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Date: 22 January 2021

By Email

Anti-Dumping Commissioner
Anti-Dumping Commission
Level 35
55 Collins Street
Melbourne Victoria 3000

Attention: Mr Gavin Crooks
Assistant Director, Investigations 3

Dear Mr Crooks,

RE: Dumping investigations – exports of certain aluminium extrusions from Malaysia – Investigations Nos 540 and 541 – Press Metal –Statements of Essential Facts – Material Injury & Causation & Australian Industry

I refer to the Anti-Dumping Commission's (**Commission**) Statements of Essential Facts dated 9 December 2020 (**SEFs**) in relation to Investigations Nos 540 and 541 (**Investigations**). The following submissions are made in relation to the SEFs, noting the extensions of time for responding to the SEFs granted by the Commission.

It is submitted that the Commission did not and could not make any preliminary findings of fact supported by evidence that the Australian industry producing like goods incurred material injury. A finding that the Australian industry has incurred material injury must be in relation to the Australian industry as a whole and not one part of the Australian industry. Because eight of the nine members of the Australian industry did not participate in any stages of the Investigations by providing any information and evidence relevant to the Investigations, the Commission has no information or evidence that the Australian industry as a whole has incurred material injury. Consequently, the Commission could not make a preliminary finding of fact that the Australian industry as a whole has incurred material injury.

In the absence of such findings the Investigations must be immediately terminated pursuant to s.269TDA of the *Customs Act 1901*.

Further, to the extent that the Commission's assessment of injury in the SEFs related to injury apparently incurred by one member of the Australian industry, namely, Capral Limited (**Capral**), that injury cannot be an 'indicator' of the economic performance of the remainder of the Australian industry in the absence of evidence that injury of one part of the industry can be attributed to the industry as a whole. There is no such evidence.

Further, the injury incurred by Capral was caused by a range of other economic factors and cannot be attributed to exports of the products under investigation entering into the commerce of Australia at allegedly 'dumped' export prices.

For these reasons as well the Investigations must be terminated.

The reasons for these submissions are set out in the Attachments to this submission.

We look forward to the Commission's confirmation that the Investigations have been terminated by the Commissioner.

If you have any questions or queries regarding any of the foregoing, please do not hesitate to contact me.

Yours faithfully,

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Attachment A
Context in which the submissions are made in response to the SEFs.

The submissions made in this document are made in the following context, and apologies in advance for stating the obvious, but it nevertheless is desirable to do so:

(a) 'dumping' consists of the product under investigation entering into the commerce of the importing country at an export price that is less than its normal value[1];
(b) while 'dumping' is not illegal or unlawful under either the WTO Anti-Dumping Agreement or Part XVB of the *Customs Act 1901*, trade remedies are available where 'dumping' is causing or threatening material injury to an industry in the importing country producing like goods;
(c) the available trade remedies are either the imposition of a dumping duty on the importation of the product under investigation or the acceptance of a price undertaking by exporters of the product under investigation; and
(d) importantly, the purpose of the trade remedies is to alter the behaviour of exporters so that their exportation of the product under investigation is no longer at 'dumped' export prices and, thereby, eliminating the injury being caused or threatened to the industry producing like goods in the importing country.

Essentially, therefore, the purpose of a dumping investigation is to determine whether the abovementioned trade remedies are warranted and, if they are, through those remedies to encourage exporters to alter their behaviour so that their exportations are not at 'dumped' prices and, because of that, the injurious effects of 'dumping' to a domestic industry in the importing country is prevented. That is, through trade remedies, exporters are dissuaded from engaging in injurious international price discrimination.

'Dumping' is neither unlawful nor illegal. It is a common and often an unavoidable practice in international trade, just as price discrimination is a common and lawful practice in domestic commerce, at least, it is in Australia following amendments to the Trade Practices Act 1974 to remove the prohibition against price discrimination. In other words, price discrimination constitutes fair and lawful trade.

The trade remedies available where 'dumping' causes or threatens to cause material injury to a domestic industry in the importing country are intended solely to offset the injurious effects of 'dumping'. They are not punitive sanctions, nor are they revenue raising. Effectively, dumping regimes provide a WTO sanctioned exception to the system of bound tariffs that is an integral part of the *General Agreement on Tariffs and Trade 1994* (**GATT**).

The role of a dumping investigation by an investigating authority, and its sole role, in this context is to make findings of fact supported by evidence as to whether the product under investigation has entered the commerce of the importing country at 'dumped' export prices and because of this material injury has been caused or is threatened to an industry in the importing country producing like goods, that is, to that industry taken as a whole and not part thereof.

[1] Article 2 of the WTO Anti-Dumping Agreement: "… a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

Such findings of fact supported by evidence justify the application of trade remedies by the importing country to prevent that material injury by offsetting the injurious effects of the 'dumped' export prices to the relevant domestic industry as a whole. Absent such findings of fact supported by evidence justifying the implementation of trade remedies, the investigation must be terminated.

Critical in such an investigation is not only whether the product under investigation has been exported at 'dumped' export prices but also whether, because of that, material injury is being caused or threatened to an industry producing like goods in the importing country taken as a whole. It is to offset the injury being caused to that industry as a whole and not part thereof by the product under investigation entering the commerce of the importing country at 'dumped' export prices. That injury to the domestic industry as a whole must be causally linked to the alleged 'dumping' and not be attributed to other economic factors.

If it is found as a question of fact that the domestic industry in the importing country has not incurred injury or has not incurred injury that can be attributed to being caused by exports entering the commerce of the importing country at 'dumped' export prices or there is no or insufficient evidence that the domestic industry as a whole has incurred injury, then the investigation must be terminated regardless of whether the product under investigation s found to be being exported at 'dumped' export prices.

In short, antidumping measures are a tax imposed on imports in the form of customs duties to offset the injurious effects of dumping on a domestic industry as a whole, not part thereof, in the importing country. It purportedly achieves this by increasing, through the imposition of the tax, export prices by amounts equal to the margin of dumping or a lesser amount if the lesser amount offsets the injurious effects of dumping. Ultimately, the objective is to dissuade exporters from exporting goods at 'dumped' export prices where this causes injury to a domestic industry in the importing country but only if it cause such injury. Finally, as a tax imposed by administrative means as opposed to by legislation, the conditions for its imposition must be strictly construed and observed, with any ambiguity or uncertainty construed to the benefit the taxpayer liable to pay the tax.

The submissions in this document focus on whether the industry in Australia producing 'like goods' to the products under investigation incurred, as a whole, material injury and, if so, whether and to what extent it was caused by the product under investigation entering the commerce of Australia at allegedly 'dumped' export prices.

If it is not found as fact, supported by evidence, that the Australian industry as a whole incurred material injury caused by exports of the products under investigation at allegedly 'dumped' export prices on entering into the commerce of Australia, then the Investigations must be terminated.

Attachment B
Australian Industry Producing Like Goods & Material Injury

This Attachment to the submission sets out who constitutes the Australian industry producing like goods for the purposes of the Investigations and, accordingly, the domestic industry producing like goods against whom an assessment of material injury must be made for the purposes of the Investigations.

B-1. Who constitutes the Australian industry producing like goods?

The Australian industry producing like goods is defined in s.269T(4) of the *Customs Act 1901* as that person or those persons who produce like goods in Australia. That is, it is those entities producing like goods in Australia to the products under investigation, being in these Investigations aluminium extrusions of certain finishes.

In its applications for the imposition of antidumping measures (**Applications**), Capral stated that the Australian industry producing like goods consisted of eight (8) entities and itself. These eight entities were listed at section A-3.9 of the Application. Those eight companies were:

- Almax Aluminium Pty Limited
- Aluminium Profiles Australia Pty Ltd
- Aluminium Shapemakers Pty Ltd
- Extrusions Australia Pty Ltd
- G James Extrusion Co Pty Ltd
- Independent Extrusions Pty Ltd
- Olympiv Aluminium Pty Ltd
- Ulrich Aluminium Pty Ltd

Each of those eight entities and Capral produced in Australia like goods to the products under investigation according to the Applications. This was accepted by the Anti-Dumping Commissioner in the Consideration Reports for the Investigations.

Thus, in accordance with the statutory definition, the 'Australian industry producing like goods' consists of those eight entities plus Capral (**Australian industry**). That is, the 'Australian industry' consists of all nine Australian producers of the 'like goods'.

This is consistent with the following extract from the judgement of Lockhart J. of the Federal Court in *Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority* [1991] FCA 49, at paragraph 39:

> "*In my opinion, the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria. The difficulty seems to me to lie, not in defining the expression, but in determining on the facts of a given case whether a particular industry answers the statutory description of an Australian industry. The latter is not a question of construction; it is a question of identification by the relevant fact finding body, in this case, the Authority.*"

This is reflected in the Commission's Dumping and Subsidy Manual:

> "*The Federal Court has held that the Australian industry is the sum total of the industry in Australia (not any part, whether that part be defined by geography, market or any other criteria) and the material injury determination must be assessed against the Australian industry as a whole. This assessment is required regardless of the size of the applicant.*" (at p.17) (Footnote omitted, which referred to the above Federal Court cases)

The issue, therefore, is did the Commission assess material injury against the Australian industry as a whole in making its preliminary findings of fact on material injury in the SEFs. As set out below, it did not.

B-2. How was material injury assessed in the SEFs?

The Commission's assessment of material injury in the SEFs was not made against the Australian industry as a whole but against one member of that industry, namely, Capral.

At Section 7.2 of the SEF for Investigation 540, the Commission stated that:

> "*Capral is the major producer of like goods in Australia. For this reason, the Commission considers that data provided by Capral is a suitable indicator of the performance of the entire Australian industry.*"

Delete the word '*considers*' and substitute the phrase '*is of the opinion*' and the true position is revealed[2]. There is no finding of fact supported by evidence that 'Capral is a suitable indicator of the performance of the entire Australian industry', but merely an expression of an opinion based on, apparently, an unfounded assumption that Capral's economic performance is a 'suitable indicator' of the economic performance of the majority of the Australian industry, that is, the other eight of the nine members of that industry. Mere speculation unsupported by any evidence.

A sample of one is not representative of the remaining members of an industry regardless of whether it is 'a major producer' or 'the major producer' in that industry. Neither the economic performance, nor economic condition, of a sample of one can be extrapolated to the remainder of the industry and certainly not without any evidence that its economic performance or condition is in fact representative of the industry and capable of extrapolation to the Australian industry as a whole.[3]

Further, even assuming that the economic performance of one member of the Australian industry could be an appropriate 'indicator' of the economic performance of the Australian

[2] Note: the word 'considers' is frequently used by the Commissioner and Commissioner when it or he is expressing an 'opinion' unsupported by evidence – that is, when speculating on the existence of a fact that may or may not exist and there is no evidence that it does exist. If there were evidence, then, no doubt, there would be no need to speculate.

[3] Note: this perhaps should be juxtaposed with the requirement in Article 6.10 of the WTO Anti-Dumping Agreement that, in determining dumping margins, requires a selection of a reasonable number of interested parties that is statistically valid and representative.

industry in that investigation based on evidence in that investigation that it was, that evidence does not exist in these Investigations. The Commission itself acknowledges this in the SEFs in the following statement:

> "*Capral is the major producer of like goods in Australia. For this reason, the Commission ~~considers~~ [is of the opinion] that data provided by Capral is a suitable indicator of the performance of the entire Australian industry.* ***This approach is consistent with other investigations into aluminium extrusions****.*" (SEF 540, section 7.2)[4] (strikethrough and square brackets added; emphasis added)

In other words, an expression of opinion not a finding of fact supported by evidence. If there was evidence, reference to previous practice in past investigations, if relevant, would not be necessary.

In any event, this is clearly inconsistent with and in breach of the legal requirement that material injury must be assessed against the industry producing like goods as a whole and not any part therof, that is, the Australian industry as a whole and not just one part of it regardless of the size of that part. It also is inconsistent with and in breach of the Commission's own policy and practice as set out in its Dumping and Subsidy Manual.

B-3. Why did the Commission adopt this approach to assessing material injury?

The Commission adopted the approach set out in the SEFs to assessing material injury because eight of the nine members of the Australian industry did not cooperate and participate in the Investigations by providing information and evidence relevant to the Investigations. In particular, whether they had incurred any injury, whether that injury was material and what were the causes of that injury.

In the Applications, Capral advised that 'most', but not all, of the other eight entities comprising the Australian industry supported the Applications for the imposition of antidumping measures on the aluminium extrusions in question exported to Australia from Malaysia. This was accepted by the Commissioner for the purposes of s.269TC of the *Customs Act 1901*, as evidenced in the Consideration Reports.

Section 269TB(6) of the *Customs Act 1901* sets out how to determine whether an application for the imposition of antidumping measures is supported by a sufficient number of members of the industry producing liked goods for the purposes of s. 269TB(4)(e) of the *Customs Act 1901*. Apparently that criteria was satisfied, although those members of the Australian industry claiming to support the Applications presumably claimed that their identities were confidential and not to be disclosed. Why this was claimed and agreed to by the Commission is unclear. Further, that support did not extend to providing information or evidence in support of and relevant to the Applications or at any stage of the Investigations in support of Capral's application for the imposition of antidumping measures.

Accordingly, as evidenced in the Applications and in the Consideration Reports, that support did not extend to the provision of information or evidence that any of those members of the

[4] Note: Capral's estimated market share is 26% with imports having a market share of 36% and, therefore, the balance presumably is held by the eight other members of the Australian industry (i.e. approx. 40%).

Australian industry supporting the Applications had incurred injury, the extent of that injury or the causes of any such injury. In the absence of such information or evidence, it is unclear on what basis the Commission could properly accept the Applications. That is, to be satisfied of the matters specified in s.269TB(4) of the *Customs Act 1901* in considering the Applications.

Further, it is evident from the public file maintained by the Commission and from the SEFs that none of the members comprising the Australian industry participated in the Investigations by providing any information and evidence relevant to the Investigations that, in the usual course, would be verified by the Commission for completeness and accuracy. Only Capral provided information and evidence that was verified by the Commission. Such non-participation precludes the Commission from making a finding of fact supported by evidence that the Australian industry as a whole incurred material injury.

However, as noted earlier above, the Commission did seek to justify its approach of relying on Capral's economic performance as being a 'suitable indicator' of the economic performance of the Australian industry as a whole as follows:

> "*This approach is consistent with other investigations into aluminium extrusions.*"

This statement acknowledges that the Commission has similarly assessed material injury in other investigations into aluminium extrusions against a single member of the industry and not the industry as a whole contrary to law and stated Commission policy. Merely repeating a deficient assessment of injury in prior investigations does not somehow cure that deficiency. Rather, it raises the question of the legal validity of the outcomes in those prior investigations and the consequences that may flow from any such invalid outcomes.

Nevertheless it is evident that eight of the nine members of the Australian industry elected not to participate at any stage in the Investigations and provide relevant information and evidence for the Commission to base its preliminary findings, including its findings on injury to the Australian industry. As a result, the Commission could not make any preliminary finding of fact regarding whether the Australian industry as a whole had incurred injury. It was precluded from doing so by the election of eight of the nine members of the Australian industry not to participate in the Investigations and provide relevant information and evidence.

B-4. What are the consequences of the non-participation of members of the Australian industry?

The consequence of the non-participation of eight of the nine members of the Australian industry in the investigations is that the Commission was precluded from making a preliminary finding of fact supported by evidence that the Australian industry as a whole had incurred injury. Technically, the only finding it could make in those circumstances supported by the evidence was that it had no evidence on which to make a finding that the Australian industry as a whole had incurred injury.

This is so regardless of any information and evidence that Capral provided regarding its own economic performance. Its economic performance cannot be attributed to the Australian

industry as a whole. There is no evidence to support any such attribution. To do so would constitute mere speculation, which is legally impermissible.

B-5. Can such non-participation be remedied?

The non-participation of eight of the nine members of the Australian industry in the Investigations cannot be remedied. Rather, that lack of participation at any of the stages of the Investigations is evidence of the fact that they do not support the Investigations. For this reason alone, the Investigations must be terminated for the reasons previously given in this submission and should not have been initiated in the first place.

To provide the Australian industry an opportunity to now to remedy its lack of participation in the Investigations would defeat the purposes of the Investigations, especially when there is no evidence that for some reason the Australian industry would now participate in the Investigations when it has not done so since the Investigations were initiated or beforehand.

Further, provision of such an opportunity to the Australian industry would unreasonably and materially delay the Commissioner in reporting to the Minister if the Investigations were not terminated beforehand, as we submit that they must be.

Such delay would be extensive as it would necessitate each of the members of the Australian industry being provided with sufficient time to provide information and evidence relevant to the Investigations, for that information and evidence to be verified, for drafts of the verification reports to be finalised and placed on the public file for the benefit of interested parties, for the Commission to then re-issue Statements of Essential Facts, provide interested parties with the opportunity to make submissions and then report to the Minister unless the Investigations were terminated. Basically, in substance it would mean recommencing the Investigations because the Australian industry had elected not to participate in the first place. This would seem unreasonable and unconscionable.

B-6 Further implications of non-participation of eight of nine members of the Australian industry.

Given that:

- in previous dumping investigations into exports of aluminium extrusions members of the Australian industry other than Capral apparently did not participate in the investigations and provide information and evidence relevant to those investigations; and
- of those members of the Australian industry supporting the Applications only Capral provided information and evidence relevant to the Applications and, therefore, those other members of the Australian industry were unlikely to participate in any stage of the Investigations,

how could the Commissioner have been satisfied of the matters the Commissioner is required to be satisfied in not rejecting an application under s.269TC of the *Customs Act 1901*, specifically, that there appeared to be reasonable grounds for the publication of a dumping duty notice?

That is, what was the information and evidence in the Applications that there appeared to be reasonable grounds the Australian industry as a whole had incurred material injury and that injury had been caused by the product under investigation exported to Australia at allegedly 'dumped' prices? How could the Commissioner not reject the Applications in circumstances when it was apparent that the likelihood that eight of the nine members of the Australian industry, or those supporting the Applications, providing information and evidence relevant to the Investigations was, at best, remote?

How could a majority of the members of the Australian industry represent that they supported the Applications in the knowledge that they would not be providing information and evidence relevant to the Applications and to the Investigations and thereby effectively undermining the Applications and the Investigations? How could the Applications be properly made in such circumstances?

Who is to be held accountable for the economic loss and damage caused thereby?

Attachment C
Material Injury & Causation

This Attachment to the submission sets out what constitutes 'injury' for the purposes of dumping investigations and how the causal links between the products under investigation entering into the commerce of Australia at allegedly 'dumped' export prices and the injury incurred by the domestic industry producing like goods is to be established and whether it was established in these Investigations in the preliminary findings of the Commission in the SEFs.

C-1. What constitutes 'injury' for the purposes of dumping investigations?

Neither s. 269TAE of the *Customs Act 1901* nor Article 3 of the WTO Anti-Dumping Agreement defines what constitutes 'injury' for the purposes of a dumping investigation.

Those provisions list a range of factors to which regard is to be had in determining whether a domestic industry producing like goods has incurred 'injury'. These are the factors, the 'injury factors', to be taken into account in the injury and causation analysis but do not define what constitutes 'injury' to the domestic industry producing like goods.

Nevertheless, what constitutes 'injury' for the purposes of dumping investigations is a relatively simple question to answer. Why do entities, be they companies, natural persons or some other legal entity, go into business? To make money. To earn revenues that, after their costs to make and sell and other expenses, earn the owner(s) of the business a profit. Individuals do not go into business to lose money. They go into business to make money, to make profits.

Consequently, an entity or industry incurs 'injury' when it incurs a reduction in its profits. The amount by which the entity or industry's profits fall, assuming this can be quantified, represents the 'injury' it has incurred and the amount of that reduction will indicate whether or not it is 'material' having regard to the entity's or industry's circumstances. The issue then is what was or were the cause(s) of that 'injury' and to what extent, which is addressed elsewhere in this submission.

This is supported by Frontier Economics Pty Limited (**Frontier Economics**) in its report '*Economic framework for injury and causation analysis*' (April 2017) prepared for the Commission (see **attached**). At page 4 of that report the following statement is made by Frontier Economics:

> "*The central link between the different injury factors is the loss of profits to the Australian industry.*" (footnote omitted)

In other words, the 'different injury factors', both price and sales volume related 'injury factors', provide the links, the causal links, if any between the cause(s) of the 'injury' and injury itself (i.e., reduced profit(s)).

Consequently, an entity or industry incurs 'injury' when, for whatever reason, that is, whether for price related reasons (i.e., causes) or sales volume related reasons (i.e., causes) or a combination of both, its revenues are reduced and, as a result, its profits are less. That reduced profit is the 'injury' incurred by the individual – nothing else. The 'materiality' of

that injury depends upon the amount of the reduced profits as a proportion of its business and its effect on the business.

C-2. What constitutes 'material' injury for the purposes of a dumping investigation?

Again, neither s. 269TAE of the *Customs Act 1901* nor Article 3 of the WTO Anti-Dumping Agreement defines what injury is 'material' for an industry producing like goods for the purposes of a dumping investigation.

However, this issue has been addressed by a Ministerial Direction. Australian Customs Dumping Notice No. 2012/24 of 1 June 2012 attached a Ministerial Direction issued by the then Minister for Home Affairs under s. 269TA of the *Customs Act 1901* in relation to 'material injury' and 'causation' (copy **attached**).

As stipulated in the Ministerial Direction itself, the directions in the Ministerial Direction are to be 'construed as subject always to the law, including Part XVB of the *Customs Act 1901*'. Further, it is stated in the Ministerial Direction that:

> "*… my direction does not deal with the carrying out or the giving effect to your powers or duties in relation to a particular consignment of goods or like goods to goods in a particular consignment but deals instead with the general principles for carrying out or giving effect to your powers. You must still have regard to the facts of the individual case. It is not enough to assert that because there is dumping or subsidisation injury automatically follows.*"

In other words, as its title indicates and as s. 269TA of the *Customs Act 1901* provides, the Ministerial Direction is no more than just that, a 'direction'. It does not fetter either the Commissioner's or the Minister's powers under Part XVB of the Customs Act 1901 and is to be construed as 'subject to the law', which law is not only Part XVB of *the Customs Act 1901* but also other relevant domestic and international law, including Article VI of GATT 1994 and the WTO Anti-Dumping Agreement.[5]

Importantly, consistent with Part XVB of the *Customs Act 1901* and the WTO Anti-Dumping Agreement, the Ministerial Direction 'directs' that "*identification of material injury be based on facts and not assertions unsupported by facts*". No doubt, those findings of 'fact' must be supported by evidence, as required by law.

Consistent with the directions in the Ministerial Direction, there must be findings of fact supported by evidence that:

(i) there is an Australian industry producing like goods to the consignment of goods under investigation (i.e., the product(s) under investigation);
(ii) the Australian industry so identified has incurred 'injury' and the nature of that 'injury';

[5] As a matter of international law, it prevails over domestic law to the extent of any inconsistency, both in terms of the domestic law itself and its administration and cannot be abrogated by domestic law.

(iii) all 'injury' attributable to other economic factors be excluded as not being capable of being attributable to the entry into the commerce of Australia of the product under investigation at 'dumped' export prices, that is, as being caused by dumping;
(iv) the 'injury' so incurred is not 'immaterial, insubstantial or insignificant'; and
(v) the entry into the commerce of Australia of the product under investigation at 'dumped' export prices caused or threatens to cause such 'material injury' to the Australian industry excluding all of such injury caused by other economic factors.

Consequently, the preliminary findings in the SEFs must be whether the Australian industry as a whole has incurred 'injury' and, if so, what was the nature and extent of that 'injury' and to what extent any of that 'injury' that is attributable to (i.e., caused by) 'dumping' is 'material'?

C-3. What was the preliminary finding on 'injury' in the SEFs?

At Section 7.1 of the SEF No. 540, the Commission stated that it "considers [*i.e. is of the opinion*] that the Australian industry experienced a deterioration in its economic performance during the investigation period through injury" in the form of:

- reduced sales volume;
- reduced market share;
- price suppression;
- price depression;
- reduced profit and profitability;
- reduced revenue;
- reduced ROS;
- reduced capacity utilisation;
- reduced employment numbers; and
- reduced wages.

It must be noted that amongst this 'shopping list' of 'injuries', only two, reduced revenue and reduced profit, constitute 'injury' for the reasons set out earlier above. The remainder are simply observable occurrences of certain economic events that, of themselves, do not constitute 'injury. They may result in 'injury', that is, they may constitute 'injury factors' linking the cause(s) of the injury to the injury itself, but of themselves do not constitute 'injury'.

For example, one of the matters claimed by the Commission as constituting 'injury' is 'price depression'. How or why does price depressions itself constitute injury? So-called 'price depression' occurs when a supplier of a product lowers (i.e., depresses) the price(s) at which it sells that product. How does the reduction of a price, of itself, constitute injury? The Commission does not explain or provide any reasons why 'price depression' of itself constitutes 'injury', as opposed to the consequences that may, but not necessarily will, flow from a price reduction.

For example, consider products, such as passenger motor vehicles, flat screen TVs, plasma and LED TVs, white goods (such as refrigerators and washing machines), mobile phones or smart phones and other mass produced, high volume consumer products. Prices for these

products have all decreased over time in recent years and significantly so. Have the producers, wholesalers, distributors and retailers incurred 'injury' as a result and, if so, what was that 'injury'? What was the 'injury' incurred by a reduction in price? A reduction in prices (i.e., price depression) need not but may result in reduced revenues and profits. All the circumstances of the price reduction need to be taken into account to determine whether the price reduction resulted in injury.

Mere reduction in a price does not of itself without more constitute 'injury'. Rather, it is the consequences flowing from the reduction in price that may, but not necessarily, result in 'injury'. For example, if the price reduction was motivated by a desire to increase sales revenues, then what 'injury' has resulted from the price reduction especially if the price reduction achieves the desired effect? That is, the price reduction resulted in increased sales volumes and, consequently, revenues and profits. Similarly, if the business elects not to reduce prices in response to changing market conditions and, as a result its sales volumes and revenues decline, is not the cause of the 'injury' the decision not to reduce prices? Hence the importance of distinguishing between 'injury' and the so-called 'injury factors' that is the 'cause' of the 'injury' – that link the cause of the injury to the injury itself.

Why would or should a commodity product such as aluminium extrusions be any different? Why would it be immune from reductions in prices due to advances in technology in the production of extrusions, lower costs in inputs to manufacture, improved supply chains, more efficient management due to technological innovations and improvements and so on? In other words, 'price depression', that is, reduction in prices, may simply be indicative of a healthy, competitive industry, both domestically and globally and that, ultimately, results in increased revenues and profits. Again, 'price depression' of itself does not constitute injury but may lead to injury or, alternatively, may lead to increased revenues and profits if countervailing commercial strategies are adopted.

Similar analysis/comments/conclusions apply to other 'injury factors' listed by the Commission in its 'shopping list' of injury, such as, price suppression, loss of sales, reduced market share and so on. All are observable occurrences that may take place by entities competing in a market or markets and that may be occurring for any variety of reasons but of themselves do not constitute 'injury'. No reason is advanced why or how each or any of these 'injury factors' listed in the 'shopping list' constitutes 'injury'.

As those factors have been listed as constituting injury, it is reasonable to assume that the Commission knows or has some reason for considering that of themselves, these 'injury factors' constitute injury but those reasons have not been disclosed in the SEFs.

Also, as noted in a separate submission on the determination of non-injurious prices, to increase the price of a commodity product such as aluminium extrusions in any market (i.e. whether affected or unaffected by dumping) is, at best, difficult:

> "*Commodity businesses lack an important feature common to the extraordinary businesses … They are unable to regularly raise prices and so are denied a valuable comparative advantage.*"[6]

[6] Roger Montgomery, 'Valuable', Ed 2nd, My 2 Cents Worth Publishing, Melbourne, 2010, p.62.

Such difficulty in raising prices is due to the commodity nature of the product and the restrictions placed on such products in an open, competitive market in terms of ability to increase prices. This must be taken into account in assessing the economic performance of an industry supplying a commodity product.

C-4. What are the implications of the Commission's preliminary finding on 'injury' in the SEFs?

Because eight of the nine members of the Australian industry did not participate in any stage of the Investigations by providing information and evidence relevant to the Investigations including whether any of such members had incurred injury during the period under investigation or the nature or extent of any such injury, the Commission has no information of evidence that any of those members has incurred any injury.

The only information and evidence that the Commission has is in relation to whether one member of the Australian industry, namely, Capral, had incurred injury. Obviously, injury incurred by one member of the Australian industry is not injury to the Australian industry as a whole.

Further, injury to one member of an industry cannot be an 'indicator' that any of the other members of that industry have incurred any injury or, if a member has, the nature or extent of that injury and what may have caused it. This would require evidence that injury incurred by one may be attributed to one or more other members of the industry and why and to what extent. There is no such evidence.

There is no evidence that the circumstances of each member of the Australian industry is the same or similar to every other member of the Australian industry. There is no evidence as to what extent members of the Australian industry are the same, similar of different in terms of production of aluminium extrusions and any other sources of aluminium extrusions supplied by it to the Australian market, their respective cost to make and sell, volumes of aluminium extrusions supplied to the Australian market, supply chains, marketing strategies, product and service differentiation, profit levels, customers, including customer profile and number, and so on.

Consequently, the economic performance of any one cannot be attributed to the others. It amounts to no more than mere speculation based on unfounded assumptions in breach of law and policy.

Capral's economic performance, including any 'injury' that it may have incurred for the purposes of the Investigations cannot, therefore, lawfully or logically be an 'indicator' of the economic performance of the Australian industry as a whole or any other member of the Australian industry.

Further, it assumes that Capral's economic performance and, in particular, any injury it may have incurred can properly be attributed to the products under investigation entering into the commerce of Australia at allegedly 'dumped' export prices. As discussed later below, Capral's economic performance has not and cannot be causally linked to the products under investigation entering into the commerce of Australia at allegedly 'dumped' export prices but can be causally linked to other economic factors (s.269TEA(2A) of the *Customs Act 1901* refers).

C-5. What has been Capral's economic performance during the injury period?

The economic performance of Capral is disclosed in its annual reports and financial statements and associated investor presentations for the financial years 2016 to 2019, all of which are publicly available on Capral's website and are **attached**. In other words, it is useful to review Capral's economic performance as disclosed to its shareholders and to the market pursuant to its disclosure obligations under the ASX's Listing Rules in particular those contained in Chapter 3: see Chapter03.pdf.

For example, according to its 2019 Annual Report, in FY2019 Capral had revenues of $419 million but incurred a loss after tax of $4.2 million. The question then is what happened to the $419 million in revenues that resulted in a loss after tax of $4.2 million? What caused this loss?

According to its Profit and Loss Statement in its Annual Report (page 42), Capral incurred liabilities (expenses) of:

- $261 million in respect of raw materials and consumables; and
- $86 million in respect of employee benefits,

amounting to $347 million or approximately 83% of revenues (approximately, 62% and 21% respectively) with the balance made of sundry other expenses. This is on sales of 56,800 tonnes in the 2019 financial year, a fall of 3,700 tonnes on the prior financial year. By way of comparison, in the preceding financial year (2018), revenues were $455 million with an after-tax profit of $6.4 million or 1.4% of revenues on sales of 60,500 tonnes.

So, what were the causes of this fall in economic performance by Capral? According to the Chairman's report in Capral's 2019 Annual Report:

> "*Sales revenues for the year of $419 million were 8% lower than the $455 million achieved in 2018, primarily as a result of 6% lower volumes compared to the prior year.*"

According to its Annual Reports and Investor Presentations, these lower sales volumes were due to contractions in the construction industry, in particular, in residential constructions to which Capral has the majority of its market exposure, as well as excess capacity in the Australian industry. Nothing to do with the products under investigations. Further, according to disclosures in the Annual Reports and Investor Presentations, imports, presumably of aluminium extrusions, placed pressure on margins (i.e. profits) as did competition from other members of the Australian industry and excess capacity in the Australian industry.

In this context it is useful and instructive to set out some extracts from Capral's Annual Reports and Investor Presentations for the financial years 2016 to 2019 (copies of which are **attached** and available on the Capral website, along with Half-Yearly Reports and Investor Presentations):

	Financial Year	***Extracts***[7]
1	2016	"… net profit after tax of $14.4 million for the year ended 31 December 2016 (2015: loss $2.5 million …)" (Chairman) "2016 saw the continuation of the high level of activity in house building which began in the second half of 2015, together with increased activity in the commercial construction and industrial sectors. As a result, 2016 volumes rose 9.7% to 63,400 tonnes (2015: 57,800 tonnes) while revenues of $425 million increased by 5.5% over the $403 million reported in 2015. This increase in revenues was accompanied by a substantial increase in profitability driven by greater capacity utilisation." (Chairman) "A lower Australian dollar assists Capral's competitiveness against imports and also assists our local manufacturing customers." (Managing Director) "Aluminium billet is the largest input cost into Capral's manufacturing operations. Metal costs were relatively stable for most of 2016 however LME rose by greater than 10% late in the year. Over half of Capral's customers are on LME based pricing contracts." (Managing Director) "Extrusion Market in 2016 has grown and is expected to remain at these levels through 2017 due to the pipeline of residential work and a lift in non-residential construction" (Investor Presentation) "Capral has an estimated 29% share of the Australian Aluminium extrusion sales volume. Import market share has fallen to around 34% of the extrusion market, from a high of 40%. Excess domestic extrusion capacity still exists but utilisation has improved." (Investor Presentation)
2	2017	"…a Net Profit After Tax of $12.1 million for the year ended 31 December 2017 (2016: $14.4 million)." (Chairman) "After a slow start in the first quarter, the remainder of 2017 saw the resumption of higher levels of activity, particularly in the commercial construction and industrial sectors, which resulted in the Company achieving a sales volume of 63,200 tonnes, virtually the same as the 63,400 tonnes sold in 2016. Revenues of $449 million were 5% higher than the $425 million reported in 2016 as a result of selling price increases due to substantially higher LME material input costs. Unfortunately, this increase in revenues did not translate into higher earnings than 2016 and this was primarily a result of being unable to fully recover the material increases in LME cost of aluminium billet which continued over the year under review." (Chairman) "The residential market slowed on the back of lower commencements, down 6.1% to 219,0002 starts. However, this was offset by growth in commercial construction and key industrial markets (manufacturing, transport and marine)." (Managing Director)

[7] Footnotes omitted.

		"The largest input cost for Capral's extrusion operation is aluminium billet which is based on the international LME price and premiums. LME rose from US$1,650/tonne at the start of Q4 2016 to finish 2017 at US$2,250/tonne. Just over half of Capral's sales volume is on LME based contracts. The balance of customers are on fixed price or price list arrangements which require notice periods. The rising LME had a material negative impact on margins as we were unable to fully recover the higher LME price from customers in a timely manner. This was the principal factor in the lower earnings against last year." (Managing Director) Channels to Market: Extrusion Direct Ex Mill (50%); Extrusion via RDC (35%); Rolled via RDC (15%) and Diverse Industry Exposure: Industrial (42%); Residential Building (43%); Non-Residential Building (15%) - ~85% of total volume extruded in our Mills and ~15% of total volume is rolled (sheet & plate) and predominantly used in industrial applications (Investor Presentation, Graph, p. 7) ♣ Extrusion market grew in 2016 but was marginally lower in 2017 due to a slowdown in residential construction ♣ Non-residential building demand was better than expected, growing by more than 10%[1] ♣ Key industrial sectors (manufacturing, marine and transport) were relatively strong ♣ Capral has an estimated 29% share of the Australian Aluminium extrusion market ♣ Import market share has fallen to ~34%, from a high of 40% ♣ Excess domestic extrusion capacity still exists but utilisation has improved (Investor Presentation) ♣ LME (USD) continued its rise in H2, increased ~23% in FY17 vs prior year average ♣ Total Metal Cost (AUD) increased ~20% over the same period ♣ Capral was unable to fully recover the higher metal cost during the period ♣ Customer pricing arrangements − LME based contracts (~50% of volume) ¬ Monthly ¬ Quarterly − Fixed price and price list (Investor Presentation)
3	2018	"…Net Profit After Tax of $6.4 million for the year ended 31 December 2018 (2017: $12.1 million)" (Chairman) "Increased sales revenues of $455 million (2017: $448 million) were achieved on volumes which were 4% lower than in 2017 as a consequence of higher selling prices due to substantially higher LME prices." (Chairman) "The US government also imposed additional tariffs on aluminium imports which had the impact of substantially increasing low-priced imports into Australia from China during the second half of the year. This increase in imports, together with slowing capacity utilisation amongst Australian extruders, continued to suppress selling prices and margins." (Chairman) "After a reasonably strong first half, the second half of 2018 saw volume decline 9% compared to the second half of 2017. Full year volume was 4% below last year. The residential market was steady at 217,8002 starts. Commercial construction and key industrial markets (manufacturing, transport and marine) were reasonably strong.

		During 2018 international markets saw unprecedented trade action taken by the US government with the imposition of unilateral tariffs on steel and aluminium into the USA. This, combined with sanctions against Russia, created a volatile market for aluminium. The high LME had a material negative impact on margins as we were unable to fully recover the higher LME price from many customers in a timely manner. The high LME also weakened the impact of anti-dumping measures in place and we saw imports of extrusion rise substantially." (Managing Director) FY18 performance impacted by slowing residential construction, partially offset by growth in key industrial markets (manufacturing, transport and marine) (Investor Presentation) Imports increased in FY18 and surplus domestic capacity continues to impact volumes (Investor Presentation) ♣ Capral has an estimated 27% share of the Australian Aluminium extrusion market ♣ Import volumes and market share have increased due to high LME negating impact of anti-dumping measures ♣ Excess domestic extrusion capacity remains (Investor Presentation) Sales revenue improvement driven by higher LME prices ♣ Margins continue to be under pressure due to imports and excess local capacity ♣ Margin impacted by: – Higher average Aluminium input prices (LME); A$2,823 FY18 (A$2,537 FY17) – Slightly lower capacity utilisation (Investor Presentation)
4	2019	"…a Net Loss After Tax of $4.2 million for the year ended 31 December 2019 (2018: Profit $6.4 million)." (Chairman) "Sales revenues for the year of $419 million were 8% lower than the $455 million achieved in 2018, primarily as a result of 6% lower volumes compared to the prior year." (Chairman) "Volume at 56,700 tonnes was 6% below 2018" (Managing Director) "Conditions were soft during the year mainly due to the slowdown in residential building activity. The market stabilised in the second half of 2019 with volume declining 2% compared to the second half of 2018. Full year volume was 6% below last year. The residential market fell 24% to 170,0001 starts. Commercial construction and our key industrial markets (manufacturing, transport and marine) were reasonably steady throughout 2019." (Managing Director) Extrusion Demand and Supply: Conditions were soft during the year mainly due to the slowdown in residential building activity. The market stabilised in the second half of 2019 with volume declining 2% compared to the second half of 2018. Full year volume was 6% below last year. The residential market fell 24% to 170,0001 starts. Commercial construction and our key industrial markets (manufacturing, transport and marine) were reasonably steady throughout 2019. (Investor Presentation)

These excerpts from Capral's Annual Reports and Investor Presentations, as well as the Reports and Presentations themselves, show that:

- over the period 2016 to 2019, Capral's profits have progressively declined;
- this progressive decline in profits appears primarily due to a decline in sales volumes over this period that, in turn, was due to a decline in the construction industry and, in particular, residential constructions to which Capral had its primary exposure;
- LME prices constituted Capral's major material production cost;
- increases in LME prices during the period were matched by increases in Capral's prices and this was facilitated by the fact that the majority of its contracts with its customers were 'LME based contracts' whose prices adjusted automatically with changes in LME prices although there were timing issues in the adjustments to the cost of LME;
- the balance of Capral's customer contracts were fixed contracts or based on list prices;
- Capral experienced difficulty in increasing its margins during this period, which it attributed to the effects of excess capacity within the Australian industry and import competition, although no explanation was given why, in the absence of excess capacity and import competition, Capral could and would increase its margins in its prices of a commodity product at the expense of its customers and its customers would have been prepared to pay higher prices.

Interestingly, imports of aluminium extrusions would include those from countries not subject to antidumping measures and those subject to antidumping measures as well as the products under investigation. In relation to the products under investigations, the Commissioner determined that such exports had not been at 'dumped' export prices in Investigation No 362 and terminated that investigation in June 2017 in relation to aluminium extrusions from Malaysia. The SEFs do not disclose any material change in the export prices of the products under investigation during the period 2016 to 2019. There, therefore, would seem to be no evidence that 'dumped' exports from Malaysia placed pressure on Capral's margins.

Further, other imports were either un-dumped or were subject to antidumping measures, which presumably meant that they were entering the commerce of Australia at un-dumped prices – that is the purpose of antidumping measures. Also, to what extent were such imports being imported by Capral and/or by other members of the Australian industry? If they were, then they were being imported at prices that undercut the Australian industry's or, at least, Capral's prices for its locally produced aluminium extrusions, as found by the Commission in the SEFs. This would indicate that the Australian industry was inflicting injury on itself. In any event, it cannot be attributed to 'dumped' imports.

Further, reduced sales volumes presumably would have that effect of placing pressure on margins. In the absence of an increase in its prices due to competitive market forces, there would be less sales volumes for Capral to recover its costs, thereby putting pressure on and presumably reducing margins (i.e. profits) and, perhaps, resulting in the announced loss in FY2019 by its decision to commence reducing its prices. In the SEFs the Commission found that Capral was able to increase its prices in line with increased costs between 2016 and

2019 but was unable to do so in 2019, although there was no increase in its CTMS in that year as LME prices remained soft having declined in previous years.

Page 36 of Capral's 2019 Annual Report contains a Table setting out the company's performance since the 2015 financial year. That Table discloses that the company's net (loss)/profit progressively declined from approximately $14.4 million in 2016 to a loss of approximately $2.5 million in 2019, details of which are extracted in the Table below:

	2016	2017	2018	2019
Net (Loss)/ Profit $,000	14,350	12,085	6,415	2,451*

[*Footnote: Operating Cash Flow, Net Profit and Basic Earnings per share adjusted to exclude Restructuring Cost and other one-off costs of $6.7 million.]

While the Table refers to Capral's overall economic performance, there is no reason to conclude that the economic performance of its aluminium extrusion business, which constitutes a major proportion if its business (85%), was not consistent with this overall economic performance and the major cause of it. This progressive decline in economic performance appears from Capral's Annual Reports and Investor Presentations to be due to reduced sales volumes that were attributable to a decline in its major market, the construction industry.

Such progressive decline in profits of Capral's business cannot be attributed solely or principally to import competition and public statements by senior management of Capral clearly contradict any such attribution. Other economic factors, including other import competition and competition from other members of the Australian industry, as well as a contracting market, all contributed to this economic performance.

C-6. Was Capral's economic performance 'caused' by allegedly dumped export prices of the products under investigation?

This issue is addressed later below. However, before doing so it is useful to set out how the causal relationship between the product under investigation entering the commerce of Australia at allegedly 'dumped' export prices should and can only be causally linked to injury incurred by the Australian industry.

While stating the obvious, 'dumping' occurs when a product is introduced into the commerce of an importing country at an export price that is less than its 'normal value', being the price at which that product is sold in the country of export. That is, 'dumping' consists of the product under investigation entering the commerce of the importing country, in this case Australia, at a 'dumped' export price.

This is clearly stated in Article 2 of the WTO Anti-Dumping Agreement:

> "*… a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product*

exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

As indicated earlier above, the trade remedies available under Australia's antidumping regime and under the WTO Anti-Dumping Agreement are available when, because of 'dumping', material injury is caused or threatened to a domestic industry producing like goods, in this case the Australian industry as a whole.

Consequently, to establish that 'dumping' is causing the 'material injury' being incurred by a domestic industry in the importing country, there must be established a causal link between the 'dumped export price' and the reduced profits experienced by the domestic industry. In the absence of such a causal link, the injury incurred by the domestic industry in the importing country cannot be attributed to the 'dumped' export prices. See Article 3.5 of the WTO Anti-Dumping Agreement, the Ministerial Direction and ss.269TAE(1), (2A) & (2AA) of the *Customs Act 1901*.

Further, even if such a link can be established, the 'other economic factors' affecting the economic performance of the domestic industry must be taken into account to preclude injury being caused by those other economic factors being attributed to the 'dumped' export price(s) of the product under investigation. See s.269TAE(2A) of the *Customs Act 1901* and Article 3.5 of the WTO Anti-Dumping Agreement.

Because 'dumping' is exclusively about 'pricing' and, in particular, the allegedly 'dumped' export price of the product under investigation on entry into the commerce of the importing country, a causal link would and can only consist of the following:

- due to 'dumping' and the extent of the 'dumping', the export price of the product in question must be undercutting the prices of the product of the domestic industry in the importing country;
- the effect of that price undercutting is causing 'price depression' and/or 'price suppression' and/or 'reduced sales volumes' to the domestic industry; and
- those prices and/or volume effects, in turn, cause the domestic industry to incur reduced revenues from the product in question and this, in turn, results in reduced profits for the domestic industry and, hence, 'injury'.

If links (i.e., the 'injury factors') in the causal chain connecting the export price(s) of the product being investigated with the injury (i.e., reduced profit) of the domestic industry are missing, then any injury incurred by the domestic industry cannot be attributed to 'dumping'. It must be due to something else.

Further, those links in the causal chain, assuming they exist, will also determine the extent of the injury incurred by the domestic industry caused by dumping. That is, the extent of price undercutting due to 'dumping' and the extent of its flow on effects, whether price and/or volume related, will determine the extent of any injury caused by dumping, with the balance, if any, attributable to other economic factors.

Finally, in undertaking this analysis it is important to identify the point of competition between the product under investigation with the domestically produced product. It is at

that point of competition that the product under investigation will have an effect, if any, on sales of the domestically produced, that is, whether it has a price effect and/or a volume effect on the domestically produced product.

As the export price is the price at which the product enters into the commerce of the importing country, this would typically be at the point of importation into the importing country. No doubt it is for this reason that that price is referred to as the 'export price'. That is, it is the price that the product competes on price with other such products being imported into the importing country from other sources, that is, other countries of export.

Competition with the domestically produced product does not usually take place at the point of importation. Rather, such competition takes place lower down the supply chain in the country of import – i.e., at the wholesaler/distributor/reseller/retailer/etc. levels of trade. At these levels of trade, the product under investigation will have had added to it the costs to sell and profit margins of each entity in the supply chain to the point of competition.

As such, the domestic industry will not be competing with the export price of the product under investigation but a different, higher price. Accordingly, to assess the effects of the product under investigation entering the commerce of the importing country at allegedly 'dumped' export prices, it is necessary to demonstrate and quantify the amount by which the 'dumped' export price flows through to the price at which the product under investigation competes with the like product produced by the domestic industry in the importing country. Only through such analysis can it be demonstrated whether and to what extent the prices of the domestic product is being undercut by the product under investigation because of 'dumping'.

This framework for analysing the causal links, if any, between the export price(s) of the product under investigation and the 'injury' incurred by the domestic industry in the importing country, that is, an analysis based on the injury factors, is reflected in the provisions of s.269TAE of the *Customs Act 1901* and Article 3 of the WTO Anti-Dumping Agreement and supported by the 'Economic framework' prepared by Frontier Economics at the request of the Commission.

The issue then becomes to what extent, if any, was such an analysis undertaken by the Commission in the Investigations as disclosed in the SEFs.

C-6.1 The Commissioner's methodology in the analysis of the causal link between dumping and material injury

The Commission's analysis in Investigation 540 of whether the product under investigation at allegedly dumped prices caused material injury to Capral is in Section 8 of SEF 540 and in the same section in SEF 541 for the other Investigation. Specifically, the methodology adopted by the Commission is set out in Section 8.3 of that SEF, namely:

> "*In assessing the materiality of injury, the Commission notes Chapter 22 of the Manual which states that causal effects may be examined using what is termed a 'coincidence' analysis; by comparing the state of the Australian industry in the investigation period to a point in time prior to the injury having commenced; or using a 'but for' analytical method.*"

and:

> "*Where a 'coincidence' analysis is not possible, the Commission may undertake an alternative analytical method, such as a 'but for' analysis, to examine causal effects. Using a 'but for' analysis it's possible to compare the current state of the Australian industry to the state that the Australian industry would likely have been in, if there had been no dumping and/or subsidisation.*
>
> *The Commission has conducted a 'but for' analysis to determine what the economic condition of the Australian industry would have been if the goods were not exported from Malaysia at dumped prices (for example, in terms of prices and profits).*"

It would seem, therefore, that the methodology adopted by the Commission was a 'but for' methodology, namely, "*what the economic condition of the Australian industry would have been if the goods were not exported from Malaysia at dumped prices*".

However, it should be noted that were a 'coincidence' analysis used, as opposed to a 'but for' test, such an analysis possesses a number of problems identified by Frontier Economics in its report to the Commission. Specifically, the fact that there is a 'coincidence' between two events (e.g. an increase in import volumes and a decrease in sales volume by the domestic industry) does not mean that the two events are causally linked. They could be mere 'coincidences'. Evidence is required to establish the causal link between the two 'coincidences'. Absent such evidence, the causal link between the two events is not established. To claim such a link is to offend against the Ministerial Direction and the law, both domestic and international.

This was recognised by Frontier Economics in its reference to the third methodology used in causation and injury measurement, the 'correlation' methodology, in its report to the Commission. That methodology is based on economic theory that 'suggests' that certain relationships exist between prices and volumes of exported and like goods. However:

> "*… because this analysis involves correlations rather than specifically assessing causation, this analysis should be supplemented with other evidence to support a determination that dumping or subsidisation has caused injury*". (at p. 6)

Absent such supplemental evidence, such an analysis would be of negligible probative value, if any. Rather, it would consist of mere speculation based on unfounded assumptions.

In relation to a 'but for' methodology, the problem is that it also requires speculation as to what would be the economic condition of the domestic industry in the absence of the product under investigation entering the commerce of the importing country at 'dumped' export prices. This requires holding constant all other factors in the relevant domestic market in the importing country, including all other conditions affecting and impacting on that market. This entails a sophisticated economic model. However, even if such a model were used, it is no more than a model that speculates on what the condition of the domestic industry might have been if all assumptions were proven and conditions in the market held constant. It is no more than mere speculation as to what could be as opposed to a finding of fact as to what actually occurred supported by evidence, which is the role of the investigating authority.

Again, this was recognised by Frontier Economics in its report to the Commission:

> "*The development of a counterfactual **must explicitly consider factors** likely to affect performance of the Australian industry producing like goods **other than dumping** or subsidisation. That is, in determining the **counterfactual prices, quantities, revenues and market shares (and other indicators, if relevant),** an attempt must be made to **identify all relevant market features which influence supply, demand, and the degree of price responsiveness to any change in supply and demand**."* (page 5) (bold added)

Was this undertaken by the Commission in either Investigation? No, at least not according to the SEFs.

In any event, the Commission does not appear to have employed a 'but for' methodology in its analysis despite its claim that it had done so. Rather, the Commission appears to have adopted a methodology based on 'coincidence'. That is, of observing the occurrence of two phenomenon occurring in the domestic market of the product in questions and linking the two as one phenomenon having caused the other without any evidence to that effect.

Without evidence of any causal relationship between two occurrences, their occurrence can be entirely coincidental and nothing more and nothing to contradict this and establish the requisite causal relationship. To draw conclusions from such coincidence would constitute mere speculation and, as noted earlier above, offends against the Ministerial Direction and the law, both domestic and international.

A dumping investigation requires an assessment of what is the actual effect of the allegedly 'dumped' export prices of the product under investigation on the domestic industry in the importing country in terms of price and volume effects and consequent effect on profit (i.e., injury). This the Commission, by its own admission, apparently has not undertaken in the analyses set out in the SEFs.

C-6.2. Commissioner's preliminary finding of price undercutting

At Section 8.6 of SEF No 540, the Commission made a preliminary finding of fact that:

> "*Having regard to the approach outlined above, the Commission's price undercutting analysis found Capral's prices for like goods sold through its mill sales channel were undercut by the fully landed Free into Store (FIS) price of the goods exported to Australia by the subject Malaysian exporters. Capral's prices were undercut by the subject **Malaysian exporter's prices** by an **average** of 20% in each quarter of the investigation period.*" (bold added)

A number of points need to be made in respect of this finding, namely:

- the price(s) of the product under investigation apparently undercut the price(s) of Capral's domestically produced product by an 'average' of 20% - that is, presumably some exports undercut Capral's prices by more and some by less than the average and in differing volumes with different effects, if any;

- what the relevance of an 'average' percentage amount of price undercutting is unexplained when, presumably, it is the actual amount of price undercutting by the export prices of the product under investigation on entry into the commerce of Australia and their respective volumes that is relevant as a 'cause' of injury;'
- the price(s) of the product under investigation that competed with Capral's product apparently is the "*fully landed Free into Store (FIS)*', which, obviously, included all on-costs from the point of importation into Australia – that is, it is not the 'export price' at which the product under investigation entered into the commerce of Australia that competed with Capral's prices. They were not the "Malaysian exporters' prices";
- it is not clear if the allegedly 'dumped' export price of the product under investigation flowed through to the FIS prices that competed with Capral's prices and, if so, to what extent;
- the preliminary dumping margins determined by the Commission for the product under investigation ranged from 3.3% to 13.3% of the exports investigated, but no analysis was apparently undertaken as to what extent those dumping margins translated into price undercutting given the FIS basis of the comparison or the extent of price undercutting resulting from such dumping margins; and
- to what extent would the FIS price of the product under investigation exceed or be less than Capral's prices if the full dumping margins were applied to the export prices of the product under investigation?

What is unclear and not explained is whether and to what extent the 'dumped' export prices flowed through into the 'fully landed free-into-store' (**FIS**) prices and, consequently, to what extent, if any, the 20% average price undercutting or any price undercutting is attributable to the dumping margins of 3.3% to 13.3% preliminary determined by the Commission. That is, for example, whether and to what extent does an export price at the point of importation that is 3.3% less than its normal value result in the product under investigation undercut the FIS prices of the like goods produced by the Australian industry if at all. There if no finding of fact supported be evidence of such flow through in the SEFs.

Further, there is no analysis of the price undercutting by volume of the products under investigation by each exporter as the dumping margin of each is different. Is the 20% average price undercutting attributable to exports with the highest dumping margin or the lowest and which were being exported in the greatest volumes? How does the range in dumping margins flow through into price undercutting and in what volumes? This seemingly would be relevant to determining whether any price undercutting can be attributed to dumping and, consequently, to what extent it gives rise to the other 'injury factors linking the dumping to any injury ultimately incurred by Capral as a result.

In addition, there does not appear to be any analysis of whether, if the export prices of the product under investigation were increased by an amount equal to the full amount of their respective dumping margins, Capral's prices would still be undercut by the product under investigation and, if so, to what extent and what effect that this would have on Capral. In other words, an application of the 'but for' test that does not appear to have been used.

Alternatively, to what extent would Capral's prices be exceeded by the FIS prices of the product under investigation if the full preliminary dumping margins were applied to export

prices? Again, another possible application of the 'but for' test that does not appear to have been used.

The problem with the Commission's analysis is that it is not possible to attribute the 20% 'average' price undercutting to the extent of the alleged 'dumping' of export prices of the product under investigation. That is, there is no downwards verification of the FIS prices to the export prices of the products under investigation. Consequently, it is not possible to attribute any upwards price and volume effects (i.e., price suppression, price depression and reduced sales volumes) and their extent to the allegedly 'dumped' export prices of the product under investigation. That is, there is no upwards verification of the price undercutting allegedly due to the 'dumped' export prices to any injury incurred by Capral let alone the Australian industry as a whole.

Consequently, any injury incurred by Capral, let alone the Australian industry as a whole, cannot be causally linked to the product under investigation entering the commerce of Australia at allegedly 'dumped' export prices. The causal links are missing due to the absence of a causal link between the allegedly 'dumped' export prices and price undercutting.

While in the circumstance it is unnecessary to do so given the above conclusion, consideration has been given below to a number of the 'injury factors' set out in the SEFs.

C-6.3 Price suppression

The Commission made the preliminary finding that Capral experienced 'price suppression' during the period under investigation. This raises a number of questions, namely:

(a) what constituted the 'price suppression';
(b) what was/were the cause(s) of the increased costs that Capral incurred;
(c) what precluded or inhibited Capral from increasing its prices to recover any such increased costs; and
(d) how did the product under investigation preclude or inhibit Capral from increasing its prices to recover any such increased costs given existing conditions in the aluminium extrusion market in Australia?

Section 7.4.2 of SEF No 540 contains the Commission's findings regarding price suppression apparently incurred by Capral. The Commission found that:

> "*Having regard to the relationship between the trends in the data in the tables above, the Commission makes the following observations:*
> - *up until 2018, the rate of increase in the prices for like goods was similar to the rate of increase in CTMS; and*
> - *the CTMS for like goods in 2019 remained the same as 2018, however, prices for like goods in 2019 declined.*"

The Commission, therefore, found on a preliminary basis that up to 2018 Capral was able to increase its prices for 'like goods' in accordance with increases in its cost to make and sell (**CTMS**) but, in 2019, its prices commenced to decline while its CTMS remained stable.

Based on these preliminary findings there does not appear to have been any 'price suppression' either before 2019 or during 2019. There was no increase in Capral's CTMS in 2019 and, consequently, there was no reason for Capral to increase its prices in 2019 due to an increase in CTMS and in prior years it increased its prices for 'like goods' in line with increased CTMS. There was no price suppression in 2019 or, for that matter, at any time prior to 2019.

However, the Commission also found that, having regard to the relationship between cost and price for like goods in absolute terms, Capral experienced increasing losses from 2018 to 2019. It is unexplained how such losses were actually incurred if prices were increased in line with increases in its CTMS prior to 2019 and in 2019, there was no increase in its CTMS.

Nevertheless, on this basis the Commissioner concluded that:

> "*The Commission [~~considers~~ **is of the opinion]** that Capral was prevented from raising its prices to recover increasing costs, such as the cost of metal. As a result, the Commission is satisfied that Capral has experienced injury in the form of price suppression.*" (strikeout and bold added)

This conclusion would seem at odds with its preliminary findings that Capral was able to raise its prices in the financial years up to 2018 to recover increased CTMS and, in the 2019 financial year, Capral reduced its prices while its CTMS remained stable. It also is consistent with the disclosures in Capral's Annual Reports that it increased its prices in line with increases in LME prices. Where is the 'price suppression'? What evidence is there that supports the above 'opinion' of the Commission and, if such evidence existed, why would the Commission need to express an opinion as opposed to making a statement of fact supported by evidence?

Presumably, the reason why the Commission was unable to make such a preliminary finding of fact was because, as indicated, that fact did not exist. That is, Capral was able to and did increase its prices in line with increases in CTMS when its CTMS increased and in 2019 there was no increase in CTMS necessitating an increase in prices.

Finally, Capral does claim in its Annual Reports and Investor Presentations that its margins were under pressure, presumably being 'suppressed', because of, amongst other things, import competition and excess capacity in the Australian industry. As has been noted earlier above, imports have not been entering the Australian aluminium extrusion market at dumped prices either from Malaysia or elsewhere. This is because such imports either have been determined not to be at dumped prices or are subject to antidumping measures or are not claimed to be being imported at dumped prices by the Australian industry.

Further, no explanation has been provided by Capral as to how or why its margins have been suppressed during the period 2016 to 2019 or beforehand. Nor has any reason been provided as to an increase or increases to the margins on aluminium extrusions, being a commodity product, at the expense of customers is or could be justified. Why would customers agree to increases in margins in the presence of un-dumped imports and competition from members of the Australian industry? Again, it is mere speculation.

C-6.4 Price depression

At Section 7.4.1 of the SEF, the Commission made the following preliminary findings regarding price depression:

> "*In relation to price depression, the variation in selling prices shown above at Table 17 indicate that Capral's price for like goods generally increased up to 2018, although it began to decrease in 2019. On the basis of this observation, price depression in relation to like goods appears to have begun to occur in 2019.*"

The issue for consideration, therefore, is why was Capral able to increase its prices in the financial years prior to 2019 in line with increases to its CTMS but, in the 2019 financial year, when its CTMS was stable, it began to reduce its prices?

What caused Capral to begin to reduce its prices in 2019? What occurred in 2019 that motivated Capral to reduce its prices, especially when the product under investigation was entering into the commerce of Australia at un-dumped prices given the Commissioner's termination of Investigation No 362 in relation to such exports? There is no evidence that the export prices of the product under investigation had materially declined since then. In any event, Capral had increased its prices in the years prior to 2019. Why was it unable to do so in 2019 and did not do so?

In the preceding Section of this submission, it was shown why Capral would likely have 'begun to reduce' its prices in 2019. There was a rational, commercial reason for it to do so that had nothing to do with import competition, or competition from other members of the Australian industry. That reason was because the aluminium extrusion market had contracted due to the contraction in the construction industry, in particular, residential constructions, as well as the excess capacity in the Australian industry referred to by Capral. This presumably motivated Capral to reduce its prices to increase its sales volumes and, consequently, sales revenues.

Nothing to do with the product under investigation but its dependence on other economic factors for its sales volumes.

C-6.5 Sales volumes

At Section 7.3.1 of SEF No 540, the Commission made the following preliminary findings regarding sales volume:

> "*The data provided by Capral indicates that since 2016 the Australian industry has generally experienced a reduction in sales volume over the injury analysis period and particularly in the investigation period.*"

Given that Capral apparently experienced a decline in sales volumes since 2016 and, in particular, in the period under investigation, the following questions arise:

(i) what caused the decline in sales volumes since 2016; and
(ii) what did Capral do to address that decline in sales volumes, if anything?

As previously noted, Capral has stated that its decline in sales volumes was due to a decline in the construction market, in particular, the residential construction market, especially in the 2019 financial year. Capral has acknowledged this affected its sales volumes. It has nothing to do with import competition, which, along with competition from other members of the Australian industry, Capral acknowledged only put pressure on margins, as opposed to reducing sales volumes.

At Section 8.5 of the SEF, the Commission addressed the issue of sales volumes and concluded that:

> "*Having regard to the analysis of the Australian market at both the whole of market and customer level, the Commission is satisfied that the* ***available information*** *supports Capral's claims that its sales volume in the investigation period* ***would likely have been higher*** *in the absence of the volume of dumped goods exported to Australia by the subject exporters.*" (emphasis added)

Why would Capral's sales volumes have been higher in, as Capral itself acknowledged, a declining market? Why is the volume of the product under investigation relevant? What evidence is there that the allegedly 'dumped' export prices of the product under investigation was reflected in the FIS prices of the product under investigation and, if so, to what extent and this resulted in the price undercutting and the extent of price undercutting found by the Commission?

What evidence is there to support Capral's claim that its sales volumes would likely have been higher in a market where sales volumes are contracting, where:

- Capral had increased its prices in all years prior to 2019 but its sales volumes revenues and profits had declined in each such year?

What had the allegedly 'dumped' export prices of the products under investigation to do with Capral's declining sales volumes when it was able to increase its prices and did increase its prices. Presumably, it was not 'losing' sales due to its prices given that Capral had elected to increase its prices in the years prior to 2019.

Hence the issue addressed earlier above as to why Capral elected to reduce its prices in 2019. It had nothing to do with competition from the products under investigation.

The preliminary finding on reduced sales volumes appears to be, contrary to the Ministerial Direction, that as the Commission has found on a preliminary basis that the product under investigation had been exported at 'dumped' export prices, this **must** have been the cause of any loss of sales volume by Capral. There is no evidence to support that assumption and certainly no evidence that any loss of sales volume to the product under investigation was due to a 'dumped' export price. The causal links referred to by Frontier Economics have not been established to exist.

Further, it is apparent from the SEFs that imports from other sources, China in particular, significantly increased their sales volumes. Were such imports able to increase their sales volumes because their FIS prices undercut Capral's prices and, if so, to what extent despite being subject to antidumping measures or was there some other reason? Also, did the other

members of the Australian industry increase their sales volumes and, if so, was this because their FIS prices were lower than Capral's prices? Or, was Capral's decline in sales volumes consistent with the contraction in the Australian aluminium extrusion market upon which it depended for its sales volumes?

It is interesting to note that this preliminary finding was based on the 'available evidence'. That 'available evidence' apparently consisted of the following:

> "*In its application, Capral provided **historic sales information** relating to **six customers** to which it submitted comprised evidence that Capral had experienced a reduction in purchase volumes and/or price-effect injury.*" (emphasis added)

Injury to the Australian industry as a whole and to Capral in particular resulting from reduced sales volumes was based on 'historic sales information' of six customers of Capral. Were those six customers of Capral a representative sample of Capral's customers in terms of terms and conditions of sale, level of trade, volumes purchased, prices, etc.? Were those six customers representative of the other customers of Capral or the customers of the other eight members of the Australian industry? What evidence is available that they were and, in the absence of such evidence, of what relevance are those six customers or their sourcing of aluminium extrusions? What evidence was there of the reasons for those customers' purchasing decisions?

In this regard, the Commission made the following preliminary findings:

> "*Having regard to the Australian market data relied on in section 5.5.2, the Commission examined imports of the goods from the subject exporters by the customers cited in Capral's application. With the exception of one customer, all other customers were found to **have increased their imports of the goods** in the investigation period (2019) compared to 2018. Further, the **number of Australian entities importing the goods from the subject exporters** in the investigation period represented an approximate 50% increase over 2016.*" (bold added)

Having regard to this extract:

- to what extent did five of the six increase their 'imports of the goods', presumably the products under investigation but this is not clear, and, more importantly, why? No reason was given for the increase in imports, nor any evidence in support, such as the basis on which these customers made their purchasing decisions; and
- which 'Australian entities' were importing the product under investigation, that is, did it include members of the Australian industry and, if so, to what extent were they sourcing aluminium extrusions for supply to the Australian market? For example, is Capral importing aluminium extrusions and, if so, from countries not subject to antidumping measures such as Indonesia. No doubt the Commission can confirm whether members of the Australian industry are importing aluminium extrusions and, if so, who is doing so and from where through access to Australian Border Force's import database.

Absent enquiries and evidence addressing these issues, it is not possible to draw any conclusions as to why customers and 'Australian entities' were sourcing their requirements

for aluminium extrusions from sources other than Capral. It cannot automatically be assumed that sourcing requirements of aluminium extrusions from suppliers other than Capral was due solely or principally to price or because of 'dumping'. There is no evidence to support such a conclusion and none is adverted to in the SEF. To draw such a conclusion contravenes the Ministerial Direction.

The preliminary findings that Capral's decline in sales volume were caused by the product under investigation entering into the commerce of Australia at allegedly 'dumped' export prices is not supported by available information or evidence. Rather, the available information and evidence supports a finding that the decline in Capral's sales volumes was due to other 'economic factors' and, principally, the contraction of the construction market, excess capacity in the Australian industry and competition from all sources.

C-7 Conclusion

It is evident, therefore, that Capral's economic performance, that is, the injury it has incurred in the form of the progressive reduction in profits during 2016 to 2019 was due to its decline in sales volumes, which, in turn, was due to a contracting construction industry, in particular residential, constructions. Excess capacity in the Australian industry, changes in LME prices, and market competition from imports and the other members of the Australian industry also were other economic factors to which such economic performance can and was attributed.

Exports of the products under investigation entering into the commerce of Australia at allegedly 'dumped' prices cannot and has not been causally linked to Capral's economic performance during the injury period, especially when the point of competition between the products under investigation and Capral's domestically produced products is at the FIS level of trade and not the point at which the products under investigation enter into the commerce of Australia.