or both before and after. Further, as to the use of the words “for your eyes only” in both the email and the response, Prysmian would not want its direct bid to Caltex to have been disclosed to its competitors or to other wholesalers and likewise Rexel Electrical did not want its bid disclosed to others.
6. Fifth, if a margin figure was to be provided to Prysmian for the purpose of bid rigging to ensure that the Prysmian bid was higher, it would make no sense to provide the wrong margin figure. The ACCC has sought to dismiss the point by saying that the contravention is in the agreement, and a failure to give proper effect to the agreement does not matter. But I agree with the respondents that this misses the point. Rexel Electrical’s conduct would be very surprising if there was a bid rigging arrangement as alleged. It would undermine the efficacy of the arrangement. Rexel Electrical’s conduct in relation to the margin supports the non-existence of any bid rigging arrangement. At the least, I am not confident in drawing an inference that there was a bid rigging agreement.
7. Finally, I agree with the respondents that the alleged bid rigging arrangement makes little commercial sense in the light of the significant competition from Olex and General Cable. Rexel Electrical and Prysmian between them could not effectively rig any bid. The alternative rationale put by the ACCC of Prysmian trying to avoid annoyance to Rexel Electrical that would be caused by undercutting Rexel Electrical evaporates once it is appreciated that the previous incident upon which the ACCC has based its case on motive was not an incident about Prysmian undercutting Rexel Electrical’s bid. Rather it was about Prysmian undercutting its own bid to Rexel Electrical.

## (k) Giving effect to the bidding agreement

1. As the ACCC’s case fails as to the existence of the bidding agreement as pleaded, its giving effect to case necessarily fails for lack of a foundation.

# M. conclusion

1. I have not sustained any part of the ACCC’s originating application. Accordingly, its application must be dismissed. I also see no good reason why costs should not follow the event.

|  |
| --- |
| I certify that the preceding eight hundred (800) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach. |

Associate:

Dated: 9 March 2017

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |

**JOHN LLYR LEWIS ROBERTS**

Fourth Respondent

**REXEL ELECTRICAL SUPPLIES PTY LTD (ACN 000 437 758)**

Fifth Respondent

**AUSTRALIAN REGIONAL WHOLESALERS PTY LTD (ACN 011 009 064)**

Sixth Respondent

**GUY PICKEN**

Seventh Respondent

**LAWRENCE & HANSON GROUP PTY LTD (ACN 080 350 812)**

Eighth Respondent

**ROBIN NORRIS**

Ninth Respondent

**BRIAN ALEXANDER WEBB**

Tenth Respondent

**LAURENCE THOMAS MURPHY**

Eleventh Respondent

**ELECTRICAL WHOLESALERS ASSOCIATION OF AUSTRALIA LTD (ACN 064 644 300)**

Twelfth Respondent