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By email:

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Dear Director

**ADC 392: Review of Measures – Aluminium Extrusions
exported from the People's Republic of China**

1 Introduction

- 1.1 Zhong Lun and Corrs Chambers Westgarth act for the for the following entities— Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd (**KAE**), Kam Kiu Aluminium Products Sdn. Bhd (**KMY**), and Kam Kiu (Australia) Pty Ltd (**KAU**) (together, “**Kam Kiu**”).
- 1.2 We are writing to you in relation to the Anti-Dumping Commission’s review 392 of anti-dumping measures on certain aluminium extrusions exported to Australia from the People’s Republic of China.
- 1.3 We make the following submissions on behalf of Kam Kiu in response to the Commission’s Exporter Visit Report regarding KAE, dated “July 2017” (**Visit Report**). That report sets out what we understand is the Commission’s preliminary view in respect of the dumping margin applicable to goods exported by KAE.
- 1.4 In these submissions, references to “the Act” are made in respect of the *Customs Act 1901* (Cth), references to “the Regulations” are made in respect of the *Customs (International Obligations) Regulation 2015* (Cth) and references to “the AD Agreement” are made in respect of the *Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994*. Similarly, references to “sections”, “regulations” and “articles” are references to the provisions of these instruments, respectively.

2 Background

The Goods and “like goods”

- 2.1 The goods the subject of the anti-dumping measures which are being reviewed (**Goods**) are defined in the following terms:

Aluminium extrusions produced via an extrusion process, of alloys having metallic elements falling within the alloy designations published by The Aluminium Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness or diameter greater than 0.5 mm., with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421 mm.

- 2.2 This definition has been further elaborated—for example, in the Commission’s *Consideration Report No. 392*—as follows:

The goods include aluminium extrusion products that have been further processed or fabricated to a limited extent, after aluminium has been extruded through a die. Aluminium extrusion products that have been painted, anodised, or otherwise coated, or worked (e.g. precision cut, machined, punched or drilled) fall within the scope of the goods.

The goods do not extend to intermediate or finished products that are processed or fabricated to such an extent that they no longer possess the nature and physical characteristics of an aluminium extrusion, but have become a different product.

- 2.3 At section 2.3 of the Visit Report, the Commission considers the “like goods” manufactured by KAE with respect to the Goods. In this regard, the Commission acknowledges that KAE:
- (a) manufactures “a wide range of aluminium extrusions which are used in a variety of applications”, including “home improvement, industrial, transport, electronics and medical applications”;
 - (b) identifies its various products using different model numbers; and
 - (c) further groups its models using a separate product code system, which primarily indicates the finish that is applied to particular models, but can also identify characteristics of the products such as the grade of alloy used and the type of processing applied.
- 2.4 During the verification visit we are instructed that KAE demonstrated—and the verification team appears to have accepted—that KAE manufactures a range of models that are used in medical equipment, the motor vehicle industry and in mobile phones (**High-end Models**). We are instructed that the High-end Models account for about 65% of Kam Kiu’s domestic sales. These products are focussed on KAE’s domestic market, and, as the Commission knows, KAE does not export these High-end Models to Australia. These High-end Models differ

from other models manufactured by KAE (**Normal Models**), including those that KAE does export to Australia, in that they involve different combinations of:

- (a) tighter manufacturing tolerances;
- (b) higher grades of alloy;
- (c) additional processing—such as, precision bending, cutting, punching or drilling;
- (d) additional preparations prior to being coated; and/or
- (e) detailed finishes.

Model matching

2.5 Section 2.4 of the Visit Report states that:

The verification team is satisfied that, consistent with the previous review and original investigation, that (sic) model matching in the event of normal values being established under section 269TAC(1) of the Customs Act 1901 (the Act), should be completed on the basis of product codes.

2.6 Kam Kiu acknowledges the verification team’s current view is that Kam Kiu has not provided “sufficient evidence to support its proposal to exclude certain models from these product codes based on the broad category of end use or application”.

2.7 On the other hand, the verification team has also indicated that, were the Commission to determine normal values pursuant to section 269TAC(1), the High-end Models “should be excluded from the applicable product codes used for model matching purposes in [that event]”. Nevertheless, the verification team did not determine a normal value pursuant to sub-section (1).

Constructed normal value and rate of profit

2.8 The verification team’s approach to determining a normal value in respect of KAE’s relevant goods, pursuant to section 269TAC, is set out in section 7 of the Visit Report.

2.9 Importantly, the Commission has expressed the view that the prices paid or payable for like goods sold by KAE in the ordinary course of trade in its domestic market were unsuitable for the purposes of identifying a normal value pursuant to sub-section (1). Therefore, instead of determining a normal value pursuant to sub-section (1), the verification team has constructed a normal value pursuant to section 269TAC(2)(c).

- 2.10 This is also said to be due to the market situation finding in Review 248.¹ In that report, the Commission's assessment of the market situation was summarised as follows:

After having regard to all relevant information, the Commission has found that the Government of China (GOC) has influenced the Chinese aluminium industry, and this influence is likely to have materially distorted competitive market conditions and both directly affected the price of the primary input used in the manufacture of aluminium extrusions, as well as likely affecting supply within that industry. The Commission has formed the view that it is satisfied there was a situation in the Chinese aluminium extrusions market during the review period such that sales in that market are not suitable for use to determine normal value under section 269TAC(1) of the Act.

- 2.11 Under section 269TAC(2)(c), a constructed normal value for KAE's goods comprises:
- (a) the cost to manufacture of the goods exported to Australia; plus
 - (b) the selling, general & administrative expenses, and a rate of profit, that would have applied, had the goods been sold domestically.
- 2.12 The Commission's approach to determining a rate of profit for KAE for the purpose of constructing a normal value is set out in section 5.6 of the Visit Report. In accordance with regulation 45(2), the verification team has calculated a rate of profit to be included in its constructed normal value calculation.
- 2.13 However, the Visit Report states that "the verification team is not satisfied that sufficient evidence has been provided by KAE, to date, to establish that [the High-end Models] are not like goods and should be excluded from any determination of profit". Therefore, as is apparent from the Visit Report and its relevant appendices, the verification team has included the data pertaining to profits derived by KAE from sales of the High-end Models in its domestic market in working out the rate of profit to be applied in the constructed normal value calculations.

3 Summary of submissions

- 3.1 In Kam Kiu's respectful submission, for the reasons outlined in this letter, the approach taken by the verification team in calculating a rate of profit, discussed in paragraph 2.12 above, should be amended before the Commission recommends a dumping margin applicable to goods exported by KAE.
- 3.2 First, Kam Kiu submits the High-end Models are not "like goods" for the purpose of calculating a rate of profit to be used in a constructed normal value.
- 3.3 Secondly, and in the alternative, Kam Kiu submits that if that is wrong, and the High-end Models are "like goods", section 269TAC(2)(b)(ii) and regulation 45(2)

¹ See the Commission's *Report No. 248 Review of Anti-Dumping Measures, Certain Aluminium Extrusions exported from the People's Republic of China*, section 4.5.

require the profits derived from domestic sales of the High-end Models to be excluded when calculating a rate of profit for the purpose of constructing a normal value.

3.4 In support of the first of these propositions, Kam Kiu respectfully submits that the High-end Models should not be considered within the scope of “like goods” with respect to the goods under consideration, including because they have been processed or fabricated to such an extent that they:

- (a) are not alike the goods under consideration in all respects; and
- (b) do not share characteristics closely resembling those of the goods under consideration.

3.5 In support of the second of these propositions, Kam Kiu submits that the overarching purpose of a constructed normal value is to allow a fair comparison between the export price of the goods under consideration and the normal value of those goods. Therefore, Kam Kiu respectfully submits, in the alternative, that the inclusion of the profits derived from domestic sales of the High-end Models in calculating a rate of profit for this purpose prevents a fair comparison from being made.

3.6 These submissions are set out in further detail in the following section of this letter.

4 Submissions of Kam Kiu

(a) Like goods

4.1 The term “like goods” is defined in section 269T as follows:

...in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

4.2 This definition invites two alternative assessments. In respect of the second assessment, Justice Lockhart stated in *GM Holden Ltd v Commissioner of the Anti-Dumping Commission*,² that the use of the word “characteristics”:

...implies a comparison of the physical characteristics of the goods themselves, including but not limited to their appearance. Characteristics would include, for example, the composition of the goods, the materials used to manufacture them, their outward appearance and the uses for which they were suitable in a commercial and practical sense.

² *GM Holden Ltd v Commissioner of Anti-Dumping Commission* (2014) 225 FCR 222.

4.3 The definition in section 269T mirrors that in article 2.6, which stipulates:

Throughout this Agreement the term “like product” (“produit similaire”) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

4.4 In its report in *Korea – Certain paper from Indonesia*,³ the Panel said of this article:

We note that Article 2.6 takes “the product under consideration” as the starting point of the definition of “like product”. It then stipulates that the like product is the product that is identical to the product under consideration, or one that has physical characteristics that closely resemble those of the product under consideration

4.5 Therefore, it is clear that, for a product to be appropriately deemed a “like product” with respect to the goods under consideration, it must be either: (a) “identical” or “alike” in all respects; or (b) have characteristics closely resembling those of the goods under consideration.

4.6 The information already provided to the verification team by KAE should be, at least, sufficient to establish that the High-end Models *are not* identical or alike in all respects to the goods under consideration. The verification team has acknowledged that the High-end Models are not the goods under consideration, given that they are not exported to Australia, and that it would not be appropriate for these High-end Models to be included in determining a normal value pursuant to section 269TAC(1).

4.7 Accordingly, the current point of difference between Kam Kiu and the Commission seems to be whether the High-end Models have characteristics closely resembling those of the goods under consideration. In this regard, and recalling the types of characteristics referred to by Justice Lockhart in *GM Holden* (supra), Kam Kiu notes that the High-end Models are:

- (a) materially different in that they are often made with different grade alloys compared to the alloys used to manufacture Normal Models;
- (b) different in outward appearance by way of the smaller lengths to which they are cut, when compared to the multiple metre long lengths that Normal Model aluminium extrusions are cut to;
- (c) also different in outward appearance by way of the different, and sometimes detailed, finishes applied to them;

³ Panel Report, *Korea — Anti-dumping duties on imports of certain paper from Indonesia*, WTO Doc WT/DS312/R (28 October 2005) [7.219].

- (d) also different in outward appearance by way of other additional production processes that are applied to them, such as drilling, CNC milling, and bending;
 - (e) characteristically different to the Normal Models due to the tighter tolerances to which they are built and the additional quality control inspections that they are subjected to—that is, the High-end Models that make it to sale are more consistent and accurate to specification than Normal Models; and
 - (f) made especially for and used in specific commercial applications—namely, in the production of mobile phones, in the production of sunroofs for motor vehicles, and in the production of medical equipment—whereas Normal Models are used in a broad range of applications, including window frames, door frames, et cetera.
- 4.8 In Kam Kiu's submission, the product code system used by KAE is, by itself, an inappropriate means to determine whether two models within the scope of that product code should also be considered "like goods". This is due to the significant differences that exist in the characteristics between certain of these products. Kam Kiu submits that these differences are such that while the High-end Models are potentially within the scope of the "same general category of goods", they are outside the scope of "like goods".
- 4.9 In terms of differences in the physical characteristics of the High-end Models used in the manufacture of mobile phones, Kam Kiu notes the following points—by way of example, during the production of these High-end Models:
- (a) the yield from the ingot when it is processed into billets is only 83%, compared with 85.6% for Normal Models;
 - (b) the aluminium, whilst it is in its liquid form, goes through two filters and a degasser, compared to only one filter and no degassing for Normal Models;
 - (c) the extrusions are cut to lengths of 6.25 mm and 134.27 mm, compared to the Normal Models, which are cut to extrusion lengths of, for example, 5800 mm; and
 - (d) various processes are applied to the cut lengths during production which are not applied to Normal Models, including CNC milling, scalping and bending.
- 4.10 Further, as mentioned above, High-end Models are produced with tighter manufacturing tolerances and often use higher grades of alloy. High-end Models also have additional production processes applied to them, such as, precision bending, cutting, punching or drilling. Some High-end Models require additional preparations prior to being coated with their finish and certain High-end Models have special, detailed finishes applied to them.
- 4.11 Examples of the differences in the yields at each stage of production between High-end Models for electronic products and Normal Models are set out in further detail in **Confidential Annexure** Error! Reference source not found. to this letter. The higher yield rates for Normal Models lead to lower manufacturing costs for

these models; whereas the lower yield rates for High-end Models lead to higher manufacturing costs. However, High-end Models can be sold with a higher profit margin, because of the higher quality control requirements, and further value is added to the models with each additional production process that is applied.

- 4.12 **Confidential Annexure** Error! Reference source not found. to this letter contains a series of photographs from within KAE's manufacturing facilities which help to demonstrate the differences in the production processes between typical Normal Models and then High-end Models for certain electronics products, including in 6 mm length, and sun roof products for the automotive industry.
- 4.13 These photographs emphasise the differences in the physical characteristics of the High-end Models as against the Normal Models, in terms of their dimensions, the processes used to manufacture the extrusions, and the differences in their outward appearances owing to the additional production processes that are applied to the High-end Models, such drilling, CNC milling, bending, and laser marking.
- 4.14 These photographs also show the higher levels of scrutiny with which the High-end Models are inspected, which lead to a greater proportion of goods being rejected and, therefore, lower yields. Finally, the photographs show the different methods of packing a typical Normal Model and certain High-end Models, which ensure that the goods are delivered to the customer in a suitable form.
- 4.15 Kam Kiu submits that these photographs support a conclusion that the High-end Models are different in nature to the Normal Models and have more in common with intermediate, semi-finished goods than with the Normal Models. The additional processes that have been applied to the High-end Models mean that they no longer possess the physical characteristics of an "aluminium extrusion". In the case of KAE's sun roof products, these are ready to be incorporated directly into the production of a final good, without requiring the customer to undertake further processing of the product.

(b) Assessment of rate of profit

- 4.16 In order to determine whether dumping has occurred, section 269TACB requires a comparison between the export prices and the normal values of the goods under consideration.
- 4.17 As the Commission is aware, an underlying principle for this comparison is set out in article 2.4, which requires a fair comparison to be made between an export price and a normal value. The text of that article is as follows:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are

also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

- 4.18 Kam Kiu submits that, by including the High-end Models in its profit calculations, when it would have excluded them had it determined a normal value pursuant to section 269TAC(1), the verification team has calculated a rate of profit for KAE that does not allow for a fair comparison to be made between the export price of the Goods and the constructed normal value that it has calculated.
- 4.19 Kam Kiu derives higher rates of profit from the High-end Models than it does from its other models. Further, these High-end Models are not exported to Australia. Therefore, the inclusion of the High-end Models in the verification team's profit calculations lead to an inflated constructed normal value against which the export prices for the goods *actually* exported to Australia are compared. The comparison of an inflated value against a non-inflated value cannot be said to be a "fair comparison".
- 4.20 This approach has the potential to lead to a flawed and unfair outcome in which any of KAE's competitors which do not manufacture models equivalent to the High-end Models—models which those competitors would be able to sell at a higher rate of profit in their domestic market—would have a lower rate of profit applied to their products by the Commission during its construction of a normal value in respect of their products. In this case, Kam Kiu's products would have a higher dumping margin applied to them upon their import into Australia and, despite potentially having the same cost to manufacture and sell as their competitors, and the same domestic profit margin on the equivalent products, be ultimately more expensive in Australia and price Kam Kiu out of the Australian market.

A hypothetical scenario

- 4.21 To illustrate this point further, it is perhaps worth considering a hypothetical scenario in which the alleged dumping (and therefore the goods under consideration) is of High-end Models, rather than Normal Models.
- 4.22 In this hypothetical, the foreign manufacturer produces both Normal Models and High-end Models, each of which it sells domestically, but only exports the High-end Models to Australia. As is the case for Kam Kiu, the foreign manufacturer in this hypothetical earns a higher profit margin in respect of its High-end Models than its Normal Models. Further, for the purpose of this hypothetical, assume that

these High-end Models are, in fact, being dumped into Australia by the foreign exporter.

- 4.23 If the Commission, in constructing a normal value in respect of the goods under consideration, were to treat the High-end and Normal Models as “like goods” for the purposes of section 269TAC(2), the profit margin applied in constructing the normal value—as calculated otherwise in accordance with regulation 45(2)—may result in an unrealistically low constructed normal value for the High-end Models. As a consequence, this could lead to an outcome where goods that are, in fact, being dumped are, nevertheless, not found to have been dumped by the Commission.
- 4.24 Presumably, in this scenario, domestic producers would be dissatisfied with this outcome and would submit that the profits derived by the foreign manufacturer from the domestic sales of their Normal Models should be excluded from the profit margins applied by the Commission when constructing a normal value.
- 4.25 Kam Kiu submits that that would, in this counterfactual scenario, be the appropriate course for the Commission to take, as it would allow a proper comparison between prices.
- 4.26 Similarly, Kam Kiu respectfully submits that, in respect of their High-end Models, it is not appropriate for these models to be included in the profit margins applied by the Commission in constructing a normal value for the goods under consideration, as this does not allow a proper comparison between prices.

Consequent reconsideration of “like goods”

- 4.27 If the Commission agrees with Kam Kiu that the inclusion of the profit margins earned by KAE on the High-end Models leads to an unfair comparison between the constructed normal values and the export prices, but nevertheless concludes that it is not open to the Commission to exclude those models for the purpose of regulation 45(2), under the assumption that they are “like goods”, then Kam Kiu submits that a narrower interpretation of “like goods” must be preferred by implication. That is to say, if the regulations indeed require the profit on *all* “like goods” to be considered, then goods that command higher profit margins on account of any additional characteristics that they possess (when compared to the goods under consideration) and which, therefore, prevent a fair comparison from being made, cannot fall within the scope of “like goods”. They are, perhaps, “goods in the same general category”, but they are not “like goods”.

5 Market situation finding

- 5.1 Kam Kiu notes the market situation finding discussed in section 7 of the Visit Report—which is mentioned briefly at paragraph 2.10 above. While Kam Kiu does not make any submissions in this letter regarding the Commission’s market finding situation, it respectfully reserves its right to do so before the conclusion of the Review.

14 August 2017

Anti-Dumping Commission

**ADC 392: Review of Measures – Aluminium Extrusions
exported from the People's Republic of China**



Should you have any queries in relation to these submissions, please do not hesitate to contact Andrew Korbel on (02) 9210 6537 or James Wood on (02) 9210 6221.

Yours faithfully

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