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By Email

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

Dear Commissioner,

RE: Aluminium extrusions exported from Malaysia – Investigations Nos 540 and 541 – Termination – Extension of time to report to the Minister

I refer to the decision of the General Manager, Investigations, to extend the date by which you are required to report to the Minister in Investigations Nos 540 and 541 to 29 April 2021, being the fourth extension of time for these Investigations.

No reasons were given for the extension other than to allow you to consider matters further. It is unclear what matters require further consideration or why.

As you would be aware, it has been submitted to the Anti-Dumping Commission (**Commission**) in response to the Statements of Essential Facts in these investigations that both Investigations must be terminated.[1]

This is because, if for no other reason, there is no evidence that the Australian industry has incurred injury.[2] The lack of such evidence is due to eight of the nine members constituting the Australian industry electing not to participate in any stage of the Investigations and provide information and evidence as to whether any of them have incurred any injury and, if so, what caused it and to what extent.[3]

Consequently, there is no evidence before you that the Australian industry as a whole has incurred injury, let alone injury caused by dumping.

[1] See Documents Nos 53, 56 and 58 in Investigation 540 and Documents Nos 61, 67 and 69 in Investigation 541.
[2] Article 11.1 of the WTO Anti-Dumping Agreement, which is an over-arching obligation, requires that measures "*remain in force only as long as and to the extent necessary to counteract dumping which is causing injury*". See also s. 269TDA (13) of the *Customs Act 1901*.
[3] As has also been submitted, such non-participation by eight of the nine members of the Australian industry in the Investigations is indicative that the majority of the Australian industry does not require the antidumping measures and, as they are not required by the industry, they should be revoked.

As you would be aware, any such evidence must demonstrate that the Australian industry as a whole and not just part of that industry or only one member of that industry has incurred injury and that injury is material and that material injury was caused through the effects of the product under investigation entering the commerce of Australia at 'dumped' export prices.

A finding of material injury, supported by evidence, must be in relation to the Australian industry as a whole and not one part of it or one member of it. The Federal Court in *Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority* [1991] FCA 49, determined as much where, at paragraph 39, Lockhart J. stated that:

> "*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) (emphasis added)

Finally, this is reflected in s.269T (4) of the *Customs Act 1901*:

> "*(4) For the purposes of this Part, if, in relation to goods of a particular kind, there is a person or there are persons who produce like goods in Australia:*
>
> *(a) there is an Australian industry in respect of those like goods; and*
> (b) *subject to subsection (4A), the industry consists of that person or those persons."*[4]

Here the Australian industry producing like goods is all nine companies producing aluminium extrusions in Australia. Consequently, any injury occasioned to that industry because of the effects of the product under investigation entering the commerce of Australia at 'dumped' export prices must be to all nine members and not any smaller proportion thereof regardless of their production capacity.[5]

[4] The requirement of injury being to the whole of the Australian industry and not part thereof is different from the requirement in s. 269TC (6) of the *Customs Act 1901* that sets out the proportion of the Australian industry necessary to support an application for the imposition of antidumping measures. Different tests for different purposes.

[5] The nine members of the Australian industry are identified in the applications for the imposition of antidumping measures in relation to the Investigations.

Absent such evidence, you are under an obligation to terminate these investigations, both under domestic and international law and to do so immediately. That is, there is no evidence that the Australian industry has incurred injury and hence your obligation to terminate the Investigations.

That there is no such evidence as is evident from the Statements of Essential Facts and the information available on the Commission's electronic public file for these investigations. There is, it is respectfully submitted, nothing further for you to consider before reporting to the Minister.[6] The obligation to terminate the Investigations has arisen.

If the Investigations are terminated, as they must be, no report is required to be made to the Minister by you under Division 3 of Part XVB of the *Customs Act 1901*. The Investigations will have been terminated before any such statutory obligation arises.

For completeness, I note that the sole member of the Australian industry that has participated in the Investigations, Capral Limited (**Capral**), recently announced that for financial year 2020 it had made a profit of $24 million, as opposed to a loss of $4.2 million in the previous year: see the profit and loss statement on page 13 of the **attached** Investor Presentation.[7] That move from a loss to a profit was due to increased sales volumes with the resurgence of the construction industry, the end of certain internal restructuring costs and Jobkeeper, all of which is evident from the profit and loss statement.

It is evident that Capral's economic performance, as well as from its Annual Reports and Investor Presentations, copies of which are on the public file, has been due to 'other economic factors', that is, the usual 'ebb and flow' of business. As has been submitted, there is no evidence that any injury incurred by Capral was caused by the effects of the product under investigation entering the commerce of Australia at 'dumped' export prices.

Hence, there is no evidence that the Australian industry as a whole has incurred injury caused by the effects of the product under investigation entering the commerce of Australia at 'dumped' export prices and, therefore, the Investigations must be terminated and be terminated immediately.

I look forward to your confirmation that this has occurred.

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[6] No new information relevant to the decision to terminate the Investigations could now be filed relevant to this and be properly verified and considered, including providing interested parties with the opportunity to defend their interests without further delaying the Investigations. Further and importantly, interested parties have been aware of these Investigations since their inception in February 2020. Consequently, there has been ample opportunity for interested parties to submit information and evidence in these Investigations. There can be no denial of natural justice in this regard, but, if new information were to be submitted now, failure to provide interested parties to properly consider such information and evidence and its implications for the Commission's preliminary findings of fact in the Statements of Essential Facts without issuing revised Statements of Essential Facts would preclude interested parties to properly defend their interests as required. Further, the Commission also has had ample opportunity since the inception of the Investigations to seek and request information and evidence relevant to the Investigations, including on the issue of injury, and, presumably, has done so.

[7] A copy of that Investor Presentation has previously been provided to the Commission in Review 544 – see Document No 29 on the electronic public file for Review 544.

If you have any questions, please do not hesitate to contact me.

Kind regards

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cc: The Hon. Christian Porter M.P.
Minister for Industry, Science and Technology