CAPRAL ALUMINIUM
SHAPING THE FUTURE

Capral Limited
ABN 78 004 213 692

15 Huntingwood Dr
Huntingwood, NSW 2148

capral.com.au

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Director
Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

Email: investigations2@adcommission.gov.au

Dear Director,

Public File

Review of Measures Investigation No. 640 – Press Metal Berhad Aluminium Sdn Bhd; Arm's Length Issues

I. Introduction

Capral Limited (**Capral**) refers to the recent submission by the Australian importer Press Metal Aluminium (Australian) Pty Ltd (**PMAA**) in relation to the above-noted variable factors review,[1] and makes the following comments.

II. Arm's Length Considerations

PMAA refers to the Commission' s recent publication of the Exporter Verification Report (**EVR**) for Press Metal Berhad Aluminium Sdn Bhd (**PMBA**) concerning the assessment of transactions between PMAA and PMBA, and disagrees with the findings that such transactions are not arm's length.[2]

To recall from the EVR on this point, the non-arm's length finding related to transactions between PMBA and PMAA via the intermediary PMB.[3] Specifically:

> *…the commission found that during the review period PMAA held long-term borrowings from PMB that are not interest bearing. The commission notes the following about the borrowings and how these impact the arms length assessment:*
>
> - *The borrowings are aged accounts payables that the parties at some stage agreed to convert to a long-term loan, and the loan balance has reduced since 2017.*
> - *The commission has analysed PMAA's rate of repayment of the loan and found that PMAA makes larger repayments some years, and smaller or even no repayments other years depending on their access to cash.*
> - *The borrowings are not interest bearing. The commission has therefore calculated commercial interest on the loan amount and added to the SGA to these imports that were supplied through PMB for the purpose of profitability calculations and found that the interest in itself made a small increase to the SGA that adjustment did not impact the profitability to PMAA's imports.*
> - *The commission then turned its mind to the structure of the loan arrangement and the quantum and timing of the repayments. The commission consider that the non-commercial nature of this arrangement, the absence of regular amortisations and the scope for PMAA to schedule its*

[1] PMA submission, EPR folio no. 16.
[2] Ibid, p. 3.
[3] Ibid, p. 9.

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> *repayments based on cash flow considerations is a strong indication that the buyer received a benefit for, or in respect of, whole or any part of the price.*
>
> *The commission therefore found that a commercial or other relationship may have influenced the price. Hence, the commission is not satisfied that the exports of the goods by PMBA via the intermediary PMB are arms length transactions.*[4]

Whether a relationship is arm's length is governed by section 269TAA of the *Customs Act 1901*. Circumstances where the price paid/payable between the exporter and importer shall not be treated as arm's length are where:

- there is any consideration payable for or in respect of the goods other than price; or
- the price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or
- an associate of the buyer, will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.[5]

Whether transactions are at arm's length is a matter of fact to be determined having regard to all the circumstances of the sales in question. Section 269TAA sets out conditions where, if any one of them exists, a transaction will not be at arm's length. According to the Manual, the section is not taken to exhaustively set out criteria for determining whether a transaction is, or is not, arm's length.[6]

Capral concurs with the Commission's arm's length assessment relating to the long-term borrowings. PMAA, however, argues that due consideration has not been given to the purpose of the borrowings, and that the use to which the funds were put and how they have been repaid qualifies the debt between the parties to be arm's length.

In relevant part, from PMAA' submission:

> *That loan was granted to PMAA by PMB in 2001. The purpose of the loan was to assist PMAA in setting up its business in Australia.*
>
> *Specifically, the loan was to provide PMAA's business with sufficient funds to enable it to setup distribution centres in a number of states in Australia. The loan was applied for that purpose. The increased business expected to be generated by PMAA's enhanced supply ability through the distribution centres, as well as the other efficiencies the setup would generate, not only benefited PMAA commercially but also PMB and PMBA through increased supply of their products. That is, the investment in the property by PMAA would be commercially advantageous for not only PMAA but also PMB and PMBA.*
>
> *Further, the loan has since been paid down by PMAA from its cashflow to the extent that, within 3 years, less than 15% of the original loan is currently outstanding, as has been verified.*
>
> *Hence the loan was a commercially prudent investment by all parties. The commercial benefit has been realised in terms of both sales volumes and consequent sales revenues flowing from PMAA's profitable business to PMAA, PMB and PMBA, as well as dividends declared from PMAA's profits.*

The fact that the loan was commercially sensible, and its balance, is not questioned by Capral. Indeed, the business use to which the funds were put would certainly be expected. What is questionable however, and to which the Commission has appropriately dealt with, are the details of the debt arrangement itself – its non-interest bearing nature and the sporadic and discretionary repayment trend permitted. On these points, PMAA argues:[7]

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[4] Ibid, p. 9-10.
[5] Refer Dumping and Subsidy Manual (**the Manual**)), December 2021, p. 20.
[6] Ibid.
[7] PMA submission, EPR folio no. 16, p. 2.

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> The suggestion that "the scope for PMAA to schedule its repayments based on cash flow considerations" as being *indicative of the non-commercial nature of the loan or that PMAA was somehow the recipient of a benefit in respect of the price it pays for the purchase of aluminium extrusion products from PMBA via PMB is misplaced.* ***Scheduling payments on a loan according to one's cash flow is not an uncommon practice****. It would be unusual not to do so and is a principle reason for negotiations between borrowers and their financiers. It is also an* ***accepted practice by the Australian Taxation Office and by Australian Border Force amongst other government agencies in the payment of debts due to the Crown by instalments****. It is also a* ***common practice in the repayment of residential home loan mortgages****, especially with the recent high interest rates. Why or how is PMAA's loan somehow unique in this regard?*
>
> …
>
> *Interest-free loans can have a commercial basis, whether between related or unrelated parties. Even* ***banks and other financial institutions provide interest-free loans****, as well as offer bank accounts that earn negative interest on deposits –* ***a not uncommon practice in recent years****. In other words, there is no rational reason that a commercial loan is confined to loans that earn interest and there is no evidence that the loan here in question did not have a commercial basis. Indeed, in a number of cultures earning interest on loans is prohibited as constituting usury* [emphasis added].

Consistent in PMAA's arguments is the 'commonality' of what are certainly uncommon lending practices cited by the importer.

For example, as of the latest available data, approximately 3.2 million out of Australia's 10.8 million residences have mortgages, accounting for about 30% of all homes.[8] Regarding mortgages under payment plans (which could be seen as relevant proxy for loans where Australian lending institutions permit borrowers to repay according to cash flow), specific statistics are limited. However, while housing loan arrears rates have been on the rise since late 2022, they remain around pre-pandemic levels.[9] Hence, the available data suggests that a relatively small proportion of Australian mortgages are currently experiencing repayment difficulties. This calls into question PMAA's *…common practice…* assertion. In any case, home loan mortgages are largely as between banks and individual lenders buying personal real estate, they are not directly comparable to commercial loans and should not be used as an example of what is "common place" for commercial loans or related company lending practices.

Moreover, for the FY2022 period, the Australian Taxation Office (ATO) collected a total of $530.1 billion in tax revenue.[10] Regarding payment plans (which, again, are a relevant proxy for discretionary cash flow repayment schedules), estimates for the 2023 financial year indicate that over 500,000 small businesses have entered into tax repayment plans with the ATO, collectively owing more than $15 billion.[11] This represents a highly immaterial (and uncommon) ~2.8 percent of debt owed to the ATO by Australian taxpayers. The ATO also charges interest on unpaid tax debts, through two primary mechanisms – the General Interest Charge (GIC),[12] and the Shortfall Interest Charge (SIC).[13] Again, while PMAA's loan might not have been interest bearing, most debts are.

Capral also submits that where agencies such as the Australian Border Force (ABF) permit the payment of tariffs and others costs on a discretionary/as-agreed basis, that such instances would be rare.[14]

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[8] Refer: https://mozo.com.au/home-loan-statistics
[9] Refer: https://www.rba.gov.au/publications/bulletin/2024/jul/recent-drivers-of-housing-loan-arrears.html?
[10] Refer: https://www.ato.gov.au/media-centre/2021-22-taxation-statistics-released
[11] Refer: ATO Has $15 Billion Owed in Tax Repayment Plans from SMEs | Thriday
[12] Refer https://www.ato.gov.au/individuals-and-families/paying-the-ato/interest-and-penalties/interest-we-charge/general-interest-charge
[13] Refer https://www.ato.gov.au/individuals-and-families/paying-the-ato/interest-and-penalties/interest-we-charge/shortfall-interest-charge
[14] As of the latest available data, approximately 90% of Australia's imports enter the country duty-free, either due to a 'Free' statutory rate or through the utilization of preferential trade agreements and tariff concessions (refer: https://www.pc.gov.au/research/completed/nuisance-tariffs/nuisance-tariffs.pdf). Given the high percentage of duty-free imports and the availability of mechanisms like TCOs, it is likely that the proportion of tariff payments under formal payment plans is relatively low compared to the total tariff revenue collected by the ABF.

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Capral therefore submits that the Commission has appropriately considered the loan arrangements in question, arriving at the conclusion that they are non-arm's length and making the appropriate adjustments to the export price. Interest free loans are not common, nor do lenders commonly agree to remittance on uncertain terms.

If you have any questions concerning this submission please do not hesitate to contact me on (02) 8222 0113 or Capral's representative Mr Chad Uphill on 0412 377 603.

Yours sincerely

[redacted]