

16 June 2022

Director Investigations 3
Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

BY EMAIL: investigations3@adcommission.gov.au

Dear Director,

Dumping Investigation No. 584 concerning Merchant Bar exported from Taiwan

AUSTRALIAN INDUSTRY RESPONSE TO SEF 584

InfraBuild NSW Pty Ltd (**InfraBuild**), the Australian industry applicant in this matter, refers to the publication of Statement of Essential Facts (**SEF**) 584 on 20 May 2022.¹ For ease of reference, InfraBuild has applied the same headings below as those appearing in SEF 584.

SUMMARY

The Commission had erred in its assessment that material injury caused by the dumped exports of merchant bar has not been experienced by the Australian industry. Specifically, the Commission:

- performed a flawed ‘coincidence analysis’ to assess causation, and failed to properly have regard to the *Ministerial Direction* and apply a ‘but for’ method for causation analysis.
- failed to apply a proper method of trend analysis when assessing the volume and profit effects of the dumped goods on the economic conditions of the industry.
- applied a flawed interpretation of the ‘ebb and flow of business’ to conclude that the injury to the industry was not ‘material’.
- failed to properly conclude that industry experienced material injury in the form of loss of market share, price suppression, reduced profits and profitability and reduced capital investment and R&D expenditure.
- failed to properly find, in the alternative, that the industry experienced the threat of material injury.

¹ EPR Folio No. 584/041.

Indeed, based on current June 2022 undercutting margins of \$[REDACTED]/t, industry calculates that unless measures are imposed, it stands to lose \$[REDACTED] in profit and profitability in the forward 12-month period.

Therefore, the Australian industry submits that the Commissioner's preliminary finding that the injury caused to it by the dumped goods was negligible and that the investigation must be terminated under paragraph 269TDA(13) would not be the correct or preferable decision. Accordingly, the Commissioner should recommend that the Minister publish a dumping duty notice under subsection 269TG(1) in respect of all exports of merchant bar from Taiwan. Furthermore, industry submits that the combination method of interim duty calculation be applied, and that by reason of the conditions of s.269TN being satisfied, issue a retrospective notice.

8. HAS DUMPING CAUSED MATERIAL INJURY

8.3 Approach to causation analysis

The Commission has wrongly concluded that in this case it is confined to use 'coincidence analysis' to assess causation. This is in direct contradiction of the *Ministerial Direction*² on this point, which provides in relevant part:

*In cases where it is asserted that an Australian industry would have been more prosperous if not for the presence of dumped or subsidised imports, I direct that you be mindful that a decline in an industry's rate of growth may be just as relevant as the movement of an industry from growth to decline.*³ (emphasis added)

Applied here, industry's claim is that its material injury has been the decline in its rate of growth. Throughout the investigation, industry produced detailed examples of how it responded to offers of dumped imports. In each and every case, industry's response was to suppress price to secure sales volume. In other words, if not for the dumping, industry would have maintained or increased its profit margins on sales and profitability. Specifically, how the size and significance of the dumping margin can be ignored by the Commission, is clearly an error in its reasoning. To proceed on this basis would place the Commission in breach of paragraph 269TAE(1)(aa).⁴

² Clare, J., Minister for Home Affairs, *Ministerial Direction on Material Injury 2012*, Canberra, Commonwealth of Australia, 27 April 2012.

³ *Ministerial Direction*, p. 2.

⁴ All legislative references in this submission are to the *Customs Act 1901* unless otherwise specified.

Even if the prescription of the *Ministerial Direction* may be distinguished from the facts and circumstances in this case, industry observes that the *Dumping and Subsidy Manual (Manual)*⁵ indicates that there may be circumstances where ...a 'coincidence analysis' has not been possible.

Properly understood, industry submits that because 'coincidence analysis' is used by the Commission to determine whether the imported dumped goods are the cause of injury to the industry, then if after removing the effects of exogenous factors, injury is found to 'coincide' in time with periods of observed dumped imports then causation is inferred. If the injury and dumping are found not to coincide in the same periods, the causation of material injury cannot not be attributed to the dumping. Applied here, industry submits that the Commission has not removed the temporary and extraordinary effects of the COVID-19 economic situation from its assessment of injury or threat of injury. Volume and prices have seen unprecedented spikes due to global supply chain disruptions and exceptional industry and economic uncertainty. However, these factors are not permanent, the Commission should have assessed how dumping behaviours will affect the domestic industry once long-term trends are returned to; as market conditions are not within a regular business cycle, but a 'super-cycle'⁶.

In any event, even if the Commission is correct to apply 'coincidence analysis' to the facts and circumstances of this case, it ought to have properly concluded that injury is found to 'coincide' with the dumped imports. Industry specifically points to the decline in undercutting in the last quarter of the investigation period:

The level of undercutting remains relatively consistent in the first 3 quarters of the investigation period, however, it decreases in the final quarter as a result of Feng Hsin's selling price into Australia increasing at a higher rate than the Australian industry's selling price.

...

Thus, the lowest point of the Australian industry's unit profit pertaining to sales of like goods coincides with the point at which the margin of price undercutting was also at its lowest.⁷

⁵ Anti-dumping Commission, *Dumping and Subsidy Manual* (December 2021).

⁶ The concept of a business 'super-cycle' is defined in our response to Section 8.5, below and represented in **CHART 6**, below.

⁷ SEF 584, p. 60.

The Commission has concluded that the reduction in undercutting observed in the final quarter is a *...result of Feng Hsin's selling price...* behaviour. However, such a causal link cannot be concluded from the chart or the data, and in fact supplementary evidence indicates the opposite is true. Price suppression was greatest as well as unit profitability was lowest in this quarter, indicating that the cause of reduced undercutting in this period is due to a change in price behaviour by the domestic industry. The increasing materiality and threat of further injury caused by dumped goods had become significant enough to prompt the local industry to price more competitively in relation to importers. This change in injury materiality, threat and industry response is evidenced by the following:

- reduced share held by industry in a growing Australian market for merchant bar;
- reduced profitability;
- increased import volumes; and
- increased price suppression indicated by a reduced margin between CTMS and unit sales value.

The reduction in undercutting observed in the last quarter could and should be interpreted not as reduced importer aggression but rather as a convergence in pricing between industry and importer as industry fought back to retain market share against competing price offers to sell dumped goods in the Australian market.

Further, to repeat the Commission's observations *...that Feng Hsin's dumping margin also decreases to its lowest point in the final quarter of the investigation period. The Commission therefore finds that dumped imports do not appear to be causing the Australian industry to suffer price suppression.*⁸

Regardless, of whether the dumping margin was at its lowest or not is immaterial, the fact is that dumping was occurring in this period and at a margin and volume sufficient to generate a response by industry in the form of reduced margins and price suppression. This should be adequate evidence that coincidence between dumping and injury is present.

Finally, it is not obvious to industry that the Commission can confidently (or reasonably) conclude that earlier exports of merchant bar from Taiwan were not in fact exported at dumped prices. On this point industry refers to its estimate of dumping margins of merchant bar exported from Taiwan since January 2017, noting that a non-*de minimis* margin was calculated for every month since February 2017. Furthermore, industry refers the Commission to its treatment of the presence of

⁸ SEF 584, p. 60.

likely dumped goods in periods preceding the investigation period in *Report No. 554 concerning concrete underlay film exported from Malaysia*. In that investigation the Commission noted that as it had:

...not previously investigated the goods under consideration. Malaysian exports were prevalent in the Australian market during the investigation period and prior periods examined – accounting for greater than 80% of the total market volumes. The Commission therefore considers that industry selling prices in the period prior to the investigation period may not be the most suitable basis on which to establish a USP.⁹

Although the question related to determining the most appropriate method of calculating an unsuppressed selling price (**USP**), the issue was whether previous exports of the goods sold into the Australian market were dumped resulting in suppressed prices in the Australian market. Applied here, similarly industry submits that:

- the Commission has not previously investigated the goods under consideration, namely, merchant bar; and
- Taiwanese exports were prevalent in the Australian market during the investigation period and prior periods examined (injury period), accounting for a significant share of the total import market volumes.

Therefore, the Commission cannot assume that any comparisons of economic performance in earlier periods were not affected by the presence of dumped goods from Taiwan. This renders any ‘coincidence analysis’ by the Commission, at best, an inutile exercise, and at worse, misleading.

7. ECONOMIC CONDITION OF THE INDUSTRY

7.3 Commission’s approach to analysing the economic condition

Consistent with subsection 269T(2AD), the Commissioner correctly specified an injury analysis period (**injury period**) for the purpose of examining trends to determine whether material injury has been caused to the Australian industry. The Manual describes this practice as follows:

The injury factors are listed in section 269TAE. Injury will be assessed by comparing the current state of the industry to a prior period. Typically, this means that causation is assessed by examining the trends or movements in the volumes and prices of dumped and/or

⁹ Report 554 – Concrete Underlay Film – Malaysia (17 December 2021), p. 89.

subsidised imports over time, and also the volume and price movements in the injury factors.¹⁰

The Commission explains that it presented the Australian industry's verified data on an *...annual basis for the 4 year period ending 31 March 2021*. However, the Commission observes that it *...has also examined quarterly trends within the investigation period to assess InfraBuild's claims that material injury from volume and price effects commenced in or about November 2020*.

There are several problems with the Commission's approach to the *trend* analysis prescribed under subsection 269T(2AD) and the Manual. Firstly, the Commission provides no explanation of how it calculates or tracks any trends it asserts to find in the verified data, for example, by means of a moving average. Secondly, any quarterly analysis performed *within the investigation period*; not *across the injury period*; is incapable of providing sufficient data reference points for meaningful trend analysis, i.e., four only, compared to a possible sixteen. Furthermore, any quarterly analysis performed *within the investigation period* only, is susceptible to fluctuations. An observation the Commission readily admits.¹¹

Given the confluence of price and volume injury in the final two quarters of the investigation period,¹² the correct or preferable approach to examining trends for the purpose of determining whether material injury has been caused is to consider the quarterly trend calculated on a 12-month moving average, and where the final two quarters of the investigation period sit with respect to the overall trend.

7.4.1 Sales volume

The Commission observes from its depiction of the industry's domestic sales volume within the investigation period *...a fluctuation in the Australian industry's quarterly sales volume throughout the investigation period with an overall rise*. We do not see how this observation contributes to any meaningful analysis of trend. When the industry's quarterly domestic sales volume is tracked across the entire four-year injury analysis period; and a 12-month moving average trend line is presented; a

¹⁰ Manual, p. 100.

¹¹ SEF 584, p. 4 at {1.3.4}.

¹² Noting that the Australian industry in fact asserts that price injury commenced in the September 2019 quarter: *Therefore, although the Australian industry experienced the price effects of the dumped imports since the September 2019 quarter, the confluence of both price and volume effects of the dumped imports commenced in or about November 2020* – precisely the position proposed in its application. (EPR Folio No. 584/019, p. 7 refers)

clearer picture of the trend of the industry's domestic sales volume may be considered (refer **CHART 1**, below).

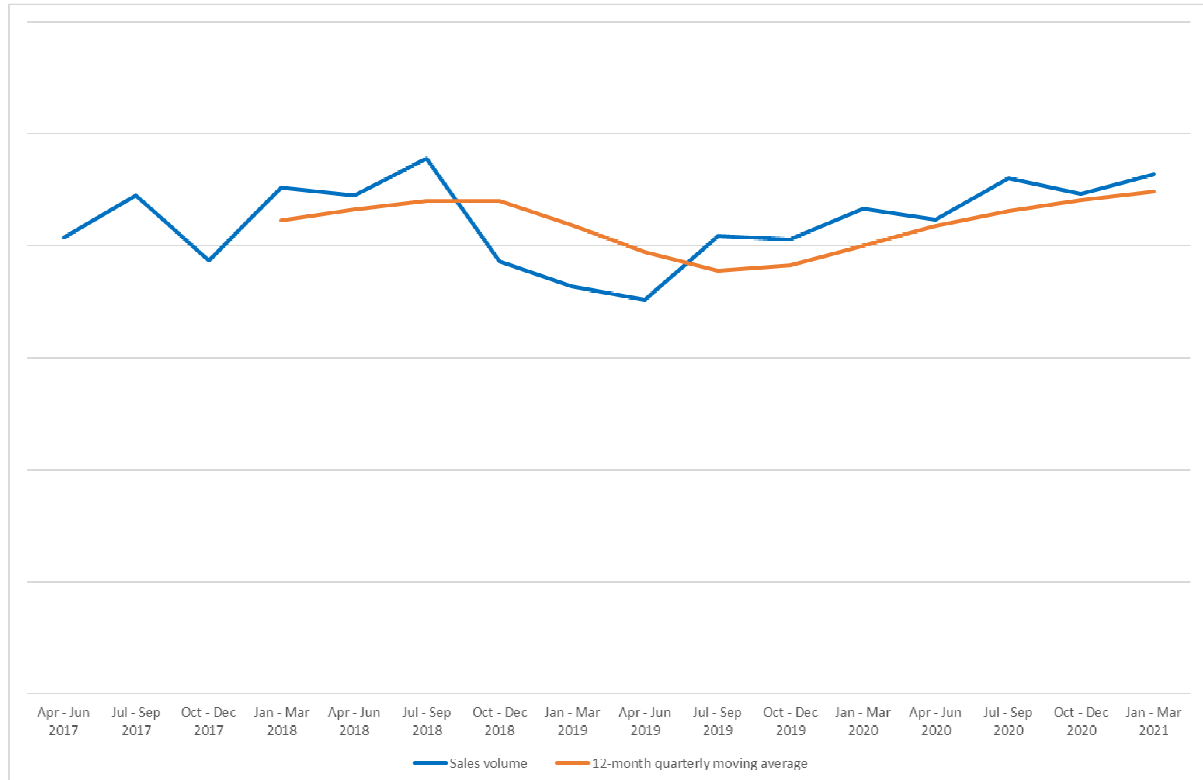


CHART 1: Australian industry's domestic sales volume of like goods – injury analysis period
(Source: [appendix A6.1](#))

CHART 1, above, indicates that in trend terms the industry's domestic sales volume increased throughout the investigation period, and that for each quarter within the investigation period, the industry's actual quarterly sales volume was above trend.

However, all that the analysis in **CHART 1** supports is that, in trend terms, the industry did not experience a decline. This is not to say that the volume effects of the verified dumped imports were nevertheless not experienced by the industry given the growth of the overall Australian market for merchant bar across the injury period, in the form of loss of market share. Here, the Australian industry's performance is revealing.

7.4.2 Market share

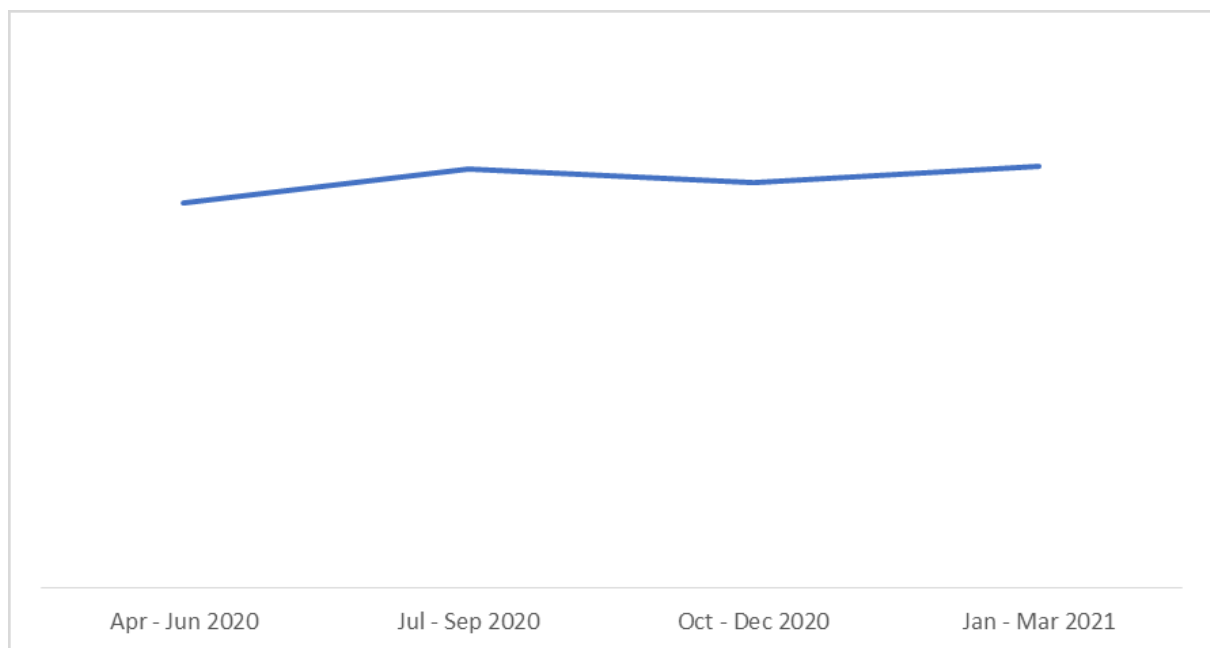
The Commission's own verified market share analysis shows that within the investigation period, the industry's Australian market share for merchant bar declined in the final two quarters.¹³ In other

¹³ SEF 584, Figure 5, p. 24.

words, even though the Australian industry experienced an increase (in absolute terms) in domestic sales volume in the March 2021 quarter, in relative terms, it was the industry's worst performing quarter for retention of its share in the Australian market within the investigation period. This was because the March 2021 quarter represented the largest quarterly growth in the size of the Australian merchant bar market. This quarter (March 2021) also represented the largest market share held by the dumped imports within the investigation period.

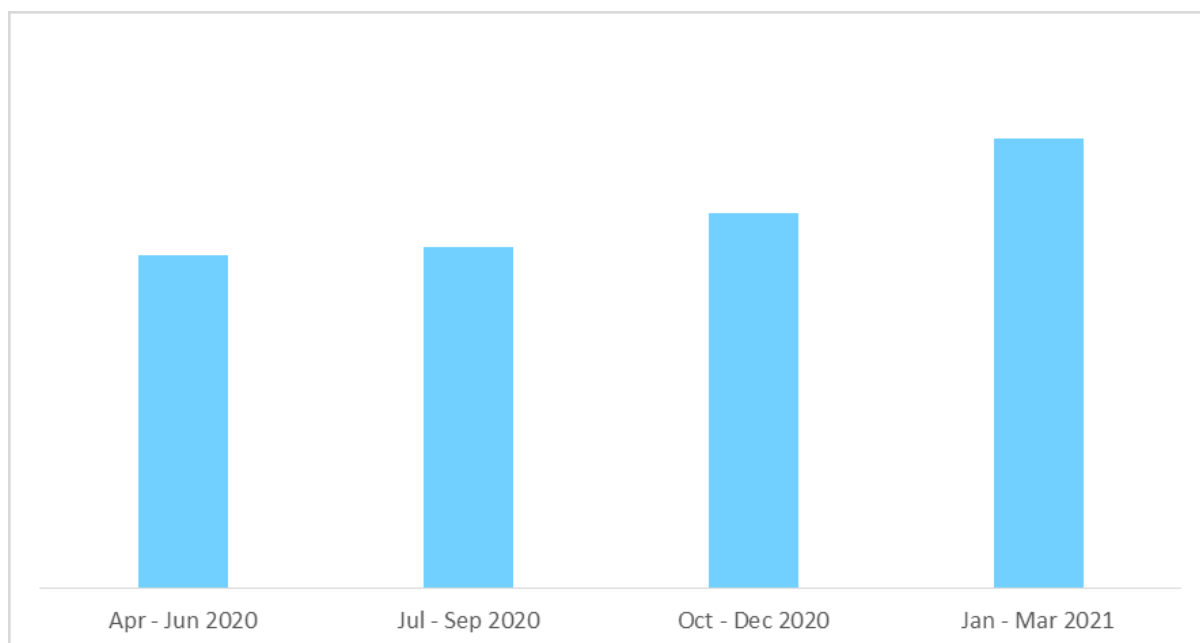
The following charts, reproduced from SEF 584, demonstrate the pyrrhic success of the industry's domestic sales growth in the March 2021 quarter.

Firstly, (reproduced) **Figure 7**, below, indicates the "growth" of industry's sales volume in the March 2021 quarter:



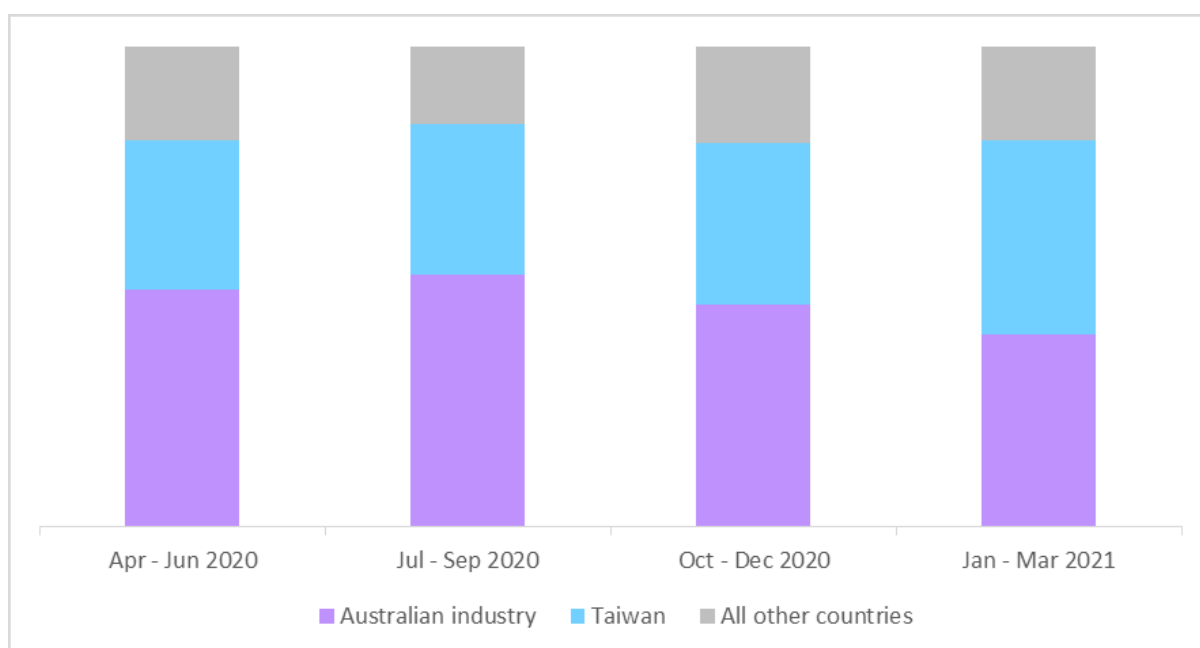
(Reproduced) Figure 7, SEF 584 - Australian industry's domestic sales volume of like goods - investigation period

Secondly, (reproduced) **Figure 3**, below, indicates the growth in the total size of the Australian market during the investigation period, where the market grew to its largest size in the March 2021 quarter.



(Reproduced) Figure 3, SEF 584 - Size of the Australian market for merchant bar during the investigation period (MT)

However, the Australian industry's quarterly sales volume increase in the March 2021 quarter did not keep pace with the increase in overall market size. **Figure 5** (reproduced below) indicates that the March 2021 quarter represented the industry's worst market share performance in the investigation period, breaking the record previously set in the December 2020 quarter.



(Reproduced) Figure 5, SEF 584 - Estimated market shares for merchant bar during the investigation period

At the same time, the market share of verified dumped imports from Taiwan grew in both the December 2020 and March 2021 quarters. On the evidence, the volume effects of the dumped imports are in the form of a loss of industry's market share within the investigation period.

However, far from reaching this conclusion, the Commission describes that *...the decline in market share in the latter two quarters of the investigation period is within a range of upper and lower limits that the Australian industry achieved throughout the injury analysis period.*¹⁴

8.4 Volume effects

The Commission expands this explanation in *Section 8.4.2*, stating the following reasons for not finding that the industry experienced volume effects injury in the loss of market share:

- *of the two latter quarters of the investigation period... only one is below the average market share achieved by Australian industry during the investigation period as a whole...*
- *The commission does not consider [the] decline to be indicative of a sustained and predictable trend caused by dumping, and is not greater than that likely to occur in the normal ebb and flow of business having regard to trends within the broader injury analysis period...*
- *the Australian industry's market share has also been lower during the injury analysis period, and its market share during the fourth quarter of the investigation period is only marginally below the average market share during the injury analysis period...*
- *note[d] that InfraBuild claimed in its application that price cycles in the merchant bar market cause fluctuations in demand, whereby price increases surge purchasing behaviour as consumers stockpile product ahead of potential further rises.*
- *Not[ed] that InfraBuild's unit selling price rose during the latter two quarters of the investigation when InfraBuild also lost market share, the commission considers that this displacement in market share could be attributed to a surge in demand spurred by price increases.*

There are several problems with the Commission's analysis above. The Australian industry considers each in turn and concludes that the Commission's reason for finding that it did not experience volume effects injury in the loss of market share is not the correct or preferable decision.

¹⁴ SEF 584, p. 41 at [7.4.3]

“of the two latter quarters of the investigation period... only one is below the average market share achieved by Australian industry during the investigation period as a whole...”

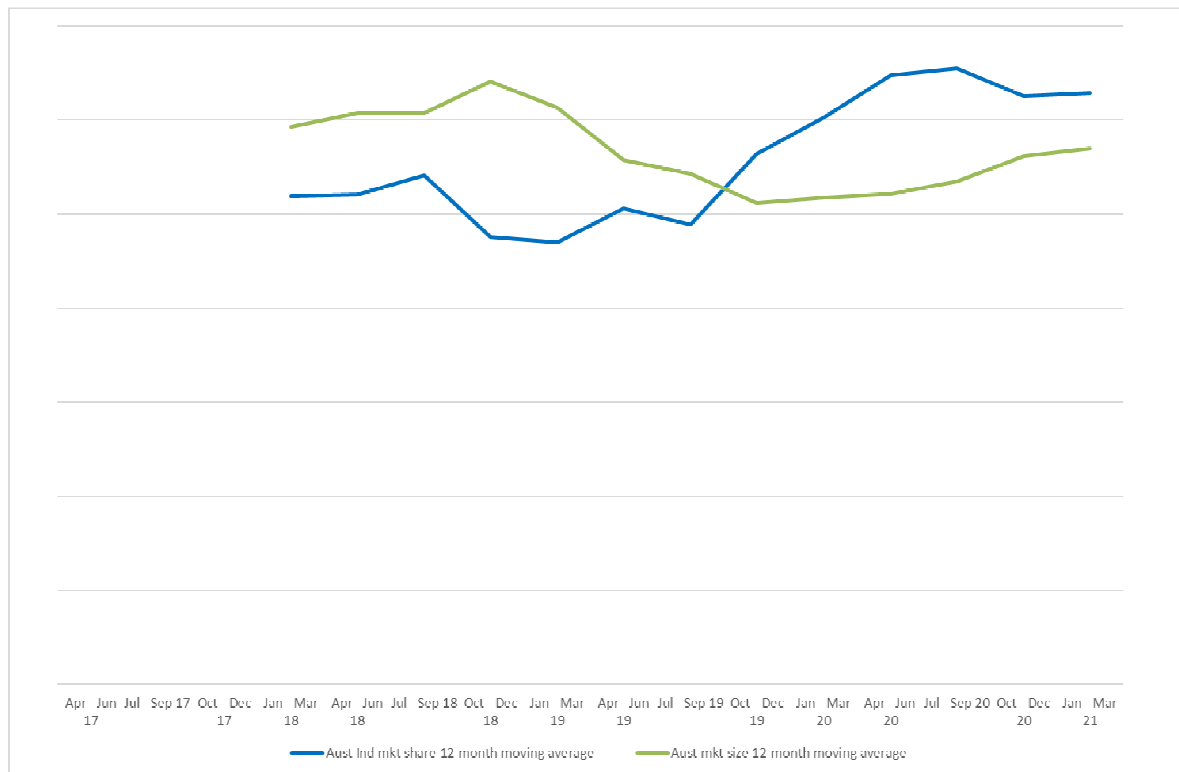
Comparison of a single quarter within the investigation period to the quarterly average across the same period is not indicative of materiality or otherwise, given that two of the quarters within the calculation of the average represent suppressed market share values. To demonstrate this, assume the following hypothetical market share scenario (which generally follows the trends represented in **Figure 5**, SEF 584):

	QTR 1	QTR 2	QTR 3	QTR 4	AVERAGE
Market share, %	40%	45%	35%	20%	35%

By applying the Commission’s logic, only the loss of market share in QTR 4 can be considered material, as it is the only value below the average of all quarters. This ignores the materiality of QTR 3, which represents a decline of 22% when compared to QTR 2, and 13% when compared to QTR 1. In summary, assessment of the materiality of injury on a suppressed average (in this case caused by dumping) is not a sound or meaningful method of measurement and is prone to be influenced by the suppression (caused by dumping) the Commission is meant to measure, not ignore.

“The commission does not consider [the] decline to be indicative of a sustained and predictable trend caused by dumping, and is not greater than that likely to occur in the normal ebb and flow of business having regard to trends within the broader injury analysis period...”

The Commission does not explain how it measures the ...*normal ebb and flow of business* ... in order to conclude that the Australian industry in this case either follows or departs from it. We submit that when measuring changes or trends in the industry’s market share ...*within the broader injury analysis period...* changes and trends in the Australian market size for merchant bar would provide a reasonable and relevant baseline measurement; or counterfactual; against which the variable (market share performance) can be tested. **CHART 2**, below, presents the trend to the industry’s quarterly market share compared to the overall size of the Australian market for merchant bar on a quarterly basis. To smooth out periodic fluctuations and better represent the trend over time, a 12-month moving average has been applied to both variables.

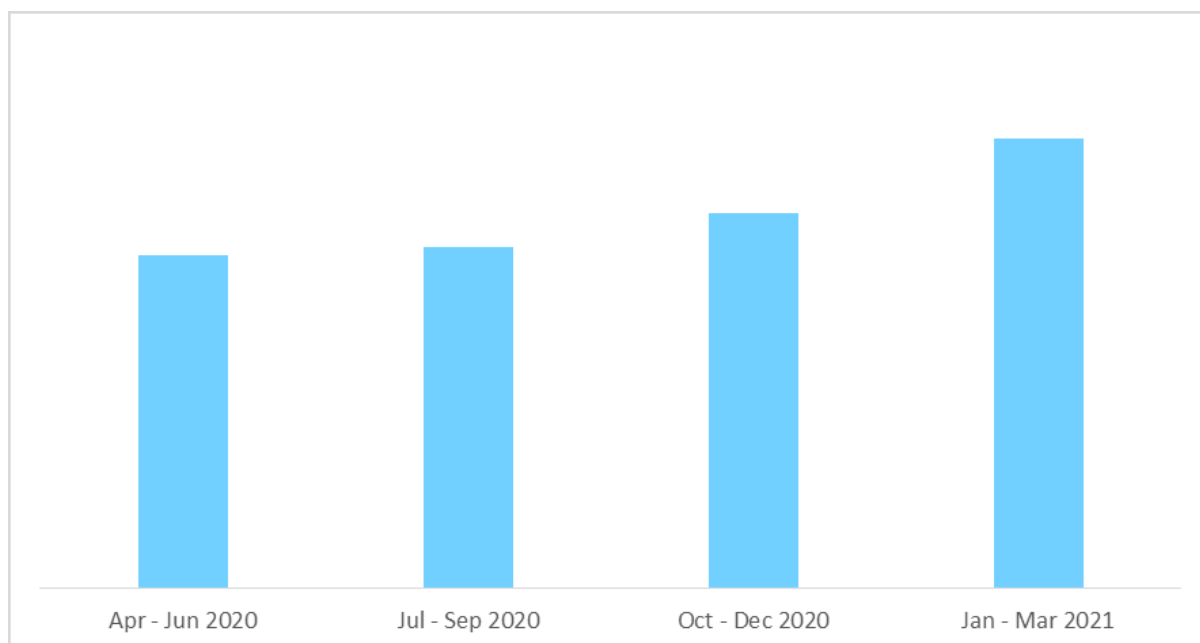


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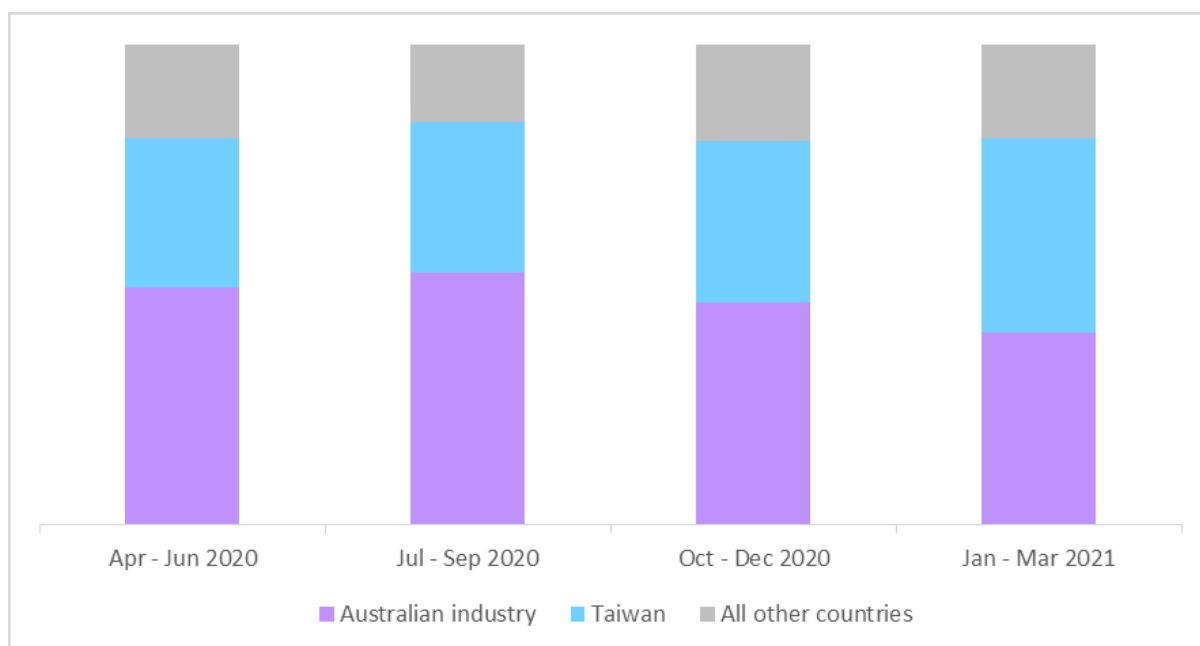
HART 2 – Twelve-month moving average of Australian industry market share (% , LHS) and Australian market size for merchant bar (MT, RHS) (Source: appendix A2)

Chart 2, above, indicates that the trend in the Australian industry’s market share does not follow the *...ebb and flow of business...* within the investigation period, specifically since the December 2020 quarter, when it appears to run counter to it.

In fact, we observe that although the Commission’s market size and share data differs from the view formed by the industry in its application (i.e. appendix A2) the Commission’s own data; (**Figure 3** of SEF 584) shows a significant increase in the size of the Australian market in the March 2021 quarter, and **Figure 5** of SEF 584 shows a significant decline in the industry’s market share for the same quarter. These observations support our contention that the industry’s market share performance does not follow the ebb and flow of business. For clarity, the Commission’s market size and market share analysis is reproduced below (refer reproduced **Figure 3** and **Figure 5**):



(Reproduced) Figure 3, SEF 584: Size of the Australian market for merchant bar during the investigation period (MT)



(Reproduced) Figure 5, SEF 584: Estimated market shares for merchant bar during the investigation period

Therefore, the Commission is wrong to dismiss the materiality of the loss of market share experienced by the industry in the investigation period. It does not follow the ebb and flow of business and the decline in market share experienced within the investigation period is significant in and of itself, as it represents a material loss of sales volume. With access to verified information, the Commission is in a position to calculate the volume of lost market share within the investigation

period; which it has failed to do, relying instead on a mere assertion of immateriality. With respect to materiality of injury, Anti-dumping Review Panel (ADRP) Member Fisher in a review of a decision under section 269TG, having determined a change in dumping margin for an exporter of 0.2%, recommended the reviewable decision be revoked and substituted with a new specified decision as she found the new decision to be materially different to the reviewable decision. She stated in relevant part:

*While it could be argued that 0.2% difference in a dumping margin is not material, it can become material in terms of dumping duty imposed when it relates to large volumes of imports.*¹⁵

Applied here, given the large volumes of industry's sales across the investigation period, the significant loss of market share in the final two quarters of the investigation period, clearly amounts to a material loss of sales and by extension, loss of revenue and overall profits.

“the Australian industry’s market share has also been lower during the injury analysis period, and its market share during the fourth quarter of the investigation period is only marginally below the average market share during the injury analysis period...”

InfraBuild fails to understand the relevance of the Commission's focus on ...*industry's market share [having] also been lower during the injury analysis period...* . Is the Commission suggesting that materiality of market share loss can only be established where, in the context of a new investigation, the troughs of market share performance within the investigation period are without precedent (across the historic injury period)? This is wholly inconsistent with the Minister's direction that identification of material injury may occur in circumstances of a ...*slowed...* not contracted ...*rate of the industry's growth...* and an outright contradiction of the Ministerial direction that ...*a decline in an industry's rate of growth may be just as relevant as the movement of an industry from growth to decline.* An extract, in relevant part is reproduced below:

I note that anti-dumping or countervailing action is possible in cases where an industry has been expanding its market rapidly, and dumping or subsidisation has merely slowed the rate of the industry's growth, without causing it to contract. In cases where it is asserted that an Australian industry would have been more prosperous if not for the presence of dumped or subsidised imports, I direct that you be mindful that a decline in an industry's

¹⁵ ADRP Report No. 39, p. 41 at [170].

rate of growth may be just as relevant as the movement of an industry from growth to decline. I direct that it is possible to find material injury where an industry suffers a loss of market share in a growing market without a decline in profits. As in all cases, a loss of market share cannot alone be decisive. I direct that a loss of market share should be considered with a range of relevant injury indicators before material injury may be established.¹⁶ [emphasis added]

Applied here, the relevant question for the Commission under the Ministerial Direction is not whether the industry has experienced a lower level of market share at any time during the injury period. Nor is it whether its level of market share during the investigation period is *...only marginally below the average market share during the injury analysis period...*, but rather whether the *...dumping or subsidisation has merely slowed the rate of the industry's growth*. In this case, not only has the dumping slowed the rate of the industry's growth, but indeed has reversed for two consecutive quarters of declines in market share.

"...InfraBuild claimed in its application that price cycles in the merchant bar market cause fluctuations in demand, whereby price increases surge purchasing behaviour as consumers stockpile product ahead of potential further rises."

InfraBuild does not understand the relevance of this statement either to the Commission's conclusions concerning materiality or causation. Firstly, it is important to note that this behaviour (anticipating price cycles) is not exclusive of the presence of dumped imports in the Australian market for merchant bar. In other words, price cycles driven by the presence (or otherwise) of dumped imports may cause fluctuations in demand. Indeed, the behaviour of the exporters and importers of merchant bar in the course of this investigation, establishes the influence of future price perceptions caused by the presence or absence of dumped prices on fluctuations in demand and stockpiling behaviours. This is best demonstrated in **CHART 3**, below:

¹⁶ Ministerial Direction, pp. 2-3.

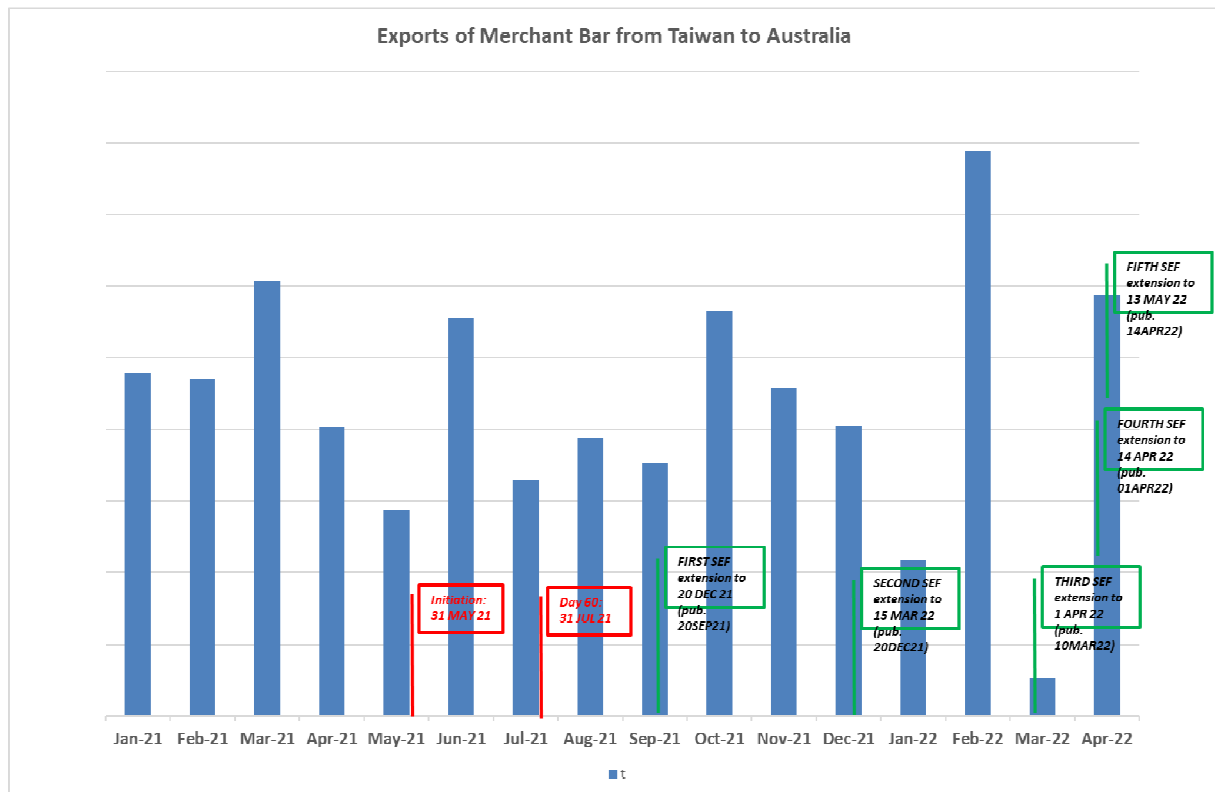


CHART 3 – Export volumes of merchant bar from Taiwan to Australia by export date (Source: CONFIDENTIAL ATTACHMENT 1)

CHART 3, above, demonstrates the Australian market’s reaction to perceptions of the presence or absence of merchant bar exported at either dumped or undumped prices; the latter remedied through a possible imposition of securities via the publication of a *Preliminary Affirmative Determination (PAD)*. For example, following initiation of the investigation on 31 May 2021, the export volume spiked in June 2021 in order to beat any possible imposition of securities at or after the Day-60 mark of the investigation. With the prospect of publication of a preliminary affirmative determination a possibility, export volumes remain suppressed until the publication of ADN No. 2021/025 on 20 September 2021 by which an extension to the publication of SEF 584 was first announced until 20 December 2021. With the perception that any securities would not be imposed prior to the SEF, export volumes again spiked in the following month (October 2021) and remained at elevated levels until January 2022. Then again following the announcement in late (20) December 2021 that the publication of SEF 584 would be extended to 15 March 2022, there was an historic spike in export volumes in February 2022 designed to “beat” any price escalation prior to the imposition of any securities. On this occasion, the perception of any price increase was defined by the published *Exporter Verification Report* for the Feng Hsin on 17 January 2022, indicating a

preliminary dumping margin of 17.7 per cent. As the perception of imminent securities again aligned with the anticipated publication of SEF 584 on 15 March 2022, export volumes declined to historic levels in that month, until April 2022, when export volumes again spiked following publication of a series of further extensions to SEF 584 on 10 March 2022 and throughout April 2022 ultimately settling on the (20) May 2022 publication date.

Applied here, it is the presence of dumped imports in the Australian market for merchant bar; and perceptions of future access to dumped prices; that is driving the fluctuations in demand. As such, the observed fluctuations in demand are a symptom; not a cause; of the dumped imports.

“...InfraBuild’s unit selling price rose during the latter two quarters of the investigation when InfraBuild also lost market share, the commission considers that this displacement in market share could be attributed to a surge in demand spurred by price increases.”

The phrase *...correlation does not imply causation...* is applicable here.

Relying on the Australian industry’s statement in its application that *...the price cycle can also impact demand...*¹⁷ the Commission attempts to attribute an increase in market price to a loss of market share in the latter two quarters of the investigation period. Indeed, in the absence of:

- Dumped imports;
- Overall market size growth; and
- Growing market share by dumped imports,

it may be possible to conclude that the loss of industry’s market share is not an example of material injury; i.e. the relationship was one of price elasticity of demand. However, this cannot be concluded here. The Australian industry’s statement concerning the impact of price cycles on demand applies to the entire market. As the Commission verified and agreed that the Australian industry in fact prices merchant bar according to an import parity pricing model,¹⁸ any price cycle observed in the market applies to the domestic industry and importers equally. Prices rose in this period for all participants and was driven by rising supply costs. The increase in prices for imports was sharper than for the domestic industry mostly due to the increased cost of shipping borne by importers (refer **CHART 3A**, below), and this is reflected in the undercutting analysis where it was observed that the degree of undercutting appeared to reduce in the last two quarters. However, if

¹⁷ *EPR Folio No. 584/001*, p. 25.

¹⁸ SEF 584, p. 55.

the supply cost increases borne solely by importers had been accounted for in market pricing the undercutting should have been reversed altogether.

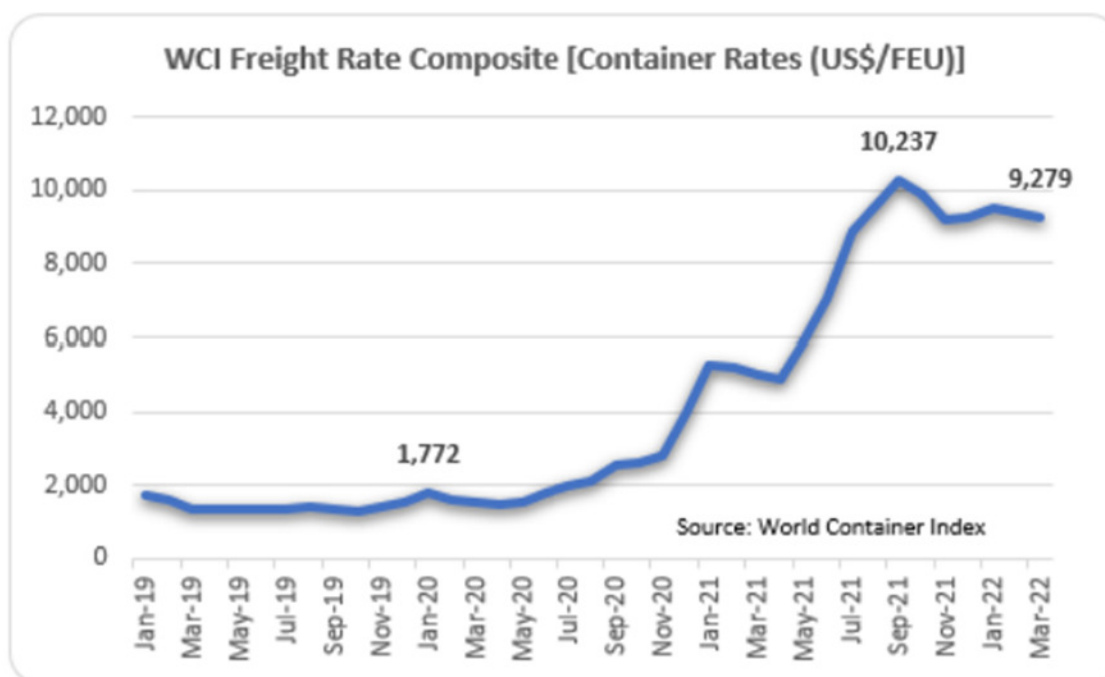


CHART 3A – World Container Index Freight Rate Composite

Although market prices for merchant bar increased in the latter quarters of the investigation period (in the case of both industry and for dumped imports), the decline in demand was not equally shared between industry and importers: the overall market size grew, dumped import volumes grew, market share for dumped imports grew at the expense of all other sources, and the industry's market share declined.

Therefore, the Commission cannot escape the conclusion that the industry's market share in the latter two quarters of the investigation period was caused by the presence and price of dumped imports and therefore constitutes material injury.

7.5 Profits and profitability

In *Figure 10*, SEF 584, the Commission charted the Australian industry's quarterly profit and profitability performance for merchant bar across the injury analysis period, and commented that *...the Australian industry's unit profitability generally fluctuated over the injury analysis period.*

The observation of fluctuations in industry's data does not in fact discharge the Commission's obligation to assess trends in profit and profitability performance across the injury analysis period, as required under subsection 269T(2AD).¹⁹ To assist in better understanding the trends observed in the investigation period, when compared to the injury analysis period, InfraBuild Steel has calculated industry's quarterly profit and profitability results on a 12-month moving average basis and compared that to the actual quarterly performance. **CHART 4** and **CHART 5**, below, refers.

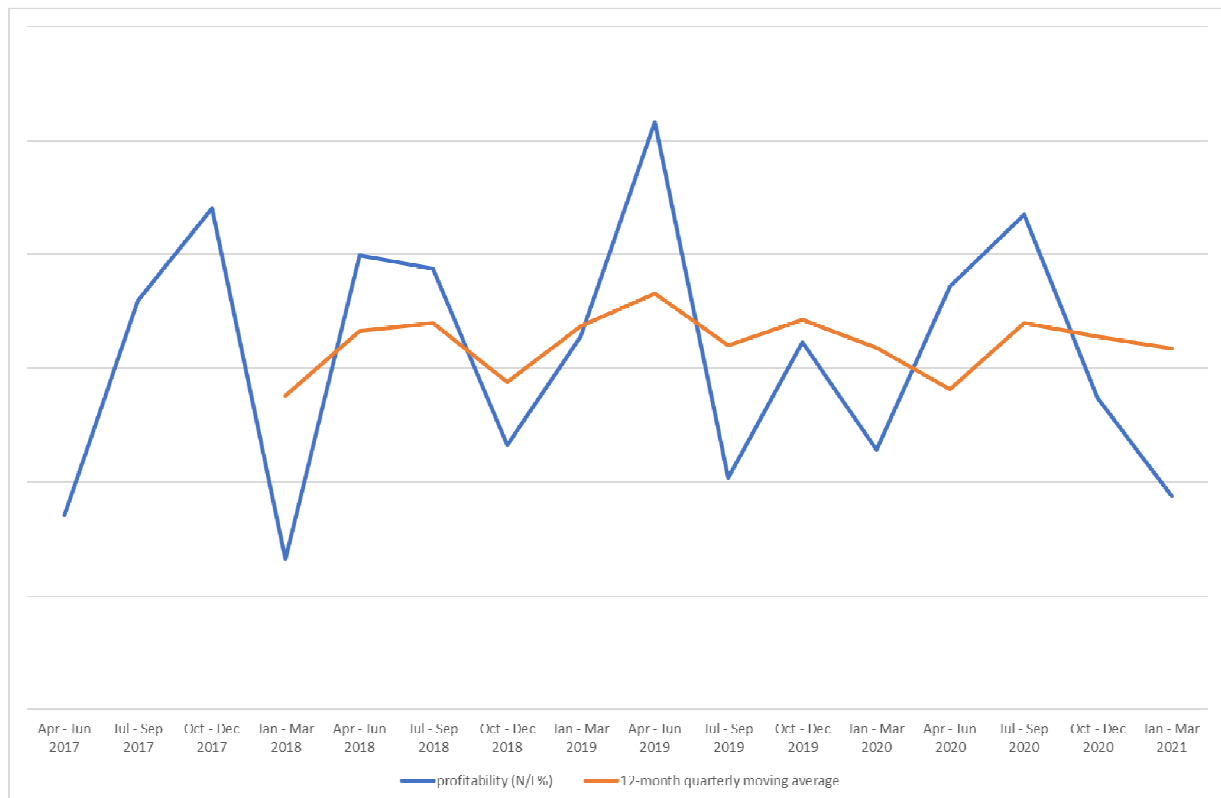


CHART 4 – Australian industry's quarterly profitability (% , per cent) on domestic sales of like goods – injury analysis period (Source: [appendix A6.1](#))

¹⁹ Subsection 269T(2AD) permits analysis of trends across the injury analysis period for the purpose of assessing questions of material injury and causation: *The fact that an investigation period is specified to start at a particular time does not imply that the Minister may not examine periods before that time for the purpose of determining whether material injury has been caused to an Australian industry...*

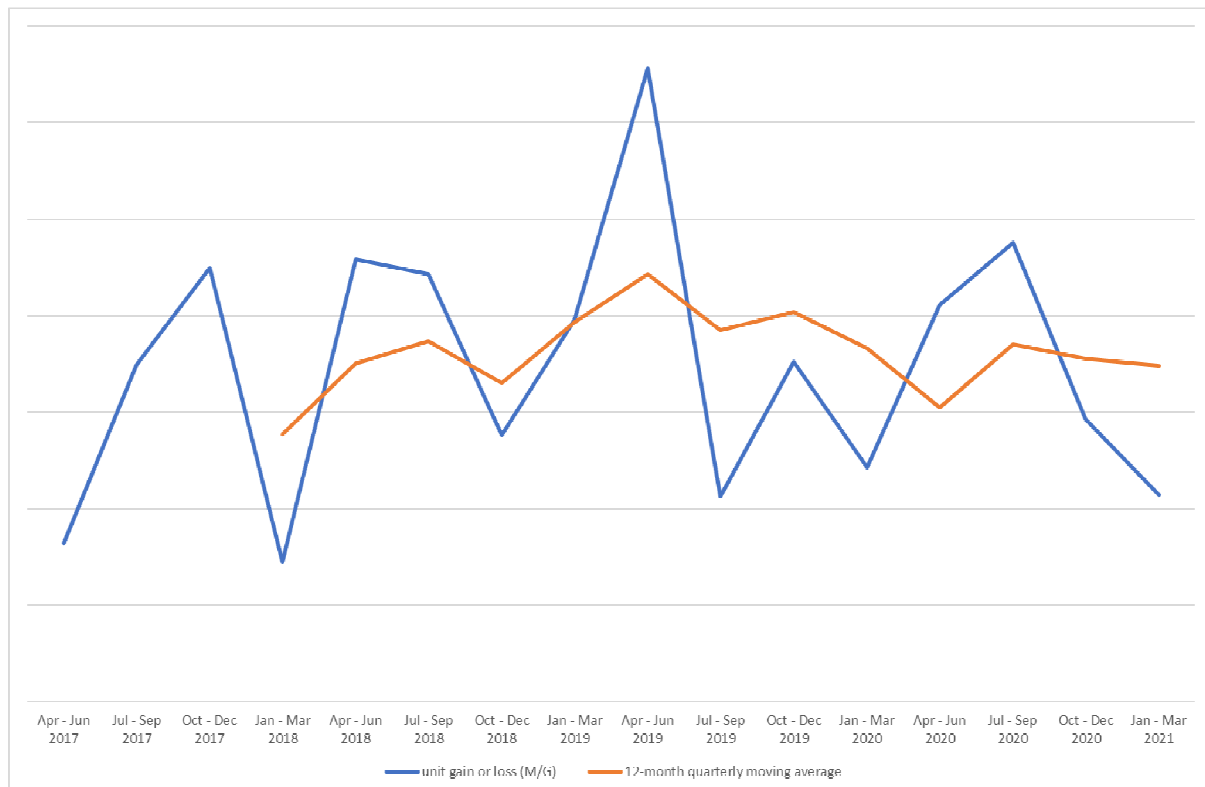


CHART 5 – Australian industry’s quarterly unit profit (AU\$/t) on domestic sales of like goods – injury analysis period (Source: [appendix A6.1](#))

CHARTS 4 and 5, above, illustrate a similar trend in the industry’s profitability and profit performance, namely that the 12-month moving average has been trending downwards since the September 2020 quarter, and that industry’s actual quarterly performance has been below trend since the December 2020 quarter.

Notwithstanding the deteriorating trend across the injury analysis period and the below trend performance within the investigation period, the Commission nevertheless has regard to a number of irrelevant observations influencing it to reach the incorrect conclusion that the industry did not experience material injury in the form of reduced profits and profitability. In summary these were:

- *Unit profitability at 31 March 2020 levels was sustained in the investigation period and the total profit increased;*
- *...quarterly profits and profitability... during the investigation period... increase[d] and peak[ed] in the second quarter before declining in the third and fourth quarters... however... industry’s domestic sales... remained profitable throughout the investigation period;*
- *There were certain quarters during the injury analysis period where unit profitability was below the lowest point during the investigation period.*

The Commission's analysis of the industry's profit and profitability ignores the industry's claim of "profit foregone". Firstly, the *Ministerial Direction* is clear on this question:

*On 22 June 2011 the Australian Government announced its 'Streamlining Australia's anti-dumping system' policy. This included a commitment to revise the current Ministerial Direction on material injury to confirm that profits foregone and loss of market share in an expanding market are relevant injury considerations.*²⁰ [emphasis added]

Specifically, the Minister directs:

*I note that anti-dumping or countervailing action is possible in cases where an industry has been expanding its market rapidly, and dumping or subsidisation has merely slowed the rate of the industry's growth, without causing it to contract. In cases where it is asserted that an Australian industry would have been more prosperous if not for the presence of dumped or subsidised imports, I direct that you be mindful that a decline in an industry's rate of growth may be just as relevant as the movement of an industry from growth to decline.*²¹ [emphasis added]

It is not sufficient under the *Ministerial Direction* for the Commission to claim that either the "unit" or "total profits" were "sustained", "increased" or that domestic sales "remained profitable", without also considering whether the rate of industry's growth slowed, or that the industry would have been more prosperous if not for the presence of dumped imports. There was nothing in the Commission's analysis to address these directions. In fact, the Commission's analysis indicates that it had regard to irrelevant considerations that stand to make its decision not the correct or preferable one. Specifically, the suggestions that:

- Unprofitability is a precondition to material injury;
- Increased "total profit" invalidates a finding of material injury; and
- Material injury requires a level of profit or profitability so low as to be without precedent across the injury analysis period.

8.5 Profit effects

Nevertheless, the Commission seeks to justify its finding that the price effects of the dumped imports did not cause material injury to the industry in *Section 8.5*, by noting:

²⁰ Ministerial Direction, p. 1.

²¹ Ministerial Direction, p. 2.

*The commission therefore concludes that the decline in profits and profitability during the second half of the investigation period is within the **established trends pertaining to the Australian industry's long term quarterly profit and profitability**. Accordingly, the commission **finds that the presence of dumped imports may not have caused the Australian industry reduction in profits and profitability during the investigation period and could form part of the ebb and flow of business.***²² [emphasis added]

Problems remain with this conclusion, foremost its non-conformance with the *Ministerial Direction* on the question of profits foregone. Secondly, the Commission's analysis has entirely ignored the prescription under subsection 269TAE(1) that in determining the question of material injury regard must be had to, inter alia, *...the size of the dumping margin, or of each of the dumping margins...*²³ and the existence of price undercutting.²⁴ Applied here, a dumping margin of 18.1 per cent for the largest exporter, and significant margins of price undercutting throughout the investigation period cannot be ignored as reasons why the industry's declines during the investigation period are more likely than not caused by the *presence of dumped imports*, and not simply *...part of the ebb and flow of business*.

Further, the Commission's causative analysis is flawed. The Commission states that it has compared industry's profit and profitability performance to so-called *...established trends pertaining to ...long term quarterly profit and profitability...*, and considers the declines observed in the investigation period *...could form part of the ebb and flow of business...* without defining what the *ebb and flow of business* should look like in terms of a business cycle for merchant bar. Here, the Commission offers no counterfactual to assist with this comparative analysis. Neither does it seek to understand or explain the conditions that resulted in historically lower levels of profit and profitability to those observed during the investigation period. For example, if the Commission is comparing industry's quarterly performance to its previous historic trough in the March 2018 quarter, how has the Commission factored in the then existential threats to the industry relevant at that time? Firstly, it represents the first fiscal quarter following the acquisition of the industry by the GFG Alliance

²² SEF 584, p. 58 at [8.5].

²³ S.269TAE(1)(aa)

²⁴ S.269TAE(1)(e): *...the difference between: (i) the price that has been or is likely to be paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and (ii) the price that has been or is likely to be paid for goods of that kind exported to Australia from the country of export and sold in Australia.*

following a period of voluntary administration.²⁵ Secondly, it coincides with the disruptions to global steel markets leading up to the United States imposing Section 232 tariffs.²⁶ How a comparison to an historic period so influenced by these events can be compared meaningfully to an investigation period in which the Australian market for merchant bar operated with dumped goods at 18.1 per cent margins is not clear to the industry.

In any event, an attempt to establish a counterfactual to test the existence of whether performance within the investigation amounted to the ebb and flow of business, industry has prepared **CHART 6**, below, based on historic movements in global scrap prices as a proxy for the steel business price cycle.

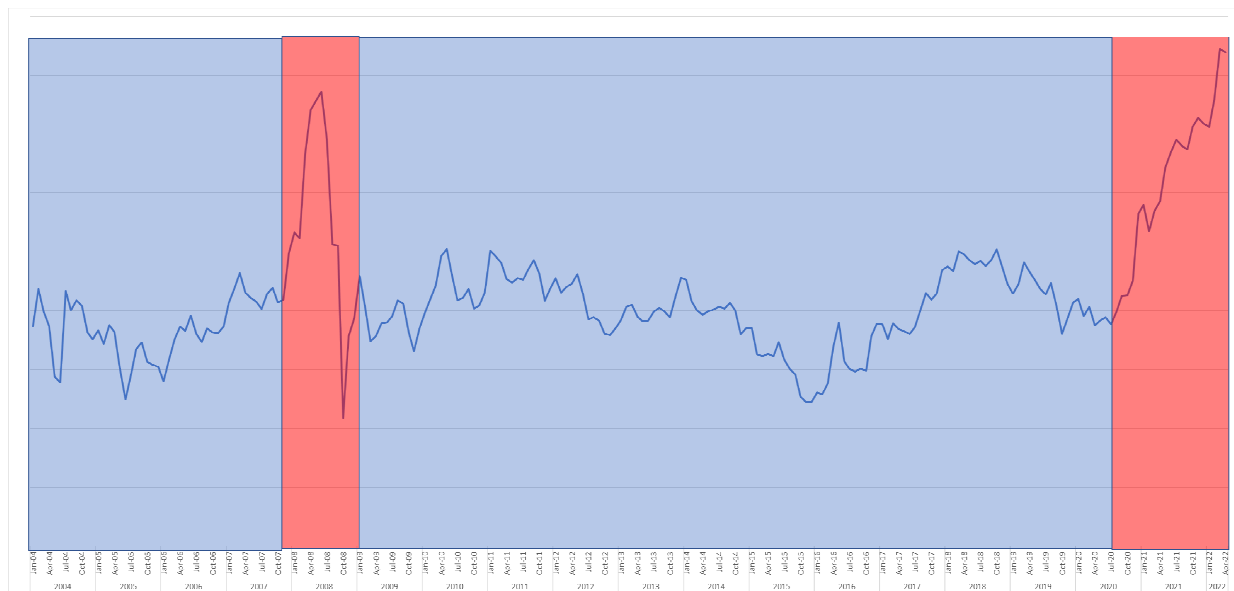


CHART 6 –Scrap price since 1 January 2004, AUD/t, CFR (Source: CONFIDENTIAL ATTACHMENT 2)

The Australian industry considers that the dependence of semi-finished (i.e. billet) and finished (i.e. merchant bar) steel products on the primary raw material (steel scrap) is such that changes in the steel scrap price over time provides a useful summary of the steel business price cycle. **CHART 6**, above, provides movements in the steel scrap price over time since 2004. The movements in price differentiate a business cycle (January 2009 to July 2020). However, it also indicates that between regular business cycles marked by the *...ebb and flow of business...* there are outliers marked by extreme events. The first relates to the ‘super cycle’ observed with the lead up to the onset of the

²⁵ On 1 September 2017, GFG Alliance acquired the former Arrium Mining and Arrium Steel businesses, including Australia’s steel manufacturer and distributor, OneSteel, currently InfraBuild.

²⁶ On 8 March 2018, the United States’ President exercised his authority under Section 232 of the Trade Expansion Act of 1962 to impose a 25 percent tariff on steel imports, with exemptions for Canada and Mexico.

Global Financial Crisis (November 2007 to June 2008), with the precipitous decline until October 2008, prior to recovery to the pre 'super-cycle' level of February 2009. The second outlier relates to the onset of the global pandemic in 2020, which has seen a super-cycle in steel markets commence in August 2020. **CHART 6**, above, indicates that this super-cycle has not yet ended. Therefore, a decline in industry performance during a super-cycle like the one observed since August 2020 is incongruous with the *...ebb and flow of business... cycles*.

Therefore, the Commission's equation of the industry's profit and profitability performance to form part of the ebb and flow of business is not the correct or preferable decision. Further regard to the industry's pricing behaviour across the investigation period needs to be undertaken.

7.6 Price suppression and depression

The Commission's analysis of industry's claim of price depression (in *Figure 11*) is flawed. It has failed to perform any trend analysis across the injury analysis period, instead only analysing the trend within the investigation period. **CHART 7**, below, presents industry's trend in price across the injury analysis period. The trend is measured by a 12-month moving average.

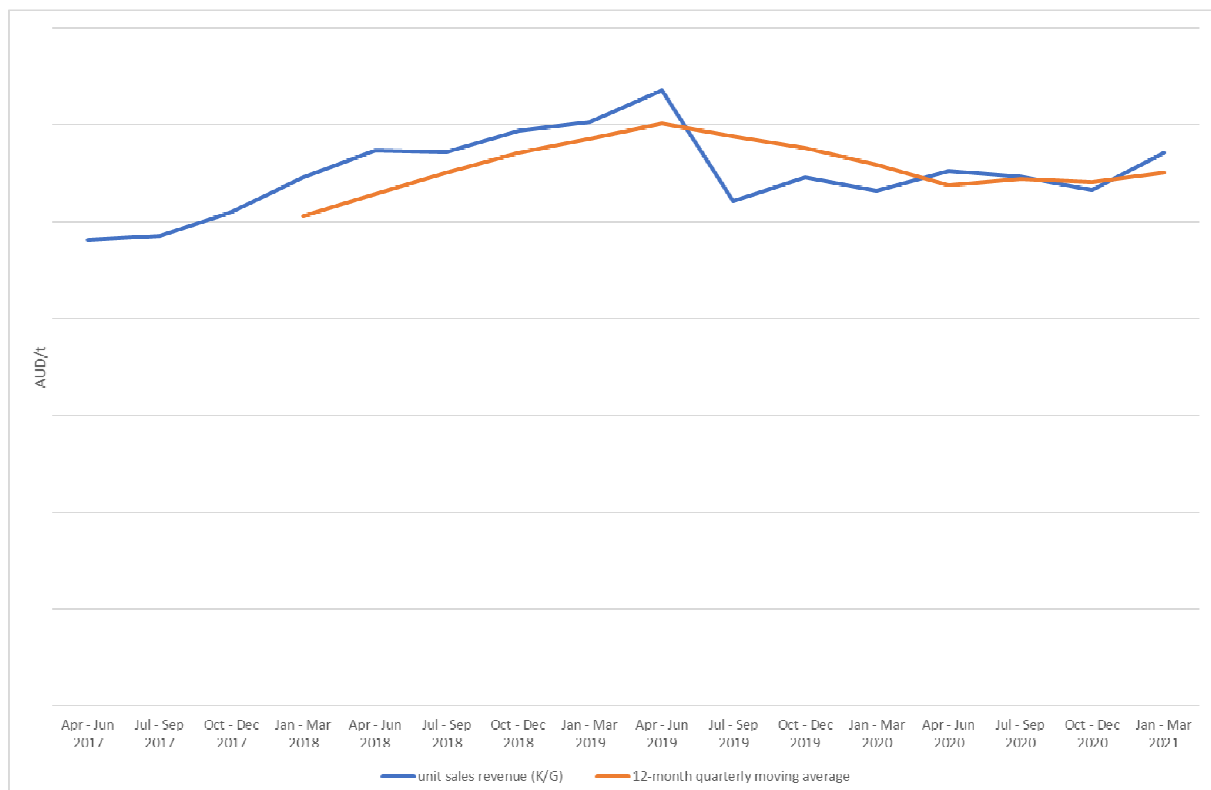


CHART 7 – Australian industry's weighted average unit selling price - injury analysis period (Source: appendix A6.1)

CHART 7, above, indicates that the industry price trend since the June 2019 quarter has been downward. This indicates price depression in trend terms.

Although there has been a recovery in unit selling price in the March 2021 quarter, it is only slightly above the downward trend. In light of the business super-cycle in steel markets since August 2020, industry's anaemic recovery in price for the final quarter of the investigation period suggests a factor is suppressing price.

The Commission purports to perform this analysis in *Figure 12* of SEF 584. Inexplicably, it reverts from the *quarterly* analysis *within* the *investigation* period for *Figure 11* (price depression), to *annual* analysis *across* the *injury* period. The Commission concludes *...the Australian industry's unit selling price and unit CTMS have largely moved in tandem on an annual basis over the injury analysis period.*

Changes in unit profit is an indication of expansions or reductions in price suppression, reflecting the difference between weighted average unit sales values and unit cost to make and sell (CTMS).

CHART 8, below, tracks the trend in quarterly unit profit across the injury period.

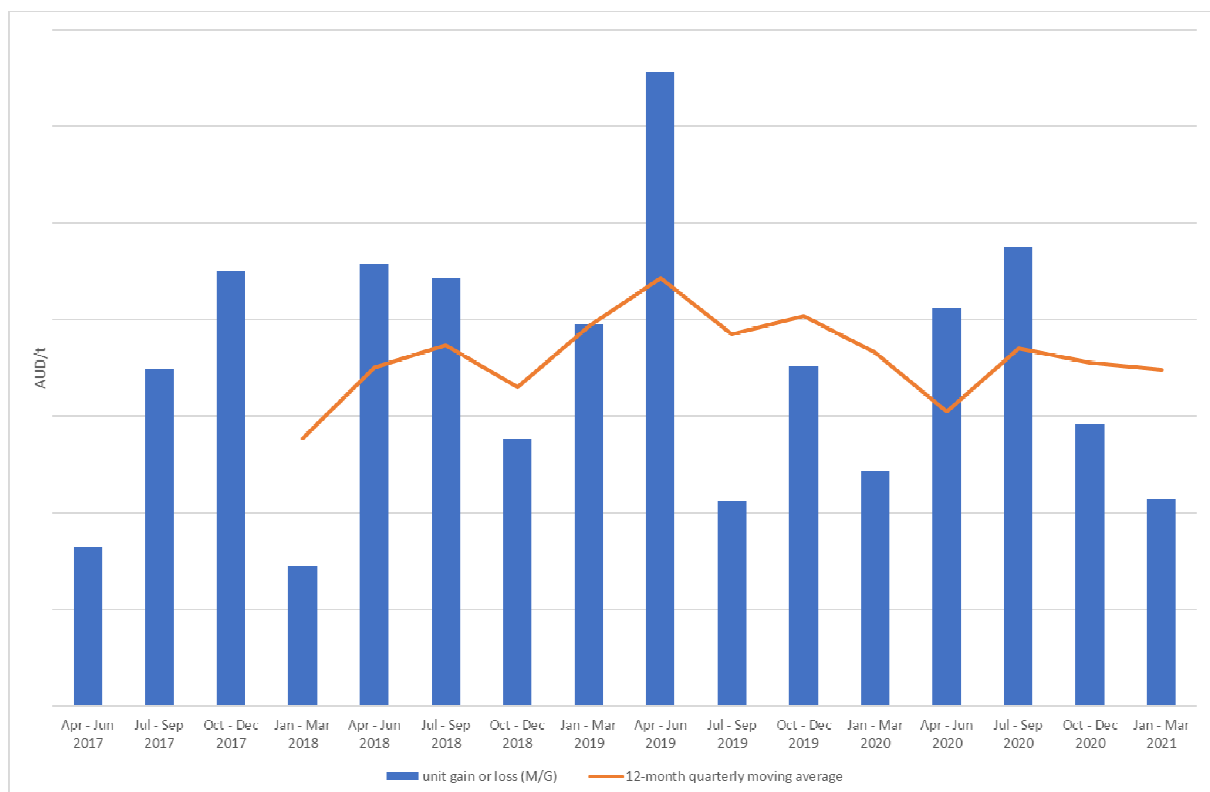


CHART 8 – Australian industry's unit gain or loss – injury analysis period (Source: [appendix A6.1](#))

CHART 8, above, indicates that industry did experience price suppression in the December 2020 and March 2021 quarters, and that the degree of price suppression was greater than the declining 12-month moving average trend.

The Commission seeks to further explain its conclusion that dumped imports have not caused material injury in the form of price suppression in *Section 8.6* of SEF 584.

8.6 Price Effects

The Commission is correct to test the incidence of price suppression not only as the difference between industry's unit selling price and unit CTMS, but also unit variable costs. This is because the existence and magnitude of price suppression may be understated in circumstances where, increased sales volumes (as occurred here); achieved through price restraint; reduces the unit overhead costs of the industry and, therefore, unit CTMS, to less than it would otherwise be, if sales volume was sacrificed in preference for greater price increases. Applied here, on either measure, industry has experienced price suppression within the investigation period.

The Commission purports to perform price undercutting analysis based on *...Feng Hsin's selling price into the Australian market*. Unfortunately, the basis of the Commission's so-called *Feng Hsin selling price* is entirely flawed and erroneous. Firstly, the Commission calculated this "Feng Hsin selling price" by adjusting *...Feng Hsin's export prices to include the cost to import and sell of the major cooperating importer, Macsteel International Australia Pty Ltd (Macsteel), to measure the level of undercutting on comparable terms of trade.*²⁷ This is a meaningless measurement of import prices for the purpose of undercutting analysis, for the following reasons:

1. The Australian industry competes with importers' sale prices, not an adjusted export price;
2. Macsteel is one of many importers, and may or may not be representative of industry's key competitors;
3. There is no suggestion that the Commission's adjusted export price calculation takes into account importers' margins, let alone Macsteel's margin (which may differ by many orders of magnitude from other importers);
4. The Commission has not accounted for timing differences and delays in arrival of the exported goods. For example, is the Commission comparing industry's invoice price in, say March 2021, to an adjusted export price landed in the same month? Given shipping delays,

²⁷ SEF 584, p. 60, footnote 67.

the export price may in fact have been relevant to an offer price competing with a much earlier invoice issued by industry.

5. Does not account for different model control codes (**MCCs**).

Undercutting analysis, properly performed, compares industry's selling prices to the verified sales information of importers (not the exporter), properly aligned to reflect the same offer date. If this was not performed here, then regrettably the Commission's undercutting analysis is unreliable, and the industry's undercutting analysis²⁸ must be preferred.

In any event, even if the Commission's undercutting analysis is sound (which is not admitted), then the Commission continues to reach a number of unsound conclusions based on it.

The Commission places some emphasis on its observation that:

*The level of undercutting remains relatively consistent in the first 3 quarters of the investigation period, however, it decreases in the final quarter as a result of Feng Hsin's selling price into Australia increasing at a higher rate than the Australian industry's selling price. Thus, the lowest point of the Australian industry's unit profit pertaining to sales of like goods coincides with the point at which the margin of price undercutting was also at its lowest.*²⁹ (emphasis added)

It is unremarkable to find after an extended period of dumping (by a weighted average margin of 18.1 per cent) that the margin of price undercutting declines, as industry suppresses its selling prices to compete with dumped imports (necessary to maintain sales volume). This is known as 'parallel price trends', and its consideration was the subject of the WTO Appellate Body Report in *China – GOES*.³⁰ In that case the Appellate Body reasoned that parallel price trends may support a price depression or suppression analysis:

We can conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis. For instance, the fact that prices of subject imports and domestic products move in tandem might indicate the nature of competition between

²⁸ *EPR Folio No. 584/019* (21 October 2021) and *EPR Folio No. 584/027* (24 January 2022) refers.

²⁹ SEF 584, p. 60.

³⁰ Appellate Body Report, *China - Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012.

the products, and may explain the extent to which factors relating to the pricing behaviour of importers have an effect on domestic prices.³¹ (emphasis added)

Applied here, the fact that the industry was found to have seriously suppressed its prices in the final two quarters of the investigation period; as evidenced by the decline in unit profit; in order to compete with undercutting imports sold into the market, would naturally lead to a reduced undercutting margin, and simultaneously a lower unit profit. Sadly for industry, it was unable to increase prices both in line with a rise in raw material costs and an increase in selling prices for the dumped imports.

The Commission's further observation that *...Feng Hsin's dumping margin also decreases to its lowest point in the final quarter of the investigation period...* is also unremarkable. Firstly, there is no suggestion that Feng Hsin ceased dumping in the final quarter altogether. Secondly, the Commission has already acknowledged that industry was unable to increase its selling prices at the same rate as the rise in CTMS, notwithstanding an increase in the flawed calculation of *Feng Hsin's selling price into Australia*. To observe a single disconnection between the dumping margin and industry's unit profit and conclude that the *...dumped imports do not appear to be causing Australian industry to suffer price suppression*, is clearly not the correct or preferable decision.

7.7 Other economic factors

7.7.1 Capital investment and 7.7.2 Research and development [R&D] expenditure

The Commission observed significant declines in both industry's capital investment and R&D expenditure in the investigation period (for the former), and across the injury period (for the latter). However, in both cases the Commission dismissed the injury as material on the basis that it *...cannot assess or isolate a decrease in... the economic factor ...related specifically to merchant bar and caused by dumped imports from Taiwan.*³²

In so deciding the Commission has again behaved in non-conformance with the *Ministerial Direction*. Specifically, the Commission has ignored the direction that *...dumping or subsidisation need not be the sole cause of injury to the industry*. Applied here, the standard of proof does not rise to the level that requires industry to isolate its measurement of capital investment and R&D expenditure to the like goods, to the exclusion of all other production. In a modern, efficient industrial manufacturing

³¹ *China – GOES* at [210].

³² SEF 584, pp. 45 and 46 refers.

facility, it is inevitable that the same capital equipment will be applied to the production of the like goods and other goods. Similarly, R&D expenditure related to plant, equipment and ancillary purposes (quality control, pollution/contamination mitigation) will also be allocated to both the like goods and other products. Therefore, it is entirely reasonable for industry to measure the value of these other economic factors by allocating capital investment and R&D expenditure to the goods based on production. Furthermore, declines in value (price, profit and profitability), and volume (sales, and by extension production volume) for the goods, will be reflected in declines in these other economic factors in two ways. Firstly, declines in fundamental economic performance for the goods will impact industry's overall ability to invest in capital for production (of both like goods and all goods), and secondly, declines in sales (and therefore production) will reduce the allocation of these economic factors to the like goods. Applied here, it is industry's contention that the observed decline in capital investment, specifically, (as allocated to the like goods) is a reflection of the anticipated, and actual, reduced profit and profitability for the like goods in the investigation period. Therefore, the Commission was wrong to ignore the declines in these economic factors as material injury, but rather serves as an additional factor supporting the overall correct or preferable conclusion that the industry experienced material injury caused by the dumped imports. This approach is consistent with the *Ministerial Direction*:

*I note that relevant economic factors to be considered when assessing material injury are referenced at subsection 269TAE(3) of the Customs Act. These **include, but are not limited** to the quantity of goods of the kind in question, or like goods, produced or manufactured in the industry; the value of sales of, or forward orders for, goods of that kind or like goods, produced or manufactured in the industry; the level of profits earned in the industry, that are attributable to the production or manufacture of goods of the kind in question, or like goods; the number of persons employed, and the level of wages paid to persons employed, in the industry in relation to the production or manufacture of the goods in question, or like goods; the terms and conditions of employment (including the number of hours worked) of persons employed in the industry; and investment in the industry. (emphasis added)*

8.9 Threat of material injury

8.9.3 Commission's assessment

The Commission observes that *...following the investigation period... quarterly import volumes of the goods from Feng Hsin as well as aggregate import volumes have not to date surpassed their respective peaks observed during the investigation period.*³³

There are several problems with this observation, both factually and contextually. Firstly, in the 12-months following the investigation period, the imports from Taiwan accounted for 113 per cent of the volume imported within the investigation period. Furthermore, contextually, industry expects that given knowledge of the investigation existed since June 2021, importer demand was probably suppressed by the risk of preliminary measures being imposed in the form of securities. In other words, even with restrained demand by reason of the ongoing investigation, export volumes surpassed their pre-initiation levels during the investigation period. Furthermore, importers of the dumped goods reference potential security and interim dumping duty rates on future deliveries and include rebate arrangements in their offers to the Australian market in the event the anti-dumping measures are not being imposed.³⁴ This shows a clear intention to continue to sell into the Australian market at dumped prices in the absence of measures.

Therefore, the basis on which the Commission concludes that the *...evidence does not suggest an imminent, substantial increase in the capacity of exporters which would, in turn, indicate the likelihood of substantially increased dumped exports into the Australian market and material injury to the Australian industry...* is flawed. In fact, not only have export volumes increased, but industry's estimate of the weighted average dumping margin for exports from Taiwan have also increased following the investigation period.³⁵

In further support of its reasons for not determining the threat of material injury, the Commission repeated its earlier problematic analysis of price undercutting (**section 8.6**). Industry repeats its earlier rebuttals, above. Indeed, the suppressing effect of the importers' offers of dumped goods in the Australian market would over time result in a reduced price

³³ SEF584, p. 63.

³⁴ EPR 584/027, pp. 2 – 3.

³⁵ CONFIDENTIAL ATTACHMENT 1.

undercutting margin, as industry reduces profit margin and profitability to retain sales volume. It is not a condition of any price undercutting analysis that it only occur in a market of falling prices. Therefore, it is entirely conceivable that both importers' and industry's prices to the Australian market may be increasing, albeit at different rates. Ultimately, the suppressing effect of dumped imports is the correct test. Applied here, the Commission is in agreement that this was the effect of the dumped imports on industry's prices.

Additionally, industry provides in CONFIDENTIAL ATTACHMENT 3 further evidence of importer price offers for dumped goods that are having a significantly suppressing effect on industry's prices. In each example, the observed price undercutting margin reduces as industry suppressed margin to compete with the importer's offers. Indeed, this relationship between undercutting margins and the penetration of importer offers for dumped goods over time should be unremarkable to the Commission, having been acknowledged by it in previous cases, and affirmed by the ADRP.

For example, in *Continuation Inquiry No. 505 concerning Hot rolled structural steel sections from Japan, Korea, Taiwan, Thailand*, the Commission reasoned:

*The Commission notes that Liberty Steel must compete with importers of HRS on the basis of price. As such, **it must reduce its prices in order to compete with those of importers**. In Liberty Steel's case, it refers to this process as the IPP. In its price undercutting analysis, the Commission has compared the prices that Liberty Steel has achieved with those of competing importers. This means that the Commission's price undercutting analysis captures the domestic price premium that Liberty Steel achieves over import prices for being able to provide local customer service. The Commission has found in section 5.3.1 of this report that the prices Liberty Steel has achieved have been suppressed. **As such, the analysis below does not necessarily indicate the full extent of price injury.**³⁶ (emphasis added)*

So too in ADRP Report No. 121:

The ADC found price undercutting occurred from each of the subject countries during the inquiry period. The degree of price undercutting varied between 0.4 per cent to 7 percent

³⁶ REP 505 at [8.2.1]

depending on the particular exporter. The ADC also noted that the price undercutting does not necessarily reflect the full extent of price injury given it had noted that the Australian industry's prices were suppressed during the inquiry period.³⁷

For the sake of completeness, industry repeats the observation by the Commission that:

...the Australian industry's prices are closely correlated with the prices of imported goods due to the Australian industry's IPP model.³⁸ (emphasis added)

However, even the Commission's analysis concerning exporters' capacity to supply is flawed. For example, Reuters³⁹ reported in May 22 that the Taiwanese *Directorate General of Budget, Accounting and Statistics (Directorate)* announced that the domestic economic outlook had been downgraded due to concerns relating to the following factors:

- COVID effects
- China slowdown dampening demand for Taiwanese exports
- Global inflation
- Ukraine conflict creating uncertainty

The Directorate detailed the following adjustments to the current economic outlook:

- Exports rising 14.62% this year, from 9.69% predicted earlier
- Revised up its inflation outlook for this year to 2.67% from a previous forecast of 1.93%.
- Gross domestic product (GDP) is expected to rise 3.91% this year, down from 4.42% growth forecast in February.

Therefore, due to the deteriorating market conditions in Taiwan it is reasonable to assume that the incentives to increase volumes into export markets such as Australia will also rise.

The materiality of injury has been progressively increasing as the volumes of imports and share of market they secure also increase. The change in materiality is reflected in the pricing behaviour of InfraBuild and explains the reduction in price differential between Taiwanese imports and the price of locally produced product in the last two quarters of the investigation period. Industry's increased

³⁷ At [36].

³⁸ SEF 584, p. 55.

³⁹ Reuters, *Taiwan lowers 2022 GDP growth forecast, hit by COVID and inflation* (27 May 2022), <https://www.msn.com/en-us/money/markets/taiwan-lowers-2022-gdp-growth-forecast-hit-by-covid-and-inflation/ar-AAXMZCZ?ocid=uxbndlbing> (accessed 1 June 2022)

responsiveness to import pricing is observed when analysing the unit variable margin across the investigation period against the moving annual average:

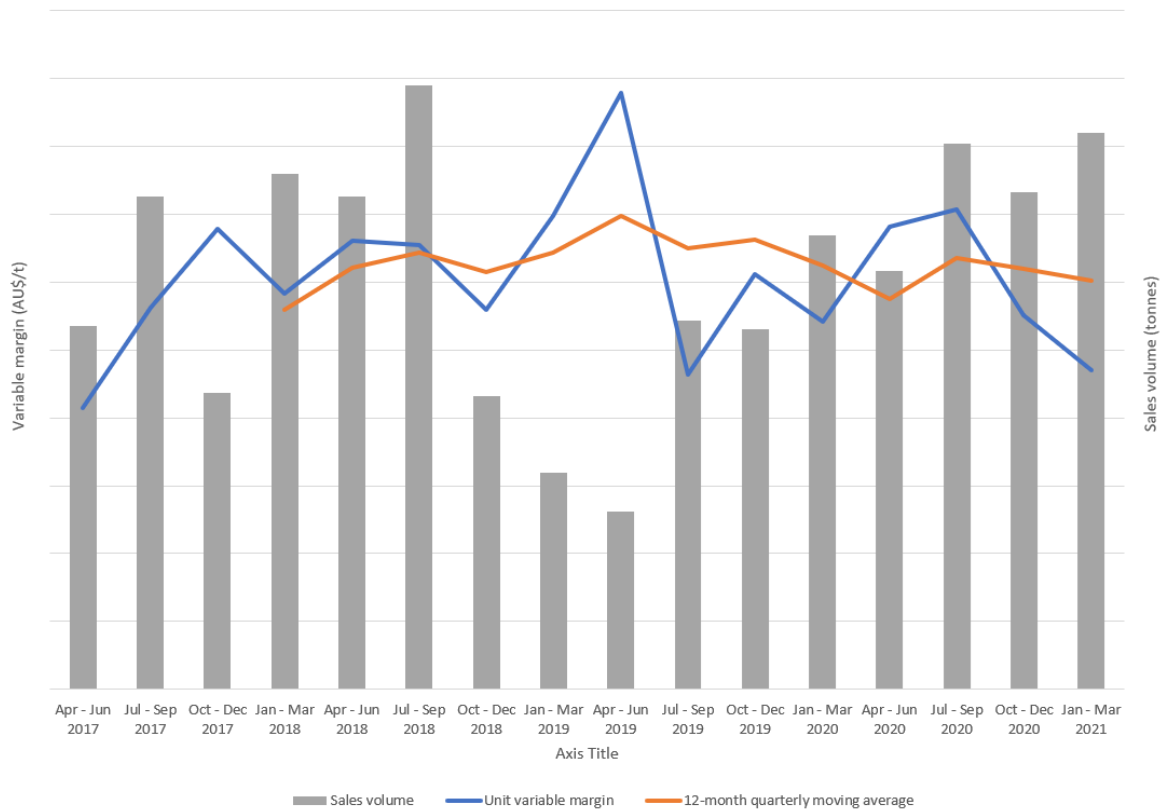


CHART 9 – Australian industry unit variable margin (incl. trend) and sales volume (Source: appendix A6.1).

It is clear from **CHART 9**, above, that in order to maintain sales volume the industry has had to reduce its variable margin by reducing the gap between import offers and its sales price (i.e. price suppression, even if not depression in trend terms). This has been mistakenly identified by the Commission in SEF 584 as a reduction in undercutting by the importers, however, it is clear when reviewing the unit variable margin that it is in fact due to a change in pricing by InfraBuild in response to the increasing aggressiveness and materiality of injury caused by the dumped imports.

If importers are allowed to continue to sell into the Australian market at dumped prices the injury to domestic industry already emerging and observed during the investigation period will only deepen and worsen in materiality. Therefore, even if the Commission is not satisfied that actual material injury has been observed within the investigation period, industry asserts that the threat of material injury to industry is imminent or foreseeable unless dumping measures are imposed.



Additionally, industry supplies the following contemporary evidence of intensifying price undercutting by the exporters the subject of this investigation, and details of the outcome of price negotiations:

Example 1 (CONFIDENTIAL ATTACHMENT 4):

Period: June 2022 offers for September 2022 deliveries

Undercutting margin: \$[REDACTED]/t (InfraBuild FIS price, \$[REDACTED]/t), [REDACTED] %.

Outcome: [REDACTED] tonnes lost sales (“placed with Taiwan”)

Value loss: \$[REDACTED]

Example 2 (CONFIDENTIAL ATTACHMENT 5):

Period: June 2022 offers for September 2022 deliveries

Offer pattern: \$[REDACTED]

Import offer: \$[REDACTED]/t

Undercutting margin: \$[REDACTED]

Outcome: [REDACTED] tonnes (Feng Hsin)

Value loss: \$[REDACTED]

EXAMPLE 6 (CONFIDENTIAL ATTACHMENT 6):

Period: June 2022 offers for September 2022 deliveries

Offer pattern: \$[REDACTED]/t decline from May 2022 offer

Undercutting margin: \$[REDACTED]/t

Outcome: Sales volume lost to Feng Hsin

EXAMPLE 7 (CONFIDENTIAL ATTACHMENT 7):

Period: June 2022 offers for September 2022 deliveries

Offer pattern: \$[REDACTED]/t decline from May 2022 offer

Undercutting margin: \$[REDACTED]/t

Outcome: Sales volume lost to Feng Hsin

Given industry's historic sales volume of merchant bar since the initiation of this investigation on 31 May 2021, industry calculates that a \$[REDACTED]/t undercutting margin, based on [REDACTED] tonnes, a loss of \$[REDACTED] in profit and profitability. This is a material loss of value.

10 PROPOSAL TO TERMINATE THE INVESTIGATION

SEF 584 advises that the Commissioner proposes to terminate the investigation. For the reasons outlined above, industry contends that this recommendation would not constitute the correct or preferable decision.

Form of measures

Australian industry submits that the Commissioner should recommend the Minister publish a dumping duty notice. Accordingly, industry submits that the amount of interim dumping be calculated by reference to the combination of fixed and variable duty method. The Commission's *Guidelines*⁴⁰ list seven key considerations for the combination method of interim duty calculation. InfraBuild addresses each of the key considerations.

- *This form of duty, like the floor price duty method and fixed duty method, may not suit those situations where there are many models or types of the good with significantly different prices.*

Applied here, this consideration should not preclude the use of the combination method of duty calculation as there are a limited number of models or types of goods, with the majority of export volume falling with the "flats" shape model. Accordingly, there will be limited divergence from the weighted average ascertained export price for the exported goods.

⁴⁰ *Guidelines on the Application of Forms of Dumping Duty (the Guidelines)*, November 2013.

- *It is suited to circumstances where there are complex company structures with related parties; and where circumvention of measures is likely.*

This consideration is relevant for the exporter, Feng Hsin.

- *It can be applied more precisely to certain goods in some cases.*

Again, as the majority of export volumes fall within the “flats” shape category, the combination duty method should be easily applied. The key differences in model to this and the other general categories of shape share similar costs and prices.

- *The ‘effective’ rate of this duty, when the duty has been imposed as a fixed amount per unit, diminishes in a rising market making it ineffective. The ‘effective’ rate increases in a declining market making it punitive.*

This is not relevant here as InfraBuild is not advocating for the combination method that uses a “fixed amount per unit”.

- *Consequently, reviews may be more likely due to the effects of a rising or falling market than would be the case with an ad valorem duty method.*

The frequency of reviews, particularly for products that show price variability, should not be a determining factor in the Commission’s decision to impose a particular form of measure. The Commission should be imposing the most effective measure to remove future injury to the Australian industry and annual reviews should be encouraged to ensure that measures are effective and contemporary.

- *The punitive effect in a falling market of the fixed form of this duty can have adverse effects on downstream industries. The Minister may need to consider these effects when deciding on the duty method.*

This is not a relevant consideration as InfraBuild is asking that the combination method employ a percentage amount for the fixed form component of the duty, not a set value. Even if the variable component of the combination became out-of-date there would be no punitive effect to downstream industries for a commodity product such as merchant bar. There are numerous exporters from a range of countries that have no dumping measures imposed.

- *The ascertained export price used in this measure can become out-of-date.*

It is widely recognised that both the normal values and the ascertained export price are likely to change and become out of that date. The Commission itself collectively refers to them as the “variable factors”. The legislation contains provisions such as Division 5 reviews and duty assessments to compensate for these changes. Importers that supply dumped product that causes material injury to the Australian industries and their supply chain partners are shielded from paying excess duty as detailed on the Commission’s website:

To ensure that the amount of dumping duty collected by Customs does not exceed the actual dumping margin for each consignment over the five-year period, provision exists for assessment of the final duty liability. This system allows for any excess interim duty to be refunded where it is found that prices have changed since the original investigation or subsequent review.

Therefore, in all circumstances where there is a positive dumping margin determined for an exporter, then the combination form of interim duty calculation should be imposed by the Minister, with the variable component being based on the ascertained export price.

Retrospective notice recommendation

In the event the Commissioner revises his proposal to terminate the investigation and instead recommends the Minister publish a dumping duty notice under subsection 269TG(1), the Minister may, pursuant to s.269TN, issue a retrospective notice. InfraBuild submits that in this case, the Commissioner should indeed include this in his final report to the Minister because in this case

importers have been surging purchases of large quantities of the goods in the expectation that they may avoid payment of any dumping duties.

Under s.269TN, duties can be imposed retrospectively on goods which have been entered for home consumption between the day of initiation of an investigation (31 May 2021) to the day securities could be taken (31 July 2021).

The *Manual* provides that once an investigation is initiated, when considering whether retrospective duties should apply, the Commission will consider all imports to Australia of the goods, looking at a period prior to the day of initiation up until the day that any securities are taken or could be taken (day 60). The purpose of this assessment is to determine if there has been an importation of a large quantity of the goods during a short period. Although not defined within domestic law, the Commission interprets these terms as follows within the *Manual*:

A 'large quantity' would be a quantity that is significantly greater than that seen in previous patterns of importations.

A 'short period' would be a period of time that is not an extended period of time, and would include the period of time between the date of initiation of the investigation and the date securities are taken (or the right to take securities).⁴¹

Applied here, **CHART 3** is again reproduced below.

⁴¹ *Manual*, p. 146.

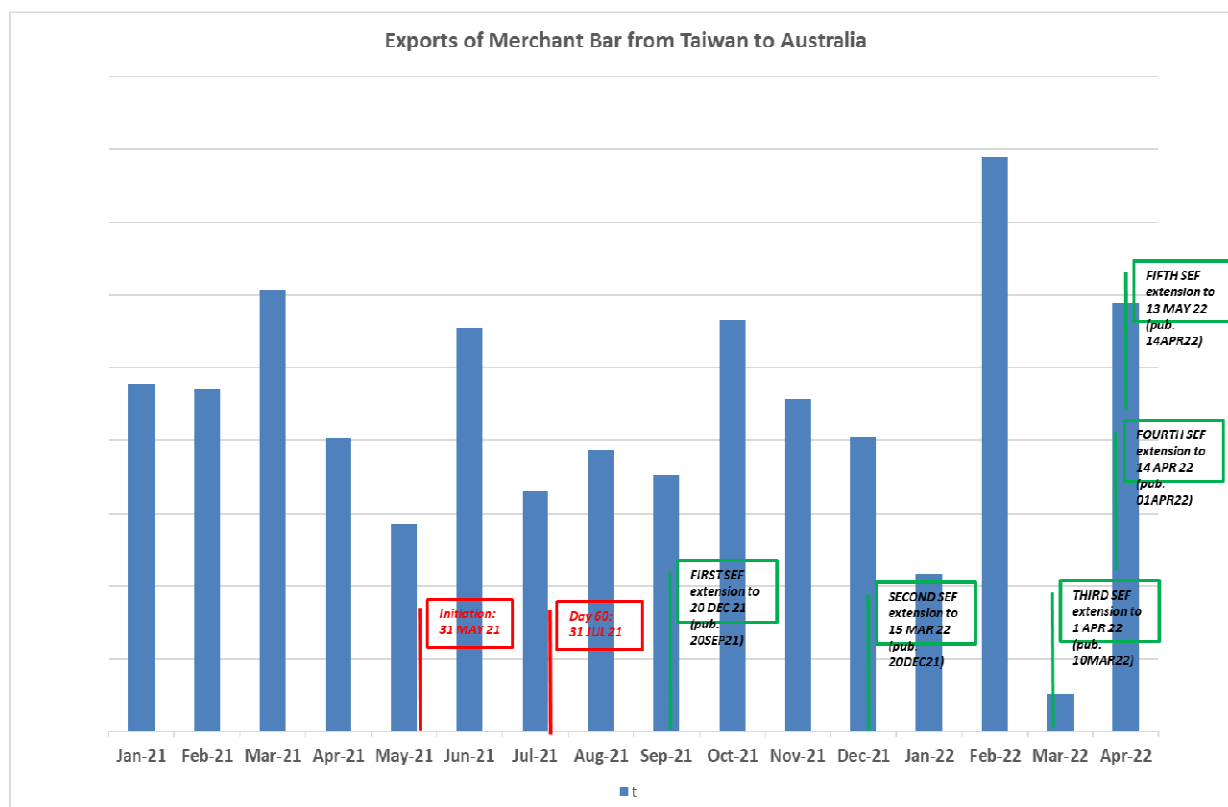


CHART 3 - Export volumes of merchant bar from Taiwan to Australia by export date (Source: CONFIDENTIAL ATTACHMENT 1)

It is observed from **CHART 3**, reproduced above, that the volume of exports from Taiwan in the 60-day period following initiation of the investigation was more than 28 per cent higher than in a comparable period immediately prior to initiation of the investigation. Industry contends that this is a large quantity of the goods exported during a short period.

Where this pattern of trade is observed, the *Manual* specifies that the Commission must make a further assessment, including a determination of the impact of these importations on the Australian industry producing like goods. Applied here, industry observes the significant price pressure it was placed under in the period immediately following the initiation of the investigation on 31 May 2021. That is to say, that its offers to customers from 1 June to 31 July 2021, for delivery and invoicing across August, September and October 2021, experienced price undercutting margins of up to [REDACTED] per cent (**CHART 3**, below, refers).

[CHART 3, below is considered confidential in its entirety]

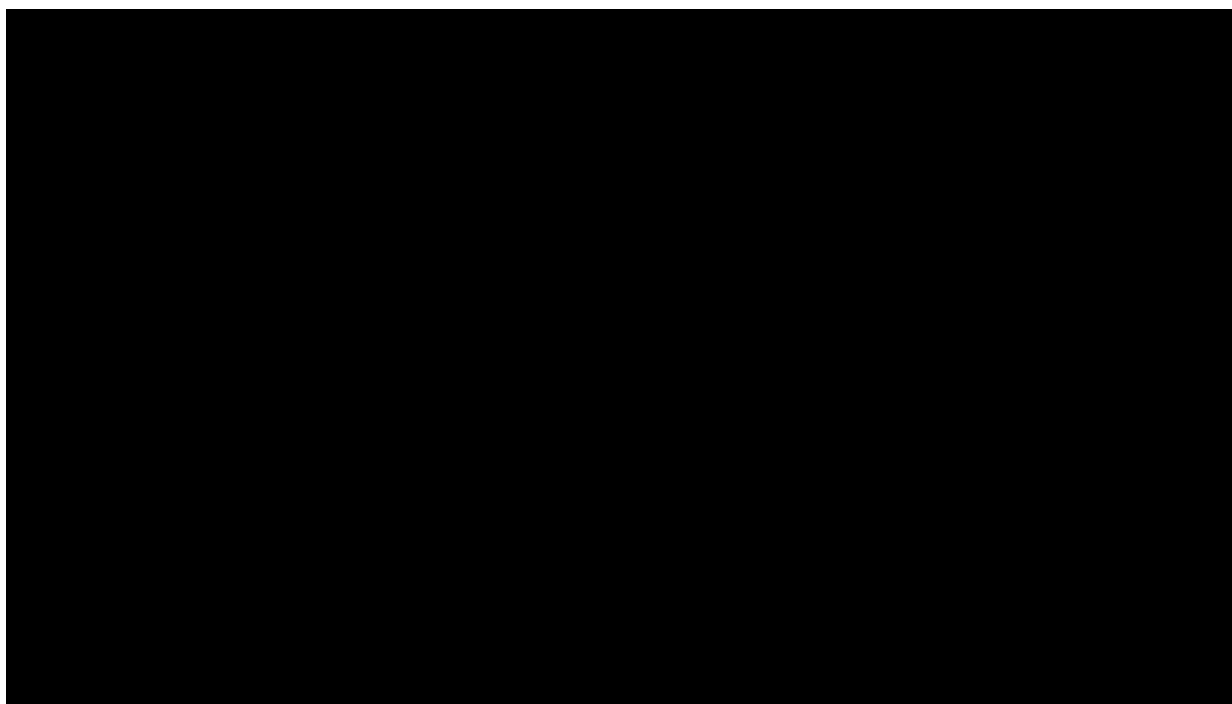


CHART 3 – Summary of price undercutting margins in the Australian merchant bar market (Source: CONFIDENTIAL ATTACHMENT 8)

Further, the Commission must also establish whether the importer knew, or ought to have known, that the goods were dumped and would cause material injury. Applied here, industry observes on 31 May 2021 the Commission published its *Consideration Report*, with the following estimation of the dumping margin for the export of the goods:

The Commission has calculated a dumping margin based on quarterly weighted average export prices (calculated from the ABF import database) and the quarterly average normal values estimated by InfraBuild for the YE 31 December 2020. The following table summarises the dumping margins estimated.

InfraBuild estimate	Commission estimate
14.6%	12.2%

Table 9: Estimate of dumping margins

Assessed at the levels shown, the dumping margin is not negligible.



Therefore, there appear to be reasonable grounds to support InfraBuild's claims that dumping has occurred and the dumping margin is not negligible under section 269TDA(1)(b)(ii).⁴²

Applied here, importers knew or ought to have known that the goods were dumped. Furthermore, given allegations of price undercutting contained in industry's application document,⁴³ importers knew or ought to have known that the dumped imports would cause material injury.

The Commission must also consider whether the publication of a retrospective notice is necessary to prevent the serious undermining of the remedial effect of a dumping duty. This assessment will examine the impact of the importations in the context of the Australian market. Applied here, the repeated surges and pull-backs in exports to the Australian market were disruptive.

In summary, we consider it appropriate for the Commissioner to recommend to the Minister that a retrospective notice be published.

CONCLUSION

Please do not hesitate to contact your InfraBuild representative on record with any questions.

FOR AND ON BEHALF OF THE

AUSTRALIAN INDUSTRY APPLICANT

⁴² CON 584, p. 14.

⁴³ EPR Folio No. 584/001, Section A-9.