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Dear Ms Caballero

Anti-circumvention inquiry – Aluminium extrusions exported from China

This submission is made on behalf of Oceanic Aluminium Pty Ltd (Oceanic), P&O Aluminium (Perth) Pty Ltd (P&O Perth) and P&O Aluminium (Sydney) Pty Ltd (P&O Sydney). The three companies are collectively referred to as the 'subject importers' throughout this submission.

The submission is relevant to the anti-circumvention inquiry initiated by the Anti-Dumping Commission (Commission) into certain aluminium extrusions exported from the People's Republic of China (China).

1. Background

On 14 April 2014, the Commission initiated an anti-circumvention inquiry into the avoidance of the intended effect of duty, following an application made on behalf of Capral Limited (Capral).

Capral's application appears to be based on the view that the subject importers have been avoiding the intended effect of the duties by selling the imported goods unprofitably when compared against a notional target price. The notional target price reflects Capral's estimate of the fully absorbed cost to import and sell plus an amount for profit.

2. Legislative framework

Section 269ZDBB of the *Customs Act 1901* (the Act) outlines the five activities which are considered to be circumvention activity for the purposes of Division 5A. These include:

1. assembly of exported parts in Australia;
2. assembly of exported parts in a third country;

3. export of goods through one or more third countries;
4. certain arrangements between exporters, and
5. avoidance of the intended effect of the duty.

Circumvention activity in the form of ‘avoidance of the intended effect of the duty’, occurs if the following apply:

- (a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice applies;
- (b) the exporter is an exporter in respect of which the notice applies;
- (c) either or both of sections 8 and 10 of the Dumping Duty Act apply to the export of the circumvention goods to Australia;
- (d) the importer of the circumvention goods, whether directly or through an associate or associates, sells those goods in Australia without increasing the price commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act;
- (e) the circumstances covered by paragraphs (a) to (d) occur over a reasonable period.

3. What is circumvention?

The explanatory memorandum to the Customs Amendment (Anti-Dumping Improvements) Bill (No. 3) 2012¹ describes circumvention as:

a trade strategy used by the exporters and importers of products to avoid the full payment of dumping and countervailing duties. Circumvention behaviours take various forms and exploit different aspects of the anti-dumping and countervailing system, but they all aim to ensure that the relevant goods do not attract the intended dumping or countervailing duty. [emphasis added]

The dictionary definition of ‘strategy’ is ‘a plan of action designed to achieve a long-term or overall aim’. Therefore, circumvention can be seen as an exporter or importer engaging in a practice, process or activity, with the sole intention or purpose of avoiding duty.

As demonstrated in this submission, all available evidence will show that the subject importers undertook all reasonable measures to ensure that they complied with the intended effect of the duties, whilst ensuring their businesses were financially viable.

4. What is the ‘avoidance of intended effect of duty’?

The replacement explanatory memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2013² describes the avoidance of intended effect of duty as:

...the situation where dumping or countervailing duty has been imposed and is being paid by the importer; however, the imposition of the duty has little or no

¹ para 12, page 6.

² para 5, page 15

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effect as, over a reasonable period, the price at which the goods are sold by the importer has not increased in line with the duty payable.

A reasonable period may be different for different goods depending on the characteristics of the goods, the conditions of the market for the goods, and other relevant factors. The reasons for the effect of the duty being avoided may be because there has been a reduction in profit taken on the sale, or where the export price has been decreased post the imposition of measures.

'Reasonable period'

After reviewing the Commission's Consideration Report 241, the public notice and the Anti-Dumping Notice No. 2014/31, it is unclear what reasonable period the Commission has nominated for the purposes of assessing whether prices have increased in line with the duty payable.

The subject importers submit that the nominated inquiry period (1 January 2013 to 31 December 2013) is an unsuitable period for this purpose as the interim duties applicable during the first ten months of that period were subsequently deemed to be unlawful by the Federal Court³. What is clear is that the unlawful imposition of the individual interim dumping and countervailing duties for each specific model (by finish) of aluminium extrusion, had a direct impact on the subject importers' fully absorbed cost to import and sell the imported goods. The unlawful model specific duties inflated the FOB export price for the goods and resulted in a duty liability being incurred by the subject importers that was significantly greater than it otherwise would have been had the interim duties been imposed consistent with the Act.

Therefore it would be purely speculative for the Commission to attempt to assess whether prices of the goods sold by the subject importers during the nominated inquiry period have increased in line with the duty payable. Firstly, as just explained, the amount of duty payable and paid (and more importantly the ascertained export prices) for over 80% of that inquiry period was incorrect. Secondly, the subject importers' prices during the inquiry period were set taking into account a cost base that is now known to be artificial and the direct result of the unlawful imposition of measures by the Attorney-General of the Commonwealth (Attorney-General).

Lastly, the subject importers have faced considerable competition and price pressures over the 2 year period during which the unlawful model specific interim duties were in effect.

As a result,

[sales information].

However, had the Commission correctly imposed a single duty rate and a weighted average ascertained export price on a total product basis as advocated by the Federal Court, the substantially lower cost base

³ Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth; FCA 870 (30 Aug 2013)

[redacted]
[redacted] [sales information].

For the reasons outline above, we contend that the reasonable period for assessing whether prices have or have not increased commensurate with the duty payable is the 12 month period from the date the interim duties were correctly amended to reflect the Federal Court orders. This period would be the most appropriate and reasonable for the following reasons.

Firstly, this is the only period since the measures were last amended in 27 August 2011, where the amount of interim duties and ascertained export price is correct. As a result, for the first time the subject importers have an accurate understanding of their cost base when negotiating prices with customers.

More importantly, the now lower cost base allows the subject importers to be more competitive against other imports and local production, thereby providing them [redacted]

[redacted] [sales information].

Secondly, as a consequence of the unlawful imposition of model specific interim duties, the subject importers have been advised by the Commission that [redacted]

[redacted] [duty liability information].

[redacted] [duty liability information].

Thirdly, the primary supplier of aluminium extrusions to the subject importers, PanAsia Aluminium (China) Co. Ltd (PanAsia), has successfully applied for a review of the measures applying to their exports of aluminium extrusions. The Commission initiated the review on 12 June 2014 and the investigation period for establishing updated export prices, normal values and non-injurious price is 1 April 2013 to 31 March 2014. As the 'intended effect of duty' is to remedy the injurious effects of dumping and/or subsidisation, it stands to reason that the issue of 'avoidance' is only relevant where the imported goods subject to duties are found to have been exported at dumped and/or subsidised prices.

Given that the review investigation period and the anti-circumvention inquiry period overlap by 9 months (1 April 2013 to 31 December 2013), we expect that the Commission will have sufficient relevant information gathered from the review to determine whether imports by the subject importers during that 9 month period were exported at dumped and/or subsidised prices. Therefore, it is only after the findings from the review have been finalised that the Commission will be in a position to understand the 'actual' effect of the duty and whether avoidance has occurred.

Lastly, under Australia's prospective duty collection system, an importer who has paid interim dumping and/or countervailing duty on particular imports is entitled to apply within specified time limits for an assessment of the final total duty payable. A refund of duties is required where the amount of duty paid exceeds the actual amount of duty payable. The duty payable is effectively established as the margin of dumping and/or subsidisation for the shipments occurring during the 6 month assessment period.

The relevant assessment period (28 October 2013 to 27 April 2014) for imports of aluminium extrusions from China partly overlaps with the anti-circumvention inquiry period and accounts for almost half of the review period. Importers have until 27 October 2014 to apply for a refund of duties.

On the expectation that the Commission will find a zero or lesser margin of dumping and/or subsidisation in the current review, the subject importers anticipate and reserve the right to request a refund of any excess interim duties paid.

The subject importers support the views of Minter Ellison in its submission⁴ of 19 May 2014 where it argues that:

the Commissioner will not be able to undertake his assessment of the factors referred to in paragraph (d) of the subsection because he will have no knowledge of the final duty payable in calendar year 2013, being the reasonable period specified in the inquiry notice.

Likewise, the Commission will be unable to determine whether circumvention of the intended effect of duties has occurred until it can properly establish the fully absorbed actual cost to import and sell the imported goods. This actual cost won't be known until after the Commission has calculated and determine the final amount of duty payable.

5. Actions of the subject importers

As explained earlier, circumvention involves an exporter or importer engaging in a practice, process or activity, with the sole intention or purpose of avoiding duty. The subject importers deny that they have engaged in any such activity intended to circumvent the effect of the duties.

In fact, the subject importers have made decisions and taken steps since the imposition of duties, to ensure that they comply with the imposed interim duties and remain financially viable in a market where they are required to compete against imports from countries not subject to duties and local production.

Export prices [REDACTED] [purchasing information]

On 27 August 2011, the Attorney-General published a notice that varied his original notice of 28 October 2010, so that amongst other things, they were taken to have effect as if

⁴ Public record for anti-circumvention inquiry (case 241) – No 009; page 3.

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different variable factors had been used in the calculation of duty on different finishes of aluminium extrusions.

The different variable factors by finish that were applicable to PanAsia's exports are outlined below.

Finish	Ascertained export price (A\$/kg)	Interim dumping duty (%)	Interim countervailing duty (%)
Mill	■	■	■
Anodised	■	■	■
Powder coated	■	■	■

Following the decision by the Attorney-General to vary the duty notices applying to aluminium extrusions imported from China, the subject importers [REDACTED]

[purchasing information].

Therefore, the free-on-board prices between PanAsia and the subject importers [REDACTED] [purchasing information]. The decision by the subject importers [REDACTED] [purchasing information] was predominantly driven by the way in which Australia's duty collection system operates.

The proportional interim dumping and countervailing duty are used to calculate the 'fixed' component of duty. This fixed amount of duty is calculated by applying the proportional duty rate to the greater of the ascertained export price or the actual declared export price, in the case of interim dumping duty. In the case of the countervailing duty, the fixed amount of duty is calculated by reference to the actual declared export price. Therefore, where the FOB export price paid by the subject importers exceeds the AEP, the fixed amount of interim duty increases.

The other part of the duty collection system is the variable component of duty. This variable amount of interim duty is the amount by which the actual declared FOB export price is less than the AEP. Therefore, where the FOB export price paid by the subject importers is less than the AEP, the importers would be subject to the fixed amount of interim duty plus the variable amount of interim duty.

In effect, the total amount of interim duty to be paid will exceed the combined dumping and subsidisation margins determined during the original investigation period, when the actual declared FOB export prices are greater than or less than the ascertained export price.

[redacted] [purchasing information] This is clearly the intended effect of the varied interim duties imposed by the Attorney-General.

On 26 September 2011, Panasia applied for judicial review challenging the validity of the various decisions made by the Attorney-General. One of those decisions was the imposition of the anti-dumping and countervailing measures on a differentiated basis by finish. On 30 August 2013, almost 2 years after their application, Nicholas J found⁵:

There is nothing in s.269TG to suggest that there was any intention to confer upon the Minister a discretion that would enable him or her to determine variable factors different to those utilised for the purpose of determining whether dumping occurred and, if so, at what margin.

His Honour concluded⁶:

It follows that the Minister was not entitled to vary the dumping duty notices so that they would have effect as if different variable factors had been fixed with respect to different finishes.

Given that the varied notice and the variable factors attached to different finishes were ultimately found to be unlawful, it is important in the context of the anti-circumvention inquiry that the Commission understands and appreciates the full impact of the anti-dumping and countervailing measures that were in effect during the two year period prior to the Federal Court judgment.

Firstly, as the measures and duties applying to different finishes was found to be unlawful, it follows that the intended effect of those duties was improper. As argued earlier in this submission, it is for this reason that the subject importers consider it unreasonable and highly speculative for the Commission to assess whether avoidance of the intended effect of the duties was occurring. For almost two years, and at least 10 months of the nominated inquiry period for the anti-circumvention inquiry, the interim duties and the intended effect of those duties were ultimately found to be improper.

Secondly, the subject importers had reasonably expected an outcome from the Federal Court proceedings within 12 months. However, in the two years between the notice being varied and the court's orders being made, the subject importers were unfairly required to compete against prices from import sources not subject to duties and prices from local producers.

The reason for the unfairness is that ascertained export prices for each finish effectively created a floor price below which the subject importers were unable to purchase aluminium extrusions from their preferred supplier, PanAsia. To do so, would have resulted in them

⁵ Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth, FCA 870 (30 Aug 2013), para 140, page 53.

⁶ Ibid, para 153, page 59.

incurring additional variable amounts of interim duties. In contrast, importers and the local producers were selling their products into the Australian market at prices that were referenced to movements in the LME price for primary aluminium.

Therefore, the actual effect of the unlawful and improper imposition of the variable factors by the different finishes was that the subject importers were uncompetitive by ensuring that their duty inclusive FOB export prices were significantly greater than the consolidated product ascertained normal value (or undumped export prices), that the Federal Court stated should have been imposed by the Attorney-General. This [REDACTED]

[REDACTED] [sales information].

[REDACTED] [purchasing information]

The unfair cost base created by the unlawful imposition of the variable factors by finish

[REDACTED] [sales information]. This was particularly evident during the period covered by the varied notice as the key driver of aluminium extrusion pricing, the LME price for primary aluminium, fell consistently from 2011 through historically low levels in 2013.

The charts at **Confidential Attachment A** show the movements in monthly LME prices and a comparison to the unlawful ascertained normal values for each finish and the consolidated ascertained normal value for the product as a whole. This clearly shows the cost disadvantage experienced by the subject importers as a result of the unlawful imposition of interim duties by finish.

In the case of mill finish extrusions, the subject importers' FOB purchase cost for the imported goods were [REDACTED] [pricing information] than they would have been if the Commission had imposed the measures lawfully. For anodised and powder coated extrusions, the FOB purchase costs were [REDACTED] [pricing information] than the now corrected and lawful interim duties.

As a consequence, the subject importers [REDACTED]

[REDACTED] [purchasing information].

Once again, this is a legitimate business decision that is an indirect intended consequence of the imposition of the duties. [REDACTED]

[REDACTED] [purchasing information].

The purpose and impact of this decision by the subject importers [REDACTED]

[purchasing and sales information].

6. External factors undermining the intended effect of duties

It is also important that the Commission apply its own policy guidelines in examining the issue of circumvention in this case. In determining whether circumvention has occurred, the Commission's most recent policy guidelines explain:

The reasons for the effect of the duty being avoided may be because, for example, there has been a reduction in profit taken on the sale, or the export price has been decreased after the imposition of measures.

In determining if circumvention activity has occurred, the Commission will give due consideration to the characteristics of the goods concerned, market conditions, nature of the relationship between the importer and exporter, and reasonable levels of profit. If external factors (such as currency fluctuation) have caused the circumstance where the selling price of the importer has not increased in accordance with the duties, the circumvention activity will not be determined to have occurred.

The replacement explanatory memorandum⁷ makes a similar point to that reflected in the Commission's policy guidelines but also points out that:

the Commissioner may consider that it is appropriate to recommend to the Minister that the notice not be altered, even when the circumvention activity may be occurring to a limited extent.

As highlighted to the Commission during its verification visits to the subject importers, there are important external factors that have contributed to undermining the intended effect of the duties.

Export price for goods from countries not subject to duties

Since the imposition of duties on goods imported from China, the Australian market has seen a steady increase in imports from countries not subject to measures. The Commission has access to Customs' import database and will be able to confirm the increased share of imports from countries such as Indonesia, Malaysia, Thailand and Vietnam.

This is further confirmed by the submission made by Independent Extrusions Pty Ltd to the current review of measures applying to aluminium extrusions⁸, where they stated:

Since October 2010 the volume of extrusions imported from China and entering Australia appears to have reduced to about 37,000 Mt annually. However the

⁷ Customs Amendment (Anti-Dumping Measures) Bill 2013; para 54, page 15.

⁸ Public record for review of measures (case 248) – No 007

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total Australian market has also retracted. It is also relevant that we have experienced a vast increase of imported extrusions from other South East Asia counties and question their original “country of origin”. [emphasis added]

The primary reason for the rise in imports from these other exporting countries is that prices are linked to the LME price for aluminium which has fallen steadily since 2010 and continues to remain at low levels. Undumped prices from these exporting countries are able to undercut duty-inclusive prices from China and local production.

Once again, the Commission has access to the Customs import database and is able to confirm FOB export prices from countries such as Indonesia, Malaysia, Thailand and Vietnam. A comparison of these prices to the comparable export prices for aluminium extrusions imported by the subject importers from PanAsia will clearly show that imports from these other countries have been setting prices in the Australian market.

This is further confirmed by evidence provided to the Commission by the subject importers, which shows that [REDACTED]

[REDACTED] [purchasing information].

It is also worth noting that [REDACTED]

[REDACTED] [information about goods supplied by Capral]. Evidence provided to the Commission shows that [REDACTED]

[REDACTED] [market intelligence about Capral sales]. A summary of

Capral's pricing into the Australian market is contained at **Confidential Attachment B**.

Supporting documentation [REDACTED] is at **confidential appendices 1 – 10**.

Therefore, it is important that the Commission properly considers the impact of competitive pricing and increasing volumes of aluminium extrusions from these other exporting countries on prices more generally in the Australian local market.

Pricing by local producers

In its application for the anti-circumvention inquiry, Capral stated that ‘price undercutting continues to have a significant injurious effect on the Australian industry’. The subject importers have provided evidence to the Commission which shows that Capral's into-store prices for locally produced extrusions were significantly below the subject importers' ascertained and declared FOB export prices. A summary of Capral's pricing into the Australian market is contained at **Confidential Attachment B**. Supporting documentation for [REDACTED] is at **confidential appendices 1 – 10**.

Therefore, any injurious effects being experienced by Capral is the result of imports from China not subject to measures, imports from other exporting countries not subject to measures ([REDACTED]), or increased competition amongst local producers. The subject importers contend that Capral's own pricing into the Australian market, at potentially unprofitable levels, is contributing to undermine the intended effect of the duties.

7. Conclusion

In conclusion, the subject importers submit that they have not in any way circumvented the intended effect of the duties. They have purchased the subject goods [REDACTED]
[purchasing information].

Those prices and interim duties were ultimately determined to be unlawful and this has impacted the subject importers' ability to remain competitive in the Australian market against increasing competition from cheaper imports from countries not subject to duties and locally produced products. As a result, it's argued that the Commission cannot properly assess whether circumvention of the intended effect of duties has occurred without removing the impact of the unlawful imposition of duties. This would require a fair degree of speculation and guessing by the Commission, as to what prices the subject importers would have been able to achieve and [REDACTED]
[sales information] fully absorbed cost to import and sell was based on the now corrected ascertained export prices, ascertained normal values and interim duties.

As a result of the price pressures experienced by the subject importers resulting from the unlawful imposition of measures by the Attorney-General, the subject importers [REDACTED]
[purchasing information].

At the same time, FOB and into-store prices for aluminium extrusions produced locally and from exporting countries not subject to measures have significantly undercut duty-inclusive FOB export prices paid by the subject importers. These low prices in the Australian market have contributed to significantly undermining the intended effect of the duties.

Finally, we note that during the verification visit to Oceanic, the attending Commission officers advised that the Commission was intending to publish an issues or discussion paper on some of the more substantive issues involved in this inquiry. The subject importers would fully support this approach to airing of issues, particularly given this is the first inquiry of its type and there are no preliminary findings which interested parties will be able to respond to before recommendations are made to the Parliamentary Secretary.

Yours sincerely

John Bracic

