Percival Legal

Non-Confidential
28 June 2023

By Email

Dr Bradley Armstrong PSM
Anti-Dumping Commissioner
Anti-Dumping Commission
Melbourne VIC 3000

Dear Commissioner,

RE: Review 609 – Review of Anti-Dumping Measures on Exports of Aluminium Extrusion Products Exported from China – Submission on Statement of Essential Facts

As you know, I represent Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd (**KAE**) and Kam Kiu (Hong Kong) Limited **(KHK)** and their related bodies corporate (collectively, **Kam Kiu**) in relation to this review of the anti-dumping measures on exports of aluminium extrusion products from the People's Republic of China, Review 609.

I refer to:

- the File Note (**File Note**) placed on the Anti-Dumping Commission's (**Commission**) public file setting out the Commission's comparative assessment of KAE's response to the exporter questionnaire; and
- the Statement of Essential Facts published on 8 June 2023 (**SEF**) in relation to Review 609. and

on behalf of my clients, make the following submissions on the preliminary findings in the abovementioned documents.

1. Preliminary observations

It is unfortunate that the Commission did not more fully confer with my clients regarding its 'comparative assessment' of KAE's response to the exporter questionnaire nor provide it with a draft for their review to ensure accuracy and correctness of the facts and findings therein. Had this occurred, then errors in the File Note, including those detailed below, presumably could have been avoided.

For example, the preliminary finding that exports by KAE have entered into the commerce of Australia at dumped prices with a dumping margin of 41.1% is manifestly incorrect. If it were correct, then:

- the constructed normal value for KAE must be approximately 41.1% greater than the constructed normal value for the other three selected cooperative exporters

notwithstanding that the cost of the major raw material in the constructed normal value for each must be the same or similar; and/or

- the price at which KAE's exports enter into the commerce of Australia must be 41.1% less than the comparable prices of the other three selected cooperative exporters' exports on entry into the commerce of Australia.

Clearly this is absurd. There is no evidence of any comparison between the constructed normal values and prices of exports of the four selected cooperative exports on entering into the commerce of Australia that explains why the exports of three of the selected cooperative exporters were at un-dumped prices but those of KAE were at dumped prices with a significant dumping margin when all four exporters compete in the same markets?

It is unusual and surprising for an investigating authority to not investigate the reasons for such discrepancy in pricing between entities competing in the same markets, especially as their prices in those markets would need to be similar in order to be competitive.

In any event the reasons for the discrepancy were unexplained either in the File Note or, importantly, in the SEF.

In addition, there were mathematical errors in the Commission's calculation of both dumping and subsidy margin. These are detailed in **Confidential Attachment C** and the confidential spreadsheets referred to in that attachment. Both the dumping and subsidy margins, therefore, require recalculation and then will need to be reviewed again to ensure that errors have been corrected and further errors have not been made.

These errors are a matter of concern because they could have been avoided.

2. Dumping margin determination – summary

The dumping margin determination for Kam Kiu consisted of a comparison of 'deductive export prices' with a 'constructed normal value' of those deductive export prices.

Both the 'deductive export prices' and the 'constructed normal values' were the products of calculations made by the Commission. Neither was an amount actual paid by one person to another for the purchase of any goods as both were artificial constructs. Precisely what the comparison of those two artificial constructs was a measure of was not explained in the SEF but it was not a measure of the price at which exports of aluminium extrusions by Kam Kiu entered into the commerce of Australia upon importation and sale to Australian customers of KHK as a factual matter supported by evidence.

However, a comparison of the prices actually paid by KHK's Australian customers for aluminium extrusions exported to Australia when compared to the constructed normal value on a proper comparison discloses that those prices were not less, or materially less, than their constructed normal value.

This should have been the preliminary finding in the SEF, and not the erroneous preliminary finding that aluminium extrusions exported to Australia by Kam Kiu were at dumped prices for these reasons as further discussed below.

In this context it is perhaps useful to note that while the law may ostensibly permit what is done, it does not follow that what is done is sensible.

3. Dumping margin – export prices

Summary: The grounds for calculating a deductive export price did not exist because the operative cause of the sales by KHK to its Australian customers at a loss was the Australian Government's intervention into pricing in the Australian aluminium extrusion products market and, in particular, the application of the combination fixed and variable duty method in working out any interim dumping duty payable on Kam Kiu's exports.[1]

Regarding the dumping margin calculation and specifically the export price, the Commission determined that KHK was the importer because sales by it to its Australian customers were on a DDP basis. It further determined that such sales were at a loss and, because of that, the Commission calculated a deductive export price. It did not assess or consider why such sales were at a loss, that is, what caused KHK to sell at a loss to its customers.

There was, however, no evidence of 'hidden dumping' or that KHK would be reimbursed for losses it made on sales to its Australian customers either by KAE or anyone else. Nor was any reason proffered why any company in the Kam Kiu group of companies would reimburse KHK for any losses it made on its sales to its Australian customers. There is and would be no commercial or financial benefit on one member of the corporate group (i.e., KAE) reimbursing another member of the corporate group (i.e., KHK) for the latter's losses in its sales to its Australian customers and none was identified by the Commission. The revenue to the corporate group would be the same even if there any reimbursement.

No reason was given as to why sales at a loss rendered the transactions in question non-arm's length, nor why sales at a loss is relevant to dumping. Sales at a loss can still be at un-dumped prices. Profitability or otherwise is neither a measure nor determinant of dumping.

No enquiries were made by the Commission as to why KHK was selling to its Australian customers at a loss, nor were any enquiries made as to whether KHK would be reimbursed for any such losses either in whole or in part. There was, of course, no reimbursement.

However, the reason for KHK's pricing to its Australian customers is self-evident. The Australian Government intervened in the pricing in the Australian aluminium extrusion products market with the imposition of anti-dumping measures. The object of that price intervention was to increase prices in that market. This was achieved or to be achieved by the

[1] Similar such intervention in pricing in the domestic market in a country of export would inevitably lead to sales in such a market as being unsuitable for use, that is, it would create a 'particular market situation' of which there are recent examples.

imposition of anti-dumping measures increasing the prices of exports of aluminium extrusion products from, amongst other countries, China upon their entry into that market and thereby increase prices as a whole In the Australian market.

The is reflected in the following statement recently made by the Panel Member of the Anti-Dumping Review Panel (**ADRP**) in a letter to the Anti-Dumping Commissioner (**Commissioner**):

> "*It is worth reflecting on the theory underpinning the impact of taking anti-dumping measures. When dumping measures are imposed, it is expected that one of two behaviours result. Firstly, exporters will increase their prices to a non-dumped level increasing their own revenues and ceasing dumping. The domestic industry will no longer be subject to dumped prices and the market will return to one not affected by dumped prices as the exporter increases the price to the importer which flows through to the domestic market.*
>
> *Alternatively, if exporters do not increase export prices, importers subject to dumping duties (to the extent of the dumping), will have additional costs (the dumping duty) and will respond by increasing their prices onto the domestic market to reflect the additional costs. Again, it is expected that the domestic market will no longer be impacted by the dumped exports as the prices will rise to a non-dumped level. The price in the domestic market is increased by the extent of the dumping margin.*" (Letter to the Anti-Dumping Commissioner, 5 October 2022, ADRP Review No 155, page 6: 2022_155_aluminium_extrusions_-_request_for_reinvestigation.pdf (industry.gov.au)) (footnotes omitted)

While correct in theory, the above statement omits the effect that the actual duty method applied to work out the interim dumping duties payable on the importation of the exports the subject of the anti-dumping measures and the consequent effect that this has on the prices of those exports when entering into the domestic commerce the Australian market (i.e., upon importation into Australia).

There are two favoured duty methods for working out the interim dumping duty payable, namely, the floor price duty method and the combination fixed and variable duty method. These methods are set out in Section 5 of the *Customs Tariff (Anti-Dumping) Regulation 2013*, a copy of which is extracted at **Attachment A**.

The fixed price duty method is preferred either when there have been no exports for the purposes of determining a dumping margin such as in the case of a new exporter seeking a determination of variable factors in an accelerated review or when a negative or negligible dumping margin is determined for exports by a particular exporter or category of exporters.

The combination fixed and variable method, on the other hand, is preferred and is almost invariably applied when there is a positive dumping margin.

The first scenario referred to in the above extract from the Panel Member of the ADRP occurs when the floor price duty method is applied. The floor price is typically the normal value of the exports of the exporter in question, that is, the domestic selling price of like goods by the exporter in its country of export. So, if the exporter exports at export prices at or above that floor price, those exports are being exported at un-dumped export prices and would enter into the commerce of Australia at un-dumped prices, thereby achieving the objective of the anti-dumping measures. Similarly, if an exporter exports at export prices below the floor price, then interim dumping duties are payable on such exports on their importation into Australia in an amount equal to the amount by which the export price is less than the floor price. This has the effect of increasing the price of the exports on entering into the commerce of Australia (i.e., on importation) to an un-dumped price and, thereby again achieving the objective of the anti-dumping measures.

However, the position with the combination fixed and variable duty method is more complex. This can be illustrated by the following example. If it has been determined that the normal value of certain exports is $150 and they have been exported at dumped export prices (e.g., $100) so that the dumping margin is 50%, then applying this duty method can result in the following scenarios:

Scenario 1: the exporter exports at the ascertained export price (i.e., $100), resulting in the application of the fixed component of the duty method, that is, the 50% dumping margin to that export price so that $50 interim dumping duty is payable on the importation of the exports. This results in the exports entering into the commerce of Australia at an un-dumped price of $150; and

Scenario 2: the exporter increases its export prices and exports at export prices equal to the normal value (i.e., $150), that is, at un-dumped export prices, but this nevertheless results in the fixed component of the duty method, that is, the 50% dumping margin, being applied to that un-dumped export price so that $75 interim dumping duty is payable on the importation of the exports. This results in the exports entering into the commerce of Australia at a duty inclusive price of $225, which is well in excess of the un-dumped price of $150 by 50%. Clearly excessive.

The outcome of Scenario 2 would likely make the exporter's exports price uncompetitive on on-sale into the Australian market not because the anti-dumping measures have increased the price at which the exports enter into the commerce of Australia to an un-dumped level but because the anti-dumping measures have imposed interim dumping duties in excess of that required to prevent the injurious effects of dumping, that is above un-dumped levels, in this case by 50%.

Accordingly, the fixed component of the combination fixed and variable duty method effectively precludes exporters from increasing their export prices to Australia to un-dumped export prices (i.e., Scenario 2). That leaves Scenario 1.

However, in Scenario 1 the effect of deducting dumping duties when calculating a deductive export in a dumping margin determination is well recognised and was taken into account in negotiating the WTO Anti-Dumping Agreement. That is, it typically has the consequence of an exporter, when selling through related importers, has, in effect, to raise its export prices to twice the amount of the dumping margin originally imposed on the exports. A worked example of this consequence is set out in Edwin Vermulst's '*The WTO Anti-Dumping Agreement, A Commentary*'[2]. This effect apparently led to the inclusion of Article 9.3.3 in the WTO Anti-Dumping Agreement[3]. The principle contained in that Article is, amongst other matters, to not deduct the dumping duties paid when calculating the amount of a refund of duty when export prices have been calculated pursuant to Article 2.3 of the WTO Anti-Dumping Agreement to obviate these adverse effects. That is, to recognise that the product was entering into the commerce of the importing country at duty inclusive, un-dumped prices. There would seem no reason to adopt the same underlying principle here.

Nevertheless, the option in Scenario 1 is to export at actual export prices equal to the ascertained export price or to marginally increase actual export prices to above the ascertained export price recognising that the dumping margin will be applied on the greater of:

(i) the actual export price; and
(ii) the ascertained export price.

(See Section 5(3)(a) of the *Customs Tariff (Anti-Dumping) Regulation 2013*)

The 'actual export price' is, of course, the 'export price' determined for each shipment in accordance with Section 269TAB of the *Customs Act 1901*: see Section 4 of the *Customs Tariff (Anti-Dumping) Regulation 2013*, a copy of which is extracted at **Attachment A**. That 'actual export price' is, of course, different from the 'price' in an import sales transaction' used to determine the customs value of imports for other customs duty purposes: see Division 2 of Part VIII of the *Customs Act 1901* and the definitions in Section 154 of the *Customs Act 1901*.[4]

---

[2] E. Vermulst, '*The WTO Anti-Dumping Agreement, A Commentary*', Oxford Uni Press, Oxford, UK, 2005, at page177.

[3] Article 9.3.3 of the WTO Anti- Dumping Agreement provides as follows:

> "*In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided*."

[4] Whether the interim dumping duties paid on shipments cleared through customs by KHK were properly calculated on the 'export prices' between KHK and KAE, as opposed to the 'customs value' based on the 'prices' in the import sales transactions with KHK's Australian customers is being reviewed. It may be that they were incorrectly calculated and KHK would be entitled to a refund of a portion of the duty paid. It also would mean that the deductions of interim dumping duty paid in the dumping margin determination also were incorrect. If the interim dumping duty was wrongly calculated it is unclear how it could be correctly calculated

In the present circumstances, KHK was selling aluminium extrusion products produced by KAE to its Australian customers on a delivered, duty paid (DDP) basis. That is, the price paid by the Australian customers to KHK was inclusive of all customs duties, such as interim dumping duties, whatever the amount of those duties might be.

In other words, the price actually paid on the exports entering into the commerce of Australia (i.e., on importation) by Australian customers were un-dumped prices or, if dumped, were at dumping margins substantially less (i.e., <10%) than that preliminary determined. This is evident not only by the fact that KHK was selling such exports to Australian customers on a DDP basis but also from the Commission's own findings set out in its calculations in the dumping margin determination for such exports: see the Commission's **Confidential Appendix 4 – Dumping margin** spreadsheet. That is, the DDP price paid by KHK's Australian customers was not less than the constructed normal value for such exports or, if less, then by margins of less than 10%. Further, this was so notwithstanding increases in the constructed normal value from the normal value determined in Continuation Inquiry 543 due to, amongst other things, recent increases in LME aluminium prices in 2021 and 2022.

Sales at a loss here were not for reasons of so-called 'hidden dumping' as may be the case where an importer, unrelated to the exporter, on-sells to its customers in the domestic market of the importing country at a loss. Here, the prices at which the exports in question entered into the commerce of Australia were at duty inclusive prices and hence no 'hidden dumping'. That is, they included the interim dumping duty payable, which the Commission then deducted when calculating a deductive export price. Further, those duty inclusive prices were not 41.1% less than the constructed normal value calculated by the Commission, nor were they 41.1% less than prices by other selected cooperative exporters to their Australian customers or 41.1% less than prevailing prices of members of the Australian industry in the Australian aluminium extrusion products market.

Accordingly, the second situation referred to by the Panel Member of the ADRP in the above extract occurred in relation to Kam Kiu's exports to Australia, that is, they were being introduced, that is sold, into the Australian market at un-dumped DDP prices, thereby achieving the objective of the anti-dumping measures. This fact supported by evidence and, indeed, by the Commission's own calculations was not referred to in either the File Note or in the SEF. Like the exports of the other selected cooperative exporters, Kam Kiu's exports were entering into the commerce of Australia either at un-dumped prices or at dumped price with a margin of <10% so that, as stated by the Panel Member, "… *the domestic market will no longer be impacted by the dumped exports as the prices will rise to a non-dumped level. The price in the domestic market is increased by the extent of the dumping margin*".

In other words, the intervention of the Australian Government in the pricing in the Australian aluminium extrusion products market through the imposition of anti-dumping measures

given that the 'export price' between KAE and KHK, when determined under section 269TAB of the *Customs Act 1901*, is a 'deductive export price'?

seemingly achieved their intended effect, at least as regards Kam Kiu's exports, of increasing prices of such exports to un-dumped prices on their entry into the commerce of Australia.

Specifically, there is no evidence to the contrary that, given the volume of Kam Kiu's exports to Australia, the particular aluminium extrusion products Kam Kiu was supplying to its Australian customers[5] and the prices at which the products were actually entering into the commerce of Australia (i.e., the prices being paid by the Australian customers), the domestic market was not and could not have been adversely impacted by those exports whether at dumped or un-dumped prices. This is supported by the preliminary finding that exports by the other selected cooperative exporters and by the residual exporters, which made up the majority of exports from China, were at un-dumped prices and the fact that:

- the anti-dumping measures on exports from Vietnam and by certain exporters from Malaysia had been allowed to expire following Continuation Inquiry 591; and
- exports from other countries such as Indonesia and Thailand are at un-dumped prices not being subject to anti-dumping measures.

This is also reflected in the fact that the Australian industry is not and has not been incurring injury whether from import competition or otherwise but has been extremely profitable as reflected in publicly available documents such as their audited financial statements, half-year and annual reports, shareholder presentations and similar documents filed either with the Australian Stock Exchange (**ASX**) or with the Australian Securities and Investments Commission (**ASIC**) or available on their websites.[6] Nor is there any evidence that this is likely to change in the foreseeable future. Clearly the prices at which imports are entering into the commerce of Australia and, specifically, exports from China at un-dumped prices are not adversely affecting the Australian industry. There is no evidence to the contrary.

If, in the case of Kam Kiu's exports, the objective of the anti-dumping measures was being achieved, that is, its exports were entering into the commerce of Australia, that is, on importation, at duty inclusive, un-dumped prices, why wasn't this referred to either in the File Note or in the SEF?

In this regard, the fact that KHK's transactions with its Australian customers may have been at a loss is irrelevant. It is irrelevant because the prices paid by the Australian customers were un-dumped prices, that is, those prices were not less than the constructed normal value for

[5] The Model Control Codes (MCCs) on which the dumping determinations are based do not refer to models of actual products but refers to categories of unidentified products according to the aluminium alloy from which the product is extruded and the finish that is applied to the product rather than to individual products for the reasons set out in Report 362.

[6] For example, Capral's Half Year Reports, Annual Reports and Shareholder presentations are available on its website: Annual Reports | Capral Aluminium and Result Presentations | Capral Aluminium. Financial Statements of a number of other members of the Australian industry are publicly available from ASIC via the ASIC website, being the financial statements required to be filed pursuant to the *Corporations Act 2001 (Cth)*. No doubt ASIC would provide copies to the Commission on request for the purposes of, for example, this review.

such exports or, if they were, only marginally. So long as those prices were not less the constructed normal value, then whether they were profitable or not is irrelevant – profitability or otherwise of sales transactions is not a determinant of dumping and KHK's prices to its Australian customers were un-dumped prices or, if dumped, at margins of <10%.

If, on the other hand, the floor price duty method had been applied to Kam Kiu's exports instead of the combination fixed and variable duty method, then the interim dumping duty paid by KHK on exports on importation into Australia would have constituted additional revenue to it and, thereby, render its transactions with its Australian customers profitable. This is evident from the Commission's own calculations[7]. What rendered the transactions unprofitable was in fact the duty method being applied. With the floor price duty method, the same price would have been payable by the Australian customers, an un-dumped price. But the transactions would have been profitable for KHK. Accordingly, export prices would not have been determined under Section 269TAB(1)(b) of the *Customs Act 1901*.

In any event, by imposing anti-dumping measures and, in Kam Kiu's case, in the application of the combination fixed and variable duty method, the Australian Government has entered into the Australian aluminium extrusion products market with the objective of deliberately and transparently influencing and affecting prices in that market including, specifically, the prices of exports entering into that market such as Kam Kiu's exports to the extent set out above. That sales to KHK's Australian customers may have been at a loss is not a matter for complaint by the Australian Government so long as the interim dumping duties payable are paid and are passed on in the price to the Australian customers, which they were in the DDP prices. Whether and to what extent sales were at a loss to KHK is a commercial decision for KHK, not the Australian Government.

Given the Australian Government's intervention into pricing in the Australian aluminium extrusion market and the consequent effect it has had on Kam Kiu's prices on entering into the domestic commerce of Australia, it would seem arguable that those prices are unsuitable for use in the dumping determination in this review. Accordingly, not dissimilar to the position in an accelerated review when there are no exports to Australia, the floor price duty method should be recommended for Kam Kiu's exports.

This would not only achieve the objectives of the measures, namely, of Kam Kiu's exports entering into the commerce of Australia at un-dumped prices but also enable KHK's sales to its Australian customers to be profitable.

Conclusion: *either Kam Kiu's export prices are unsuitable for use in determining a dumping margin due to the Australian Government's intervention and influence on such prices through the imposition and application of the anti-dumping measures or, alternatively, the effect of such intervention must be taken into account pursuant to Section 269TAC(8)(c) of the Customs Act 1901 when comparing the deductive export prices with the constructed normal values to*

[7] Refer to the Commission's Confidential Appendix 6 – Profitability of imports.

ensure a 'proper (fair) comparison'. Further, the proposed duty method to be recommended for Kam Kiu's export should be the floor price duty method for the reasons given.

4. Dumping margin – normal value – fair comparison

Summary: as the 'base prices' from which the deductive export prices were derived as well as the deductive export prices themselves were affected and 'modified in different ways by taxes or the terms or circumstances of the sales to which they related', a range of adjustments was required to the constructed normal values when being compared to the deductive export prices to ensure a 'proper (fair) comparison' that were not made.

A constructed normal value was calculated for each selected cooperative exporter due to the preliminary finding that a 'particular market situation' existed in China as regards the price of aluminium in China due to government intervention and influence on prices of aluminium in China: refer Appendices A & B to the SEF.

The constructed normal value for Kam Kiu was compared with the deductive export prices to determine the dumping margin for Kam Kiu's exports. However, in making that comparison, account was apparently not taken of the fact that the 'export prices' to which the constructed normal value was being compared were in fact 'deductive export prices' based on the negotiated and agreed DDP prices between KHK and its Australian customers. In negotiating and agreeing those prices, those prices and the deductive export prices derived from those prices, of course, were '*modified in different ways by taxes or the terms or circumstances of the sales to which they relate*d'.

That is, in calculating the deductive export prices from the DDP prices negotiated, agreed and paid by KHK's Australian customers, which prices, being DDP prices, were obviously affected by the Australian Government's pricing intervention in the form of the anti-dumping measures , the Commission deducted various costs from those prices, including the interim dumping duties paid, KHK's general selling and administrative expenses and KHK's profits so as to derive the 'deductive export prices' between KAE and KHK. Those deductive export prices, of course, were not actual prices the amounts of which were paid by KHK to KAE but an artificial construct calculated by the Commission and, as such, were '*modified in different ways by taxes or the terms or circumstances of the sales to which they relate*d'.

The fact that both the 'base prices' (i.e., the prices paid by KHK's Australian customers) and the deductive export prices were modified by factors not present in China, that is, in the calculation of the constructed normal values, does not appear to have been taken into account in the comparison between the deductive export prices and constructed normal value.

Also, not taken into account is the fact that sales in the domestic market would be and were at a different level of trade, namely, to distributors and not to an intermediary, trading company such as KHK. It is unsurprising that a comparison of prices at different levels of trade reveal a material difference in prices with one being greater than the other. Hence the pricing to distributors, including profit to be realised on such transactions, would be markedly

different than the sales by KAE to KHK, as would a number of other costs including interim dumping duties. Rather, the equivalent level of trade for comparison are the sales by KHK to its Australian customers as they are distributors and prices to them would reflect that level of trade.

Accordingly, a range of adjustments were required pursuant to Section 269TAC(8)(c) of the *Customs Act 1901* to effect a 'proper (fair) comparison' between the deductive export prices and their constructed normal values.

The issue, therefore, is what adjustments are required to made to the constructed normal value to make a proper (fair) comparison with the deductive export prices? It is submitted that the following deductions, at least, are required:

(i) an amount equal to KHK's SG&A and profit margin to take account of the level of trade difference, that is KAE's sales to KHK are to a trading company, whereas sales to entities in China are distributors;

(ii) an amount equal to the interim dumping duties paid because such taxes are not payable in sales to entities in China who, again, are distributors.

Conclusion: *if 'deductive export prices' are persevered with, then the abovementioned adjustments, at least, were and are required to be made to the constructed normal values when being compared to the deductive export prices to ensure a 'proper (fair) comparison'.*

5. Duty methods for working out interim dumping duty

Summary: the combination fixed and variable duty method should not be the recommended duty method for Kam Kiu's exports because the 'actual export price' on which that method depends for its application is a deductive export price but a deductive export price cannot be determined in advance of working out, for example, the interim dumping duties to be deducted in the calculation of such a price.

The duty method for working out any interim dumping duty payable on exports by Kam Kiu is currently the combination fixed and variable method, which has the effects as described earlier above, as compared with the floor price duty method applying to other selected cooperative exporters.

The Commission is preliminary proposing to recommend that the combination fixed and variable duty method continue to apply to Kam Kiu's exports. With respect, that proposed recommendation is misconceived and wrong for the reasons set out below, as well as those discussed earlier. Rather, the appropriate duty method, if any, would be the floor price method that is proposed be recommended for the other selected cooperative exporters and residual exporters.

As is stated in the Foreword to the Commission's Dumping and Subsidies Manual each case is to be considered on its merits and that must be the case here.

First, the application of the combination fixed and variable method is impractical administratively. The dumping margin preliminary determined for Kam Kiu was based on a deductive export price determined pursuant to section 269TAB(1)(b) of the *Customs Act 1901*. In applying the fixed component of the combination fixed and variable duty method to Kam Kiu's exports, it will be necessary to determine the 'actual export price' of such exports, which Section 4 of the *Customs Tariff (Anti-Dumping) Regulation 2013* states is the 'export price' determined under section 269TAB of the *Customs Act 1901*: refer **Attachment A**. Presumably that would require a determination of a 'deductive export price', as has been determined in this review, but it is unclear how that could be determined when amounts to be deducted such as for interim dumping duty and overseas freight and port charges are not known when the base price, that is, the price to the Australian customers, was set (i.e. when negotiated and agreed) as they would have not been incurred at that time. That is the actual amounts to be deducted, the ' prescribed deductions' pursuant to Section 269TAB(2) of the *Customs Act 1901*, would not be known in order to determine a deductive export price until actually incurred.

Precisely, therefore, what would be the 'actual export price' for the purposes of Section 3(a)(i) of the *Customs Tariff (Anti-Dumping) Regulation 2013*, nor how it would or could be determined for the purposes of applying the combination fixed and variable duty method is not apparent, nor explained in the SEF. This issue is not addressed in the Commission's proposed recommendation, nor does the Commission appear to have turned its mind to this question in the SEF.

This issue also would seem to arise regardless of what duty method is recommended. That is, it arises because each duty method depends upon determining the 'actual export price' of each shipment under Section 269TAB of the *Customs Act 1901* in order to work out the interim dumping duty payable. This would seem dependent upon the 'export price' being the same as the 'customs value', that is the 'price' payable in the relevant 'import sales transaction' to which customs duty rates are applied to work out the customs duty payable[8].

If the 'export price' and 'customs value' are different, such as when the 'export price' is the price paid to the exporter by an entity other than the importer, then the 'customs value' cannot be used for working out the interim dumping duty payable as it is not the 'export price'. That is, the 'export price' for a shipment is not necessarily the 'price' at which those goods enter into the commerce of Australia (i.e., import price), especially when the 'export price' is referable to a transaction occurring prior to the importation of the goods into Australia and, therefore, not necessarily the transaction for the importation of the goods into Australia, as opposed to its exportation from the country of export.

How interim dumping duty is to be worked out in such or similar circumstances is not apparent given that the importer making the import declarations to clear the shipment in question

[8] Refer Division 2 of Part VIII of the *Customs Act 1901*.

through customs would not necessarily have or have access to the confidential information necessary to establish the 'actual export price' of the shipment.

These and related issues were not addressed by the Commission in the SEF in its proposed recommendations for the duty methods to work out interim dumping duties.

Here the relevant 'export' transactions as determined by the Commission are the transactions between KAE and KHK. Those transactions are transactions for the sale and purchase of goods between two entities in China to be performed in China. The prices paid by KHK to KAE for goods supplied under those transactions to it in China are not the prices at which the goods in question enter into the commerce of Australia – simple question of fact. The prices at which those goods enter into the commerce of Australia are the 'prices' in their 'import sales transactions'[9], that is, the prices paid by KHK's Australian customers to KHK. This would be the 'customs value' declared on import declarations but, obviously, there are not the 'actual export prices' to which a dumping margin is to be applied.

If, because here KHK is the importer and has access to information necessary to determine the actual export price of shipments in accordance with Section 269TAB of the *Customs Act 1901*, the issue then is how should such export prices be determined? Should it be the actual price paid by KHK to KAE or should it be a deductive export price calculated in a manner consistent with the deductive export prices that the Commission has calculated in this review and, if the latter, how is such a calculation to be undertaken when certain of the costs to be deducted have not yet been incurred and are dependent upon that calculation?

That is, how is a dumping margin to be applied to work out the interim dumping duty payable when, here, the 'deductive export price' has not been determined and cannot be determined until the interim dumping duty payable, amongst other costs, has been worked out, which requires the 'deductive export price'. This is not addressed by the Commission in recommending the combination fixed and variable duty method for Kam Kiu. It requires addressing.

In this context, it must be noted that if, for the purposes of working out any interim dumping duty payable on shipments by Kam Kiu, the combination fixed and variable duty method were to be continued to be used and the dumping margin were to be applied to the export price as last ascertained (i.e., the ascertained export price in this review), then the effect would be that the prices payable by the Australian customers to KHK, being a duty inclusive (DDP) price, it would be essentially the same as the price currently payable by the Australian customers, as is evident from the Commissions own calculations.

This would be the outcome because applying the dumping margin to the 'ascertained export price' (i.e., to the weighted average deductive export price determined in this review) would uplift that 'ascertained export price' to an amount equal to the 'constructed normal value' and that 'constructed normal value' would or should reflect the prices payable by KHK's

[9] See definition of 'price' and 'import sales transaction' in section 154 of the *Customs Act 1901*.

Australian customers or vice versa. This demonstrated by reference to the Commission's dumping margin calculations in **Confidential Appendix 4 – Dumping margin**. In **Tab (b)** of that spreadsheet. If the amounts of interim dumping duty paid are deducted from **Column CD**, then the margin falls to <10%. In other words, instead of the interim dumping duties being deleted as a cost, that portion of the purchase price paid by the Australian customers is retained as revenue for Kan Kiu. Not only does this make KHK's sales profitable but effectively reduces the dumping and subsidy margin, if any, to less than 10% …

If the other deductions made in **Columns CE and CF** in **Tab (b)** of **Confidential Appendix 4 – Dumping margin** are deducted, then the dumping and subsidy margin falls to <2% or no dumping or subsidy margin. It effectively converts the transaction to an FOB sale between KAE and the Australian customers similar to the transactions between the other selected cooperative exporters and their Australian customers with the same dumping outcome.

For these reasons the proposed duty method for Kam Kiu should be the same as for the other selected cooperative exporters so that Kam Kiu is not unfairly disadvantage when it is self-evident that its exports, on entering into the commerce of Australia, are at the same or similar prices as other exporters in China and are effectively un-dumped. That is, it should be the floor price duty method, which result in KHK's transactions being profitable as well as its exports entering into the commerce of Australia at un-dumped prices.

The floor price duty method is the appropriate duty method because it would set a floor price for Kam Kiu's exports such that if the 'price' at which such exports enter into the commerce of Australia (i.e., on importation, being the price paid by KHK's Australian customers) is at or above the constructed normal value determined for Kam Kiu, then no interim dumping duty would be payable. If, however, the 'price' is below that constructed normal value, then interim dumping duty would be payable in an amount to the extent that such price is less than the constructed normal value.

This would ensure the Kam Kiu's exports would continue to be entering into the commerce of Australia at un-dumped prices, that is, achieving the objectives of anti-dumping. It also is consistent with the duty method being proposed for the other selected cooperative exporters and residual exporters.

However, the problem remains as to what that floor price would be for Kam Kiu's exports and, in particular, how the 'export price' for particular shipments is to be determined under Section 269TAB of the *Customs Act 1901* so that Kam Kiu can ensure that those actual 'export prices' equal or exceed that floor price.

That problem exists because of the apparent disconnect between export prices, which are determined by, essentially, reference to the price payable to the exporter for the exportation of the goods in question from the exporting country, whereas dumping duties, being a special duty of customs, are levied on the importation of the goods into the importing country with the duty payable being calculated on the price for the importation of the goods. The price for

export and the price for import can be different prices for the same goods. Hence the disconnect.[10]

The issue is how is that disconnect to be addressed in the application of the duty methods. That is not addressed in the Commissions proposed recommendations to the Minister in the SEF and it would seem relevant to the recommendations as to the appropriate duty method.

The Commission's advice and guidance, therefore, is requested in this regard as it is not apparent how an 'actual export price' for a shipment can be determined for the purpose of applying a duty method if it is not an actual amount paid or payable by one party to another but, as has been determined for Kam Kiu in this review, a calculated amount that is not in fact paid by KHK to KAE for the exports in question. How is a dumping margin to be applied to an 'actual export price' that does not exist and cannot be calculated in accordance with Section 269TAB(1)(b) of the *Customs Act 1901* because, amongst other things, the 'prescribed deductions' have not been incurred at the time the calculation is required.

Conclusion: it is submitted that the appropriate duty method for Kam Kiu's exports is the floor price method because it would avoid the adverse consequences of the combination fixed and variable duty method while at the same time achieving the objectives of the anti-dumping measures. However, the Commission's advice and guidance is required on the administration of a floor price, as well as other duty methods, and on determining the 'actual export price' under Section 269TAB of the Customs Act 1901 for the purposes of applying a duty method in Kam Kiu's circumstances.

6. Dumping margins – particular market situation - constructed normal values – implications

In determining dumping margins for each of the selected cooperative exporters, a constructed normal value was calculated for comparison with the deductive export prices.

The reason for calculating constructed normal values was because it was determined that a 'particular market situation' existed in China in relation to the major raw material used to produce aluminium extrusion products, namely, aluminium. The preliminary finding of a 'particular market situation' was due to the intervention and influence of the Government of China on prices for aluminium in China: see Appendix A to the SEF.

It is unclear precisely what effects that the Government of China had or may have had on aluminium prices in China or their consequent, flow-on effects to the prices of aluminium extrusions in China, especially given that, according to Capral Limited (**Capral**) in its application aluminium prices in China, the SHFE aluminium prices were higher than LME aluminium prices:

[10] This disconnect is also reflected in the Trade Remedy Index (Trade remedy index (TRINDEX) | Department of Industry, Science and Resources) that tracks '*monthly index figures, using **import** volumes and prices indexed against the relevant base year*' presumably obtained from Australian Bureau of Statistics import data. That is, it tracks 'import' data, not 'export' data but, presumably, for anti-dumping purposes it is 'export' data that is relevant and not data relating to the prices and volumes of goods entering into the commerce of Australia?

see **Attachment B**. This lack of certainty was in fact acknowledged by the Commission in the SEF:

> "The commission recognises the impact of these GOC influences on supply are **extensive, complex, and multifarious, and their impact on the price of aluminium extrusions is difficult to quantify**. However, based on the commission's extensive analysis, and best available information, the commission has concluded these influences have caused a **likely material impact** on the domestic price of aluminium extrusions in the review period." (emphasis added) (SEF, page, 89)

Essentially, therefore, the effect and extent of any effect of the 'particular market situation' is not known or, at least, sufficiently to be quantified, which, presumably, is the same thing.

In any event, this indeterminate effect of Government of China intervention and influence apparently flowed through to the aluminium extrusion products market in China where it was determined that market conditions did not prevail (i.e., prices were artificially low), thereby precluding a 'proper comparison' between normal values based on domestic selling prices in China with export prices: see Appendix B to the SEF. Specifically, the effect of the 'particular market situation' preliminary found to exist in China apparently had the following effect:

> "*Based on the information before the commission, the effect of the market situation on the domestic sales prices in China does not result in any competitive advantages or disadvantages between the key market players, being Chinese producers. Consequently, this particular market situation modifies the conditions of competition in a consistent manner for the key market participants.*
>
> *In Australia, where no market situation or input cost decrease exists, competitive pricing prevails at a higher level. Higher input costs for those participants producing without the benefit of a market situation establishes a higher minimum threshold for competitive prices. Under these circumstances, the effect of the particular market situation in China on the price of aluminium extrusions sold into the Australian market results in competitive advantages and disadvantages between market players.*
>
> *Specifically, Chinese exporters enjoy a cost advantage that either manifests as an increased margin at the prevalent level of competitive pricing in the Australian market, a low export price that undercuts the prevalent level of competitive pricing, or a combination whereby the Chinese manufacturer can enjoy a higher margin while still undercutting other market participants. The effect of the particular market situation on export price is to modify the conditions of competition in Australia to the benefit of Chinese exporters and, to the extent that benefit manifests as a low price that undercuts the prevalent level of competitive pricing in Australia, to the detriment of all other market participants in that market.*

Consequently, and consistent with findings made in REP 543, the relative effect of the particular market situation on domestic and export prices is different in the relevant markets."[11] (page 97 of the SEF)

In summary, it would seem that exports of aluminium extrusion products from China possessed a competitive comparative advantage over domestically produced aluminium extrusions in Australia due to Australia being a high cost, high price jurisdiction. However, that analysis is flawed and flawed as evidenced by the Commission's own preliminary findings.

First, the competitive comparative advantage that producers/exporters in China apparently possess due to the particular market situation is, in fact, repudiated by the Commission's preliminary dumping margin determinations. Those dumping margin determinations were based on constructed normal values that, in turn, were calculated so as to eliminate the effects of the so-called particular market situation. Having done so, the preliminary dumping margin determination for three of the selected cooperative exporters and, consequently, for all of the residual exporters, was a preliminary finding that their exports were not a t dumped export prices. In other words, having taken into account the particular market situation in the constructed normal value calculation, exports by those exporters were neither dumped nor,

[11] Note: it is incorrect to state as is stated in the extract that 'no market situation' exists in Australia. A 'market situation' does exist in Australia. It just does not exist to decrease the cost of inputs to manufacture aluminium extrusion products or to reduce the prices of aluminium extrusion products. Australian government policies, practices and legislation operate to intervene in and influence the cost of inputs to manufacture, such as energy, labour, land and generally the cost to make and sell aluminium extrusion products and the prices of aluminium extrusion productions such as the anti-dumping measures. The effect of such government intervention and influence is that both the cost to make and sell aluminium prices in Australia and the prices of aluminium extrusion products in Australia are artificially high and do not reflect global benchmarks, especially when compared with producers in the Asia-Pacific region. This is in fact acknowledged in Appendix B to the SEF and in the above extract from that Appendix so that Australian producers are at a comparative competitive disadvantage. That comparative competitive disadvantage created by the particular market situation cannot be remedied by a protective customs tariff barrier in the form of anti-dumping measures: refer the Productivity Commission's '*5-year Productivity Inquiry: A competitive, dynamic and sustainable future*' (Report No 100) (7 February 2023), especially Volume 3: see Advancing Prosperity - 5-year Productivity Inquiry report - Productivity Commission (pc.gov.au) The Australian aluminium extrusion industry is not alone in this respect. Australian government intervention and influence also purportedly affected the costs of inputs to a manufacture and prices in a number of Australian industries as the dumping and subsidy investigations into those industries exports to the People's Republic of China revealed, at least according to the Government of China, and in the Australian A4 Copy Paper industry as found by the Commission in Review 551 in a comparison between the Indonesian and Australian A4 Copy Paper markets (refer Section 4.6.3 of Report 551: 551 - 055 - report - final report - rep 551.pdf (industry.gov.au)).

It also is incorrect to assert that the comparative competitive advantage that producers/exporters in China may possess over other participants in the Australian aluminium extrusion products market without undertaking a comparative assessment of prevailing economic conditions in each country where aluminium extruded products are being produced and exported to Australia. That assessment has not been undertaken and, accordingly, the SEF is deficient in this regard – it presents a distorted view of the comparative competitive advantage or disadvantage of suppliers of aluminium extrusion products to the Australian market without the necessary economic analysis.

as asserted, conferring on their exports a comparative competitive advantage due to the particular market situation.

The exception to this, the dumping margin determined for Kam Kiu, is explicable, for the reasons discussed earlier above, as being due to the duty method applied to its exports, the combination fixed and variable duty method. The application of that duty method was unique to it amongst the investigated exporters, with the others having the floor price duty method applied to their exports. The other difference was in the nature and structure of transactions between the other selected cooperative exporters with their Australian customers and that of Kam iu with its Australian customers – that is, the former being direct sales to the Australian customers, whereas Kam Kiu's sales were through a trading company in China. However, that difference in transaction structure did not result in a material difference in prices to the Australian customers or, in other words, the prices of the exports on entering into the commerce of Australia. This appears to have escaped the attention of the Commission or, at least, no material difference was identified that conferred a competitive advantage of one structure of transactions over another.

Hence the difference in outcomes in this review, which difference has nothing or little do with their respective pricing of their exports on entering into the commerce of Australia.

Second, the comparative competitive disadvantages of the Australian industry, if it existed, was due to the Australian producers and market being a high cost, high priced jurisdiction notwithstanding that prices for aluminium extrusion products are governed world-wide, including in Australia, by LME aluminium prices and MJP premiums or their equivalent. No assessment was undertaken as to whether the high costs and therefore, the high prices of domestically produced aluminium extrusion products in Australia was due to intervention and influence of Australian governments and other institutions in the cost of various inputs to manufacture in Australia, such as energy, labour, land, water, etc., nor any benchmarking of Australian producers cost to make and sell against international benchmarks: see footnote 11 above. Nor was there analysis of the Australian industry's pricing when compared with that of prices of aluminium extrusions products sourced from countries overseas. Other anti-dumping inquiries have found that the Australian industry's prices have been less than that of exports in the Australian aluminium extrusion products market despite the Australian industry being a high cost, high priced industry. Such price differences can be due to a range of factors none of which are related to dumping.

Third, the analysis in Appendix B of the SEF refers to the market conditions of the Australian aluminium extrusion products market. However, exporters do not compete in and supply product in the Australian aluminium extrusion market. By definition, exporters compete with one another in global export markets, not in domestic markets of importing countries. Hence the difference between, for example, prices for aluminium extrusion products in Australia and prices in global markets, which presumably is also why Australian producers do not or cannot compete in global markets. Accordingly, the extent of competition in the Australian domestic aluminium extrusion products market is not relevant whether a proper comparison is possible

between prices in China and export prices. The Australian domestic aluminium extrusion products market is not the relevant market. The relevant market or markets is/are the export markets in which exporters and export compete with other exporters and exports.[12]

In any event, the Commission's preliminary findings in Appendices A & B of the SEF would seem intended to overcome the problem that occurred in relation to A4 Copy Paper being exported from Indonesia following the WTO Panel's finding in '*Australia – Anti-Dumping Measures on A4 Copy Paper*' (WT/DS529/R) (4 December 2019), Specifically, the finding of a particular market situation and its implications for a 'proper comparison' between normal values and export prices. It was subsequently found and accepted by the then Minister in Review 551 that while a particular market situation existed in Indonesia in relation to the supply of wood, wood chips and pulp for the production of A4 Copy Paper, an open competitive market for A4 Copy Paper nevertheless existed in Indonesia, thereby enabling a 'proper comparison' of prices in that market with export prices to Australia.

However, in this review, the consequence of the preliminary findings regarding a 'particular market situation' in China was that the Commission has preliminary found that the particular market situation precluded a 'proper comparison' between domestic selling prices of aluminium extrusion products in China with export prices to Australia and, hence that normal values could not be determined under Section 269TAC(1) of the *Customs Act 1901*. Instead 'constructed normal values' were determined. This is the effect of the outcome of the findings in Appendices A & B of the SEF.

The importance of this finding and the determination of constructed normal values for all selected cooperative exporters is that the major cost used in those calculations is the cost of aluminium and the cost of aluminium used in the calculations was the unprecedented historically high LME aluminium price during the review period as evidenced in the graph at **Attachment B**. Accordingly, regardless of whether the dumping margins preliminary determined are positive, negative or negligible or, if positive, whether the margin is 41.1% or less and regardless of which duty method is used to work out any interim dumping duty payable on exports from China on importation into Australia, all exports from China will need to be not less than the applicable constructed normal value to avoid or minimise the liability for interim dumping duty.

Where a positive dumping margin exists and the combination fixed and variable duty method applies, then exports exported at the ascertained export price will attract the fixed component of the duty method to uplift that ascertained export price to an un-dumped price equivalent to the applicable constructed normal value (i.e., again the effective 'floor price'). However, if such exports are at export prices equal to the constructed normal value (i.e., at un-dumped export prices), then the fixed component of the interim dumping duty will still be payable but calculated on the un-dumped export price.

[12] For principles in identifying 'markets' see: Bruce, A., '*Australian Competition Law*', #rd Ed, LexisNexis Butterworths, Sydney, 2018, Chapter 3 and cases cited therein.

Similarly, where a negative or negligible dumping margin exists and the floor price duty method exists, then exports exported at or above that floor price, which would be the constructed normal value, would attract no interim dumping duty. However, if exported below that floor price, interim dumping duty would be payable in an amount by which the export price is less than the floor price so as to uplift the export price to the floor price (i.e., constructed normal value).

In other words, all exports from China should be entering into the commerce of Australia at prices not less than the applicable 'constructed normal values' and those constructed normal values would be based in the unprecedently high LME aluminium prices and MJP premiums. Hence those constructed normal values would operate as an effective 'floor price' regardless of the dumping margins and regardless of the duty method used to work out interim dumping duties. That is, prices of exports from China on entering into the commerce of Australia (i.e., on importation) would be increased to at least the applicable constructed normal values and this, in turn, consistent with the views expressed by the Panel Member of the ADRP extracted earlier above would increase prices in the Australian aluminium extrusion products market commensurately.

The significance of requiring exports from China to enter into the commerce of Australia at prices not less than the applicable constructed normal values is that if LME aluminium prices and MJP premiums fall from those historically high levels, as they already have, then exporters from China will be precluded from adjusting their export prices downwards commensurately without attracting liability for interim dumping duty or additional liability for interim dumping duty.

That inability to adjust export prices downwards in such circumstances would obviously have an adverse competitive effect on exports from China, potentially excluding them from the market.

This gives rise to several issues, namely:

(i) whether, given that LME aluminium prices have fallen substantially from the unprecedent historically high levels during the review period, the constructed normal values and ascertained export prices, amongst other things, will be revised and updated to reflect current LME aluminium prices that are more in line with historic LME aluminium prices; and

(ii) whether the foregoing gives rise to competition issues in so far as the revision of the measures seeks to excludes exports from the Australian market by setting high tariff barriers based on unprecedent historically high LME aluminium prices and not to prevent or remove the injurious effects of dumping as there is no injury being caused by dumping, as well as administrative law issues such seeking variation of the anti-dumping measures for an improper purpose; and

(iii) whether the exclusion of competitive exports from China is in the national interest by maintaining high prices for aluminium extrusions products for the construction industry and the consequent affordability of, for example, residential dwellings.

These issues are addressed in the subheadings below.

Revision and updating of variable factors since the review period

The review period for this review of anti-dumping measures, Review 609, is the 12-month period 1 July 2021 to 30 June 2022. That review period was characterised as a period of unprecedented historically high LME and SHFE aluminium prices and MJP premiums. For example, according to Capral in its application for this review, LME and SHFE aluminium prices increased from about US$2,000 per tonne to about US$3,000 per tonne during 2021 to 2022: see screenshot at **Attachment B**.

As these are the principal determinants of the prices of aluminium extruded products, the historically high level of LME and SHFE aluminium prices and MJP premiums has had a major effect on the prices of aluminium extrusion products in both Australia and China and globally.

However, since the review period, those historically high level of LME and SHFE aluminium prices and MJP premiums have fallen and fallen back to historically typical levels.[13] Consequently, the prices of aluminium extrusion products also have fallen commensurately in both Australia and China, but this is not being and will not be reflected in the determination of the variable factors in this review unless updated.

It is submitted that because the Commission is on notice that:

(i) LME and SHFE aluminium prices and MJP were at unprecedent historically high levels during the review period and that this consequently flowed through to the prices of aluminium extrusion products in both Australia and China; and

(ii) those historically high level of LME and SHFE aluminium prices and MJP premiums have since fallen, as also have the prices of aluminium extrusion products in Australia and China commensurately,

so that variable factors determined on information and evidence relating to pricing during the review period is now considerably out-of-date and requires updating to be meaningful. It is submitted that the Commission should do this is as a matter of priority. Should the Commission need updated information and evidence from the selected cooperative exporters, such information presumably could be readily provided as it would consist only of updating information already provided and verified, but presumably it would be confined to update LME aluminium prices and MJP premiums that are publicly available.

[13] Current LME and SHFE are publicly available from a variety of sources including from the LME's and SHFE's websites: see: LME Aluminium | London Metal Exchange and Aluminum (shfe.com.cn)

The Australian industry, including Capral, could or should not object to the information on which the variables are being determined be updated in the circumstances to current information. For example, in its application Capral expressed concern that exports from China were not fully reflecting LME aluminium prices in their FOB prices for aluminium extrusion products exported to Australia: refer page 8 of Capral's application: If there has been a decrease in LME aluminium prices, consistent with that expectation, this also should be fully reflected in the FOB prices of aluminium extrusion products exported to Australia and that this be reflected in the dumping margin determinations in the interests of 'free and fair trade' of which members of the Australian industry such as Capral have advocated.

The alternative is, of course, for interested parties, such as exporters and importers including Kam Kiu, to apply for a review of the anti-dumping measures prior to the publication of a notice advising of the outcome of this review, which they are currently statutorily entitled to do.

Competition issues

It is and has been well-established and public knowledge that prices for aluminium extruded products both in Australia and in other countries are principally determined by aluminium prices and, specifically, LME aluminium prices or, in the case of China, SGFE aluminium prices and MJP premiums.

Since 2020 those prices and premiums have increased to historic unprecedent levels to the levels reached during the review period in this review as depicted in the graph in Capral's application for the continuation of the anti-dumping measures: see extract at **Attachment B**.

In determining the variable factors of exports from China based on those historically high unprecedented levels and then applying anti-dumping measures to exports from China, whether using the combination fixed and variable duty method or the floor price duty method, the outcome will be the same. That is, interim dumping duties will be payable to the extent that export prices are less than the constructed normal value. Regardless of which duty method is used, the object will be to ensure that exports from China enter into the commerce of Australia at prices not less than the constructed normal value applicable to those exports. That is, ensuring that such exports enter into the commerce of Australia at un-dumped prices, namely, not less than their constructed normal values. Those constructed normal values, of course, are based on the historically high and unprecedent LME aluminium prices and MJP premiums.

Accordingly, when LME aluminium prices and MJP premiums fall from those historically high levels, which has already occurred, exporters from China will not be in a position to commensurately reduce their export prices to reflect that decline. To do so would necessarily result in interim dumping duties being incurred to the extent that export prices fall below the constructed normal values. Thus, setting dumping margins (i.e., variable factors) and applying anti-dumping measures, that is, duty methods for working out interim dumping duties

payable based on those variable factors, will necessarily render exports from China uncompetitive due to the resulting artificially high export prices.

One can only surmise that this is the objective of the Australian industry and, in particular, Capral and those members of the Australian industry supporting its application. That is, the objective is not to seek relief from the injurious effects of dumping because the majority of exports from China have not been being exported to Australia at dumped export prices as the Commission has preliminary determined, which also appears to be the case from earlier investigations, reviews and inquiries as summarised in the SEF, and the fact that the members of the Australian industry are and have been highly profitable as disclosed in the publicly available documentation referred to earlier above.

This would seem to raise competition law issues. For example, whether such behaviour is contrary to Section 46 of the *Competition and Consumer Act 2010*, which provides:

> *"(1) A person who has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:*
>
> *(a) that market; or*
> (b) *,,,,"*

It is apparent that Capral, either alone or with other members of the Australian industry possess a 'substantial degree of power' in the Australian aluminium extrusion products market. This is evident from the various anti-dumping investigations, reviews and inquiries into exports of aluminium extrusion products to Australia, including the ADRP's review of a Ministerial decision (see ADRP Report No. 135 and 137), that determined that the economic performance of one member of the domestic industry, Capral, either alone or with others was representative of the whole – a finding that seemingly is not possible unless possessed of substantial market power.

The issue, therefore, is whether taking advantage of a statutory right or rights, such as that or those provided in Australia's anti-dumping regime to obtain remedies in this case against injurious dumping, assuming that injurious dumping exists, can result in a contravention of competition laws in Australia?

This is possible where the object of taking advantage of a statutory right is not for the purpose for which the statutory right was conferred but for some other extraneous purpose. Here, seeking a review of the anti-dumping measures in the existing circumstances arguably could be argued as not to be seeking relief from injurious dumping.

First, there was no dumping by the majority of exports from China and the remainder of exports were not entering into the commerce of Australia at dumped prices. In addition, as set out in Table 1 to the SEF, three principal exporters from China, namely, Goomax, Jinxiecheng and Yongya, were found to be exporting at negative dumping margins in previous

inquiries and it was noted above that Table that two other exporters from China were exempt from any anti-dumping measures. Such exporters presumably would account for the major proportion of exports from China.

Second, there is no evidence of the Australian industry incurring injury whether from dumping or otherwise, nor is there any evidence that the existing measures, to the extent there any against exports from China, were ineffective or, if they were, why they were. Either way, exports from China would be entering into the commerce of Australia at un-dumped prices.

Rather the available evidence indicates that the reason for the application for the review of the anti-dumping measures was for the variable measures to be revised and, consequently, be revised so as to be based upon the historically high LME aluminium prices and MJP premiums that existed during the review period. As set out above, the apparent reason for this is to effectively render exports from China uncompetitive in pricing following a fall in LME aluminium prices and MJP premiums from the unprecedented historically high levels on which the revised measures would be set and, possibly, thereby exclude, such exports from the market, leading to a substantially lessening of competition in the market.

Judicial support for such misuse of market power can be found in the High Court of Australia's decision in *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90; [2004] HCA 48:

> *" ,,, to suggest that there is a distinction between taking advantage of market power and taking advantage of property rights is to suggest a false dichotomy, which lacks any basis in the language of s 46. As already discussed, property rights can be a source of market power attracting liability under s 46125 and intellectual property rights are often a very clear source of market power".* (at para 125)

Here, what is being taken advantage of is not a 'property right' but a 'statutory right'. The 'statutory right' that confers the source of power here is the ability of one or several members of the Australian industry who individually or collectively can seek remedies under Australia's anti-dumping regime contained in Part XVB of the *Customs Act 1901* and, through their substantial power materially effect the outcome. The exercise of this power is evident in the various investigations, reviews and inquiries into exports of aluminium extrusion products to Australia where not only can those members seek remedies without the participation of other members of the Australian industry, who comprise the majority by number but not be production, but also by virtue of the fact that their economic performance is taken to be representative of the industry as a whole regardless of evidence to the contrary.

Taking advantage of Australia's anti-dumping regime for anti-competitive purposes was in the recent Federal Court case of *Australian Competition and Consumer Commission v BlueScope Steel Limited* (No 5) [2022] FCA 1475 that involved price fixing cartel arrangements. In that case BlueScope Steel was found to have been engaging in cartel price fixing behaviour contrary to a prohibition of such behaviour in the *Competition and Consumer Act 2010*:

> "*The ACCC further alleges that Mr Ellis devised a strategy for addressing competition from overseas steel manufacturers, being to restrict the volume of imported steel coming into Australia and to persuade overseas steel manufacturers to increase the price at which they sold flat steel products to Australian import traders. The ACCC says that the strategy also involved threatening to make anti-dumping applications against overseas steel manufacturers unless the price at which they sold flat steel products in Australia increased.*" (at para 8)

That allegation was confirmed in that case – see the findings of His Honour O'Bryan J. at paragraph 1552 of the judgement: Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5) [2022] FCA 1475 (fedcourt.gov.au).

It is not being contended or suggested that any such cartel and/or price fixing conduct Is being engaged in by anyone. That is not the concern. The abovementioned case is, however, illustrative of statutory rights being taken advantage of for anti-competitive purposes.

The concern here is that the provisions of Australia's anti-dumping regime may be being used for an extraneous purpose, namely, to restrict and exclude import competition from the Australian aluminium extrusion products market as opposed to lawfully seeking remedies from injurious dumping as it is suggested by the fact that advantage appears to be being sought to be taken in the revision of the variable factors of the high LME aluminium prices and MJP premiums at a time when the domestic industry has been incurring no injury, let alone injury caused by dumping by exports from China.

Of course, given that LME aluminium prices and MJP premiums have now fallen to more historically normal levels details of which are publicly available and can be readily obtained from amongst other sources the LME and SHFE websites as indicated earlier above, then this concern would be alleviated by updating the dumping margin determinations upon which it is proposed to base any variations to the variable factors be updated with current LME aluminium prices and MJP premiums to more accurately reflect current market conditions. This would be consistent with Capral's claim in its application for the review of the measures that FOB export prices of exports from China should fully reflect current LME aluminium prices and MJP premiums:

> "*Capral highlights with the Commission the narrowing of the gap between the LME aluminium price and the China FOB (USD) values for exports to Australia during the highlighted period July 2021 to May 2022. This narrowing of the gap confirms that Chinese export prices to Australia are not reflecting the full increase in recent aluminium prices*." (underlining added) (see page 8 of Capral's application)

No doubt, if export prices of exports from China should reflect the full increase in LME prices and MJP premiums, then they also should fully reflect decreases in those prices and premiums.

The Australian industry could not object to this being advocates of 'free and fair trade'.

National interest

It is evident from the Commission's analysis in Appendix B to the SEF that, in comparison with China and probably in comparison with other countries in the region, the Australian industry's cost to make and sell aluminium extrusion products is significantly higher as are the prices of aluminium extrusion products in the Australian market.

As the Panel Member noted in her correspondence to the Commissioner in ADRP Review 155, the effect of anti-dumping measures is to increase prices in the relevant Australian market, which, in this case, is the aluminium extrusion products market. While whether the anti-dumping measures applying to aluminium extrusion products exported to Australia from a variety of countries have had that effect has not been investigated and is unlikely to be investigated, it nevertheless raises the question of whether it is in the national interest for the Minister to vary the anti-dumping measures as applied for by Capral?

Before answering that question, there is the question is the national interest a relevant consideration for the Minister to take into account when exercising his statutory discretion to vary anti-dumping measures.

In a recent review, a Panel Member of the ADRP considered it was not. The reasons given were that:

> "*The national interest is a broad concept which invariably requires a balance between potentially conflicting interests. In the present case, by not expressly legislating for the application of a public interest test, it would appear the government has suggested that it would be appropriate to have regard to industry policy objectives in preference to other competing economic or financial outcomes which are said to be in the national interest. As there is was [sic] no express requirement that the Minister address national interest considerations it cannot be said that the Minister erred in that regard.*" (ADRO Report 153, at para 33)

With respect, that finding was both factually and legally incorrect.

It was factually incorrect because the reason why the Federal Government did not expressly legislate for a national interest test was because the national interest was a relevant consideration for the Minister to take into account in exercising his/her statutory discretion. This was reflected in the Federal Government's response to the Productivity Commission's review of Australia's anti-dumping regime, which recommended an express public interest test, namely, 'Streamlining Australia's anti-dumping system; An effective anti-dumping and countervailing system for Australia' (AGPS) (June 2011) in which it was stated that:

> "*The Minister currently has an unfettered discretion not to impose measures. The Government believes this is adequate for the Minister to take account of the public interest when circumstances warrant broader matters be considered, subject to the changes outlined in 6.2.*

> *As indicated in 6.1, the Minister has an unfettered discretion not to impose measures. In reporting its findings to the Minister, the Branch will now include an assessment of the expected effect that any measures might have on the Australian market for the goods subject to those measures, and like goods manufactured in Australia, and in particular any potential for significant impacts on this market.*" (Sections 6.1 & 6.2, page 26)

Further, the reason why the decision as to whether to impose, vary or continue anti-dumping measures is vested in the Minister and as a statutory decision is to ensure that the national interest is taken into account. That is the role of Ministers in the Federal Government and consistent with the Westminster system of government, namely, to take into account and make decisions in the national interest. That is what they were elected to do or, as Minister of the current Federal Government including the Prime Minister have stated, it is part of a Minister's job description.

Of concern is the fact that reports and recommendations to the Minister have not addressed whether the imposition, variation or continuation of anti-dumping measures is in the national interest, even where such matters are raised by interested parties. It is noted that similar concerns were expressed in the recent Royal Commissions into Robodebt and into aged health care. Whether interested parties believe a decision to impose, vary or continue anti-dumping measures is or is not in the national interest, ultimately that it's a matter for the Minister to decide.

As the national interest is a relevant consideration for the Minister to take into account, it is submitted it would not be in the national interest for the Minister to vary the variable factors as applied for by Capral.

The reason why it would not be in the national interest is because there is no evidence that a variation to the anti-dumping measures, that is, to the variable factors is required to prevent or remove the injurious effects of dumping from the Australian industry. That is the object of anti-dumping measures – to prevent or remove the injurious effects of dumping being caused to the domestic industry – but there is no evidence that the existing measures are failing to achieve that objective and hence variation is required to achieve that objective. Mere change in the variable factors is of itself not justification for a variation to anti-dumping measures, especially when as here, the domestic industry is not and has not been incurring any injury , let alone material injury, and there is no evidence of that injury caused by dumping is likely to occur in the reasonably foreseeable future.

In addition, as the Productivity Commission has recently stated:

> "*Overall, given the implications for resource allocation, there is likely to be an economy-wide net cost associated with any system of anti-dumping measures. While the scale of the cost to Australia is unclear, it would be determined by the size and scope of such measures.*

> *Yet, such costs persist. While WTO rules stipulate that anti-dumping measures are to be implemented for a set duration, the Anti-Dumping Commission has approved extensions in several instances. As such, anti-dumping measures represent an ongoing source of protection to relatively few firms and an ongoing economy-wide net cost. Moreover, there is no exit plan: the protections carries no expectation that firms will implement strategies to improve their competitiveness; nor has there been an indication from government that such measures are part of a broader plan to facilitate structural adjustment*." (Productivity Commission, '*5-year Productivity Inquiry: A competitive, dynamic and sustainable future*', Volume 3,(Report no. 100 – 7 February 2023) page 82)

Effectively, therefore, the ultimate stakeholders, Australian business and consumers will be bearing the increased prices for aluminium extrusion products and, especially, the products they are used to build such as residential housing the costs of which are significantly increasing in Australia as is public knowledge and of considerable political concern.

Unfortunately, with the exception of the Productivity Commission there have been no inquiries into the economic effects of the imposition of anti-dumping measures and whether the benefits to one or several companies that dominate an industry outweigh the cost to the remainder of the economy or studies similar to those undertaken in the USA that have demonstrated the significant cost and adverse economic effect anti-dumping measures have had there on the construction industry: see : 'Dumping' Doesn't Mean What You Think It Means | Cato Institute.

It is respectfully submitted that it would not be in the national interest to vary the variable factors, especially given the prevailing circumstances. To determine whether varying a tax such as the variable factors comprising the anti-dumping measures is in the national interest, such determination, amongst other matters, take into account the following:

- whether the tax (i.e., the anti-dumping measures) is achieving its intended purpose of preventing/removing the effects of injurious dumping and, if not, why not and to what extent;
- whether varying the tax is necessary to achieve its intended purpose of preventing/removing the effects of injurious dumping and, if so, why and to what extent the tax would need to be varied to achieve that purpose;
- whether increasing the tax would assist the domestic industry improving its competitiveness both domestically and globally and, if so, how;
- what the downstream effects would be in increasing the tax such as what effect would it have on Australian businesses and consumers?

These matters have not been considered and it is submitted require consideration by the Minister in his determination as to whether the variable factors comprised in the anti-dumping measures, that is, the tax, should be varied and, if so, to what extent.

7. Non-injurious price

It is stated in the SEF that the Commission proposes to recommend to the Minister that the Minister not determine a non-injurious price. The reasons given for this proposed recommendation are:

- that normal values for the selected cooperative exporters were not determined under section 269TAC(1) of the *Customs Act 1901* because of the operation of subparagraph 269TAC(2)(a)(ii) of the *Customs Act 1901*; and
- that residual and other exporters should not have an advantageous outcome over selected cooperating exporters.

While acknowledging the provisions of Section 8(5BAA) of the *Customs Tariff (Anti-Dumping) Act 1975*, which entitles the Minister not to determine a non-injurious price in the circumstances set out in that provision, it is discretionary, not mandatory, in its operation. As stated in the Foreword to the Commission's Dumping and Subsidy Manual, each case must be considered on it merits. That must be the case here.

A non-injurious price is the minimum price necessary to prevent or remove injury caused by dumping (Section 269TACA of the *Customs Act 1901* and Article 9.1 of the WTO Anti-Dumping Agreement).

If a price less than the full dumping margin would be sufficient to prevent or remove injury caused by dumping of exports from China, it is unclear why the Commission would not recommend to the Minister that anti-dumping measures be set at that price. Whether a particular market situation existed or not in the country of export or whether normal values had been determined under Section 269TAC(1) of the *Customs Act 1901* because of the operation of subparagraph 269TAC(2)(a)(ii) of the *Customs Act 1901* would seem irrelevant regardless of the statutory provisions.

The minimum price to prevent injury is a price unrelated to the normal values of exports from the subject country. Whether prices at or above that minimum price are or are not dumped export prices is irrelevant because exports at such prices would be above the price that would cause injury.

In the particular circumstances here, it is evident that exports from China have not been causing injury to the Australian industry. As the Commission would be aware, the Australian industry is and has been highly profitable. This is evident from publicly available documents such as their audited financial statements, half-year and annual reports, shareholder presentations and similar documents filed either with the Australian Stock Exchange (**ASX**) or with the Australian Securities and Investments Commission (**ASIC**) or available on their websites. Neither exports from China nor from any other country have been causing injury to the Australian industry, nor is there any evidence that they are likely to do so in the foreseeable future, especially given the high cost of construction for both residential and industrial premises that is likely to continue for the foreseeable future.

Further, it is evident that the three selected cooperative exporters and the residual exporters whose combined exports would constitute the majority of exports of aluminium extrusion products to Australia have not been causing injury to the Australian industry because of dumping due to their exports being exported at un-dumped prices. As the Commission has recommended that the floor price duty method apply to exports by such exporters, the issue is what price less than that floor price would be the minimum price necessary to prevent injury to the Australian industry or is the floor price the minimum price?

Of concern in this context is that the Commission proposes to recommend to the Minister not to determine a non-injurious price for the reasons set out earlier above. The Commission is not proposing to provide to the Minister information as to what the non-injurious price would or could be were the Minister of a mind to determine a non-injurious price together with information why the Commission considered and is therefore recommending that a non-injurious price should not be determined. Ultimately it is for the Minister to decide whether or not to determine a non-injurious and, if it is decided to determine a non-injurious price, what that non-injurious price is. It presumably is the role of the Commission or Commissioner to provide the Minister with the necessary information supported by evidence to make that decision along with its recommendation(s).

That does not appear to be the case here. Rather, it would seem that rather than providing the Minister with options and a recommendation, it has already been decided that a non-injurious price not be determined and that is what is being recommended.

Why adopt such an approach? Setting a non-injurious price presumably would or could undermine setting the level of anti-dumping measures based on the unprecedent, historically high LME aluminium prices and MJP premiums. This despite the fact that prices substantially lower than those prevailing during the review period would be required to cause injury to the Australian industry given its robust health.

It is submitted that the non-injurious price should be the lowest, current un-dumped export price of aluminium extrusions being exported to Australia, whether from countries from which exports are subject to anti-dumping measures or from countries from which exports are not subject to anti-dumping measures such as Indonesia and Thailand. It is understood that the Australian industry sources aluminium extrusion products from the latter two countries to make up the increasing shortfall in production capacity to meet demand in Australia, which increased import volumes are reflected in the Commission's Trade Remedy Index (TRINDEX): Trade remedy index (TRINDEX) | Department of Industry, Science and Resources

8. Miscellaneous – Ministerial Direction

Given that it has been preliminary found by the Commission that:

- exports of aluminium extrusion products by three selected cooperative exporters and all residual exporters, who collectively account for the majority volume of aluminium

extrusion products exported to Australia, were not being exported to Australia during the review period; and

- exports of aluminium extrusion products by one selected cooperative exporter were preliminary found to be being exported to Australia at dumped prices but that finding was an aberration due to the duty method applying to its exports and the method adopted to assess whether such exports were being dumped as they were clearly not entering into the commerce of Australia (i.e., on importation) at dumped prices; and
- publicly available documents concerning the financial and economic performance of the Australian industry has been, is and is likely to continue into the foreseeable future strong and it is not incurring injury but is experiencing historically high profits and profitability,

the Minister should request the Commissioner pursuant to Section 269ZA(3) of the Customs Act 1901 to undertake a review of the anti-dumping measures to determine whether those measures as applying to exports of aluminium extrusions exported from the People's Republic of China are no longer warranted.

It is respectfully requested that the Commissioner seek such a direction from the Minister as such a direction would be appropriate in the circumstances.

9. Conclusions

In light of the above, it is submitted that:

(i) the dumping margin determination for Kam Kiu's exports be re-considered and be re-determined having regard to the matters raised in this submission, including the determination of export prices and adjustments to the constructed normal value in its comparison with export prices; and

(ii) any proposed revision of the variable factors comprised in the anti-dumping measures applying to exports of aluminium extrusion products exported from China be based on current LME aluminium prices and MJP premiums rather than those at unprecedented, historically high levels during the review period, the use of which could only be for anti-competitive purposes and not to purportedly remedy the injurious effects of dumping of which there is no evidence; and

(iii) the Minister be presented with sufficient information supported by evidence for him to properly consider whether to set a non-injurious price, as well as the Commissioner's recommendation having regard to that information; and

(iv) the report to the Minister includes advice that consideration of the national interest is a relevant consideration in the exercise of his statutory discretion whether to vary the variable factors and matters relevant to that consideration include those listed in the dot points under the heading 'National interest'.

The request that the Commission provide advice and guidance is requested on the on determining the 'actual export price' under Section 269TAB of the *Customs Act 1901* for the

purposes of applying the applicable duty method in Kam Kiu's circumstances is reiterated. Grateful also if that advice could be provided on the public file for benefit of interested parties.

Finally, the request that the Minister be approached to request the Commissioner, pursuant to Section 269ZA(3) of the *Customs Act 1901*, to undertake a review of the anti-dumping measures to determine whether those measures as applying to exports of aluminium extrusions exported from the People's Republic of China are no longer warranted, is also reiterated.

This letter is non-confidential and may be placed on the public file and I would be grateful if you would do so.

Please contact me if you have any queries regarding the foregoing.

Yours sincerely,

Andrew Percival
T: +61 (0) 425 221 036
E: andrew.percival@percivallegal.com.au
W: www.percivallegal.com.au

Attachment A

Duty Methods – Working Out Interim Dumping Duty payable.

Customs Tariff (Anti-Dumping) Regulation 2013

4. Definitions

"**export price** has the meaning given by section 269TAB of the *Customs Act 1901*."

5. Methods of working out interim dumping duty

Combination of fixed and variable duty method

"(2) A method is:

(a) work out the amount of the difference between:

(i) the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; and

(ii) the normal value of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; and

(b) if the export price of the particular goods is less than the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice, work out the amount of the difference; and

(c) add the amounts worked out under paragraphs (a) and (b) to obtain the interim dumping duty payable on the goods.

(3) The amount worked out under paragraph (2)(a) must be:

(a) ascertained as a proportion of the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice, and **applied to the greater of**:

(i) the export price of the particular goods; and

(ii) the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; or

(b) applied by reference to a measure of the quantity of the particular goods; or

(c) applied by reference to a combination of a proportion mentioned in paragraph (a) and the quantity mentioned in paragraph (b).

Floor price duty method

(4) A method is to work out the difference between:

(a) the export price of the particular goods; and

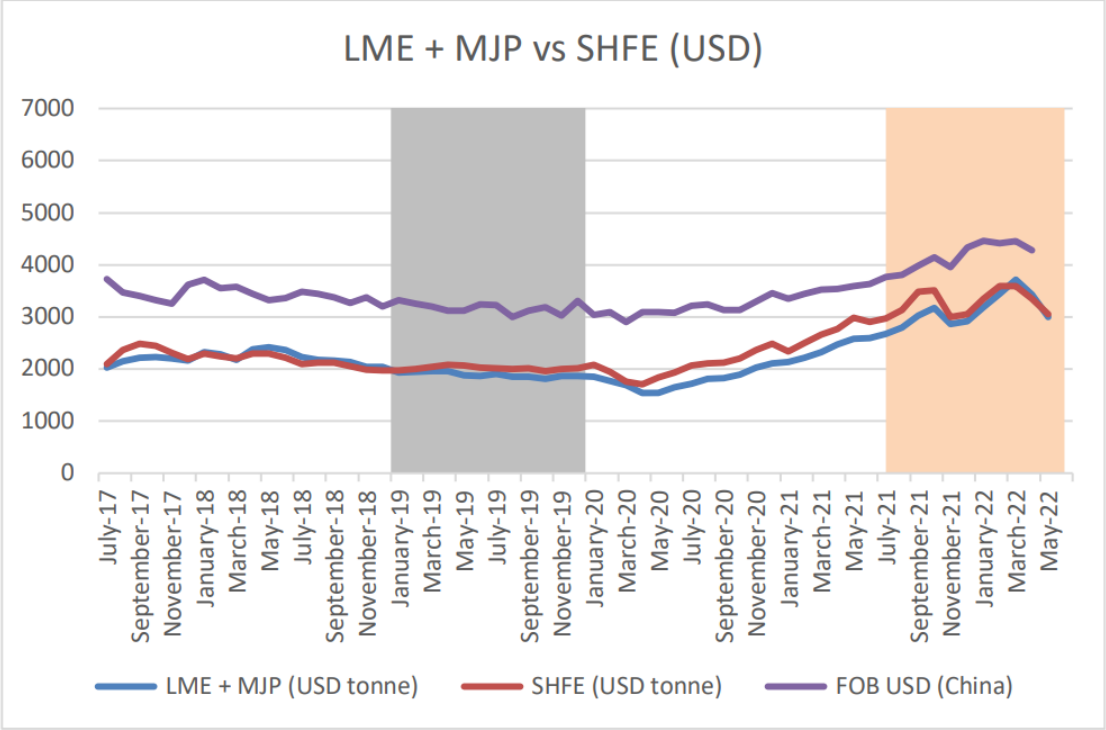
(b) the normal value of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; to obtain the interim dumping duty payable on the goods."

(**emphasis** added)

Attachment B

LME vs SHFE Aluminium Prices

Figure 1 – LME aluminium + MJP vs SHFE (AUD)



Source: Capral Limited application – Review 609, Document No.2, page 8

Confidential Attachment C

Errors in Dumping and Subsidy Margin Calculations

[*The following text has been redacted as being commercial-in-confidence to Kam Kiu and consists of mathematical and related errors in cost and pricing data in the determination of the dumping margin*.]