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Non-Confidential

By Email

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

Dear Commissioner,

RE: Continuation Inquiry 591 – Exports of Certain Aluminium Extrusions from Malaysia and Vietnam – Submission in Response to Statement of Essential Facts 591

I refer to the Statement of Essential Facts 591 (**SEF**) published on the Anti-Dumping Commission's (**Commission**) electronic public file on 18 March 2022.

This submission is made on behalf of my clients, Press Metal Aluminium (Australia) Pty Ltd and its related bodies corporate, Press Metal Berhad (**PMB**) and PMB Aluminium Sdn Bhd (**PMBA**) in response to the SEF.

Specifically, this submission is made in support of your proposed recommendation to the Minister for Industry, Energy and Emissions Reduction (**Minister**) to allow the anti-dumping measures in question to expire on 27 June 2022, and supports but also adds to the reasons for that recommendation.

1. Submission

- 1.1 My clients concur with your proposed recommendation to the Minister that the anti-dumping measures be allowed to expire on 27 June 2022 for the reasons you specify in the SEF.
- 1.2 My clients further submit that there are additional reasons why the anti-dumping measures should be allowed to expire and they include the following:
 - (i) as is evident from your preliminary findings in the SEF, exports the subject of this inquiry have not and, on the expiry of the anti-dumping measures, are unlikely to cause the Australian industry material injury because of dumping;
 - (ii) the analysis of each level of trade in the Australian aluminium extrusion market and the pricing of products within each such level is insufficient to

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support a finding that the expiry of the anti-dumping measures would likely lead to the continuation or recurrence of material injury that the measures are intended to prevent;

- (iii) there is insufficient evidence from members of the Australian industry to explain why some are profitable and others are not when all are exposed to the identical prevailing market conditions in the Australian market; and
- (iv) the cause of injury for some members of the Australian industry, that is, unprofitability, is their business model and, specifically, as discussed in this submission, the effect that fluctuations in the LME aluminium price have for their business, especially the recoverability of fixed costs and consequent profitability.

1.3 My clients also submit that, for the reasons set out in a separate submission, you cannot be satisfied on the evidence that the expiration of the anti-dumping measures applying to exports of aluminium extrusions from Malaysia to Australia purportedly by PMBA would lead to, or be likely to lead to, the continuation or recurrence of dumping and the material injury that the measures are intended to prevent. Accordingly, they submit that you also cannot recommend to the Minister the continuation of the anti-dumping measures to apply to exports of aluminium extrusions from Malaysia to Australia purportedly by PMBA.

2. Grounds for Submission

2.1 *Will material injury continue or recur?*

2.1.1 At Section 8.7 of the SEF, the Anti-Dumping Commission (**Commission**) asks the question ‘will material injury continue or recur?’ and answers that question:

“Based on the evidence before it at this stage of the investigation, the commission considers that in the event the measures expire, while exports at dumped prices are likely to continue, the injury that this may cause to the Australian industry is, on balance, not likely to be material.” (Section 8.7 of the SEF, page 69)

2.1.2 My clients concur with that conclusion for the reasons that are set out later in that Section of the SEF.

2.1.3 However, while the Commission considers what constitutes ‘material injury’ for the purposes of this inquiry having regard to the Ministerial Direction on Material Injury, it does not address the threshold issue of what constitutes ‘injury’. ‘Injury’ is a term that is not defined in either Australia’s anti-dumping legislation or in the WTO Anti-Dumping Agreement. It would seem difficult to identify what constitutes ‘material injury’ or the causes of ‘injury’ without identifying what constitutes ‘injury’.

2.1.4 Members of the Australian industry consist of entities that produce like goods for a commercial purpose, that is, to sell at a price in sufficient volumes to generate revenue and thereby profit. As a result, 'injury' is incurred by such enterprises when their revenues and, consequently, profits are diminished for one or more reasons. This is reflected in the following statements:

*"To define a successful business it is necessary to begin by understanding what a business is – in essence 'a commercial operation that is run with the aim of making a profit'. This poses two questions: what is a commercial operation and what is profit?"*¹

- *A commercial operation is an activity that is conducted for the benefit of its owners. The significant part is 'for the benefit of its owners', which differentiates it from a government organisation or a charity where the activity is conducted for the benefit of the people it serves. Although the difference is about who gains from success, the route to success for all these activities is to understand and satisfy customers better than your competitors.*
- *A profit is a trading surplus whereby the revenues earned from a commercial operation exceed its costs. This surplus belongs to the owners of the business to use as they choose; to take for themselves, to reinvest in the business or a mixture of the two. For a government organisation or a not-for-profit organisation such as a charity the surplus is reinvested back in the activities to further benefit the people it serves."*¹

2.1.5 Hence, 'injury' to such commercial enterprises is either a failure to make a profit or a diminution of profits, in either case from whatever causes.

2.1.6 In this context, matters such as price undercutting, price suppression, price depression and reduced sales volumes do not, of themselves, constitute 'injury' to a commercial enterprise but are occurrences or events that such enterprises may experience that may have the effect of reduced or foregone revenues and, consequently, reduced profit and hence 'injury'.

2.1.7 In an anti-dumping context, these matters provide the causal links between exports at dumped export prices and injury to a domestic industry in the importing country. This is reflected in Articles 3.1 and 3.2 of the WTO Anti-Dumping Agreement which section 269TAE of the *Customs Act 1901* purports to implement.

2.1.8 Importantly, anti-dumping is concerned with 'pricing', specifically, exports entering into the commerce of the importing country, here Australia, at export prices less than their 'normal value' and thereby causing injury.² It is that price differential or

¹ J. Tennent, 'Guide to Financial Management', The Economist in association with Profile Books Ltd., London, U.K., 2008, page 1.

² Refer Article 2.1 of the WTO Anti-Dumping Agreement.

international price discrimination by exporters that anti-dumping measures purport to offset through the imposition of a customs duty on such products in the form of a dumping duty when imported to the extent necessary to remedy any material injury caused by such pricing.

- 2.1.9 In this context you examined whether the exports in question were undercutting the prices of the Australian industry, recognising that you had only limited information before you concerning the prices of the Australian industry, that is, principally if not exclusively, prices charged by Capral Limited (**Capral**). You examined price undercutting at two levels of trade, which you described as follows:

“At the first level of trade, the Australian industry is in direct competition with overseas producers of the goods for the supply of extrusions to Australian importers who are either involved in the distribution of imported goods onto the Australian market or transform the imported goods into other products, e.g. windows, doors.

At the second level of trade, the Australian industry competes against importers of the goods from overseas who sell those imports onto the Australian market.”
(Section 8.7.2 of the SEF, page 74)

- 2.1.10 My clients respectfully submit that that is not quite correct. There are several levels of trade in the Australian market for the supply of aluminium extrusions of which two are primarily relevant for present purposes, namely:

- (i) the distributor market, being distributors who obtain their supplies of aluminium extrusions from overseas or domestic producers for on-sale into the Australian wholesale and retail markets, either directly or indirectly;
- (ii) the wholesale market, being the supply of aluminium extrusions by wholesale to entities such as fabricators for further manufacture before being on-sold to end-users; and
- (iii) the retail market, being the supply of aluminium extrusions by fabricators as complete, final products to end-users.

- 2.1.11 This is reflected in the following extract from the SEF, but not entirely accurately as there are more than two levels of trade in the Australian market:

“In the case of the Australian market for aluminium extrusions, the Australian industry is competing against suppliers of the goods at two different points in the supply chain, alternatively referred to as level of trade.

At the first level of trade, the Australian industry is in direct competition with overseas producers of the goods for the supply of extrusions to Australian importers

who are either involved in the distribution of imported goods onto the Australian market or transform the imported goods into other products, e.g. windows, doors.

At the second level of trade, the Australian industry competes against importers of the goods from overseas who sell those imports onto the Australian market.”
(Section 8.7.2 of the SEF, page 74)

- 2.1.12 PMAA supplies aluminium extrusions only to the wholesale market, whereas Capral supplies both the Australian wholesale and retail markets. These differences in levels of trade obviously are reflected in the pricing of aluminium extrusions supplied to each market.
- 2.1.13 In the SEF it is noted that competition takes place when aluminium extrusions are sold onto the Australian market, which gives rise to the question of what is the ‘Australian market for aluminium extrusions’? As indicated above, there are several such markets or sub-markets within a general Australian aluminium extrusions market. The products and prices of aluminium extrusions supplied to each obviously differ.
- 2.1.14 However, in the price undercutting analysis set out in Section 8.7.2 of the SEF, it is stated that the Australian industry sells into two of the levels of trade, namely, the wholesale and retail levels:
- “The Australian industry producing like goods sells directly to end users who transform the goods into products such as windows and doors, other residential solutions or for use in applications such as boat building. The Australian industry also caters for a large base of customers through its distribution centre networks. The ordering and lead-time arrangements differ between customers and depending on the sales channel through which the products are sold.”* (Section 4.4.2 of the SEF, page 24)
- 2.1.15 Given the above market structure, one issue that arises is how prices are determined for aluminium extrusions supplied to each such market or sub-market?
- 2.1.16 It is submitted that the market relevant that ultimately is the most relevant for this issue is the retail market for the sale of aluminium extrusions to end-users. The end-product, whether sourced from overseas or produced domestically and whether subjected to further processes of manufacture domestically, competes in the retail market for purchase by end-users.
- 2.1.17 Prices to those end-users, amongst other factors, must be competitive in order for suppliers to that market to compete in that market. This necessarily requires that suppliers to the retail market source product for sale or on-sale into that market at prices that enable them to add their overheads plus an amount for profit and still

sell at competitive (retail) prices. In other words, it is prices in the market to end-users that ultimately determines prices at the other levels of trade, such as in the wholesale market, in the supply chain.

- 2.1.18 Putting aside momentarily the importance that London Metal Exchange (LME) prices for alumina have on the prices of aluminium extrusions, not only in Australia but in other countries, it is the retail market that ultimately determines prices in the Australian aluminium market, and that indicates that suppliers at each level of trade are 'price takers'.

Price undercutting analysis by level of trade

- 2.1.19 Although not completely clear, it appears that the price undercutting analysis was undertaken at two levels of trade namely, the distributor level of trade and the wholesale/retail levels of trade combined.
- 2.1.20 At the distributor level of trade, the price undercutting analysis consisted essentially of the following:

*"The analysis compared the weighted average (AUD per kg) Free Into Store (FIS) prices of the Australian industry's sales of aluminium extrusions with the duty inclusive FIS weighted average prices of the goods sourced from the cooperative exporters."*³ (Section 8.7.2 of the SEF, page 74)

- 2.1.21 It was concluded that, at this level of trade, the FIS prices to importers (e.g., PMAA) did not undercut those of Capral, with the exception of the price of one exporter. Rather it was the other way around, especially as regards PMBA's FIS duty inclusive prices to PMAA. You noted that:

"When reviewing specifically to the first level of trade the commission has established that, inclusive of all finishes, Capral experienced undercutting by EAA across the inquiry period of between 2% to 12%. However, Capral did not experience undercutting from PMBA's prices inclusive of all finishes across the inquiry period. Alumac's products overall have been priced higher than Capral.

Prices are similar for lower value mill finish extrusions between Capral, EAA and PMBA throughout the inquiry period. As noted earlier, mill finish goods account for approximately 75% and 60% of EAA and PMBA's exports respectively. Capral's prices were set just below PMBA for the inquiry period, while EAA only undercut Capral during the second half of the inquiry period. EAA was able to drop its prices in Q1-2021, while both PMBA and Australian industry were increasing prices. Alumac was

³ Note: this would seem to be primarily if not solely comparison of CAPRL's FIS prices to wholesalers with PMBA's FIS (duty inclusive) prices to PMAA, these being essentially the only fully cooperating Australian producer, importer and exporter entities in the inquiry.

not found to be undercutting Capral's prices for mill finish products during the inquiry period." (underlining added; Section 8.7.2 of the SEF, page 75)

- 2.1.22 A number of conclusions can be drawn from the foregoing. First, the exports in question, as a whole, were not undercutting the prices of Capral (representing the Australian industry) at the distributor level of trade and, consequently, could not be causing it injury. Second, to the extent that EAA's prices undercut those of Capral, were EAA's exports in sufficient volumes that in prevailing market conditions they could have caused injury? That possibility would seem remote, especially given that the exports in question held 2% of the total Australian market. No doubt this was taken into account in reaching your conclusion and proposed recommendation. Finally, regardless of the position of other exporters, it is clear, based on your findings of fact, that PMBA's exports were not and could not be causing injury to Capral (representing the Australian industry) at this level of trade.
- 2.1.23 Given that PMBA's exports were not undercutting Capral's prices at the first level of trade, its exports could not be causing injury to Capral at the second level of trade even if they were being exported at dumped prices. As the Commission verified, PMAA's sales into the Australian market were profitable, inclusive of interim dumping duty and, therefore, competing at un-dumped prices with Capral's (representing the Australian industry) products. Further, as you note, PMBA increased its export prices to Australia during the second half of the inquiry period, which is not consistent with an exporter seeking to undercut the prices of the domestic industry in the importing country.
- 2.1.24 Hence, even if you were minded to recommend the continuation of the anti-dumping measures, there would be no basis to do so in respect of exports by PMBA.
- 2.1.25 However, it is unclear whether the price undercutting analysis was undertaken in relation to both the wholesale and retail levels of trade. For example, it is stated in the SEF that:
- "At the second level of trade, the Commission compared the Australian industry's prices to the selling price at which imported goods were sold by importers onto the Australian market. At this level of trade, the selling prices are inclusive of all costs borne to bring those goods into store from a supplier, the seller's relevant SG&A costs and profit. The commission has relied on verified importer data from PMAA as it was the only cooperative importer during the inquiry period. Capral's sales from its distribution network are included in this undercutting analysis."* Section 8.6.2 of the SEF, page 75)
- 2.1.26 The issue with this price undercutting analysis is that it is not clear whether it was undertaken in relation to each of the wholesale and retail levels of trade. For example, PMAA is a wholesaler only, whereas Capral is a wholesaler and retailer.

This is reflected in the following statement on Capral's website, as well as other information regarding its supply of aluminium extrusions into the Australian market:

"Capral's regional distribution centres support a network of conveniently located trade centres. You'll find Capral Aluminium Centres operating in strategic locations throughout the region. Our trade centres cater for both one off customers and account customers." (See: [Aluminium Sales and Trade Centres | Capral Aluminium](#))

- 2.1.27 Obviously, the aluminium extrusion products, general selling and administration costs and expenses and prices would be and are different at each such level of trade. It, therefore, is unclear precisely what prices were compared for which products at which level of trade?
- 2.1.28 The reference in the above extract to PMAA suggests that the price undercutting analysis was undertaken at the wholesale level of trade. However, my clients are concerned that Capral's sales retail sales may have been included in the price undercutting analysis. If so, that would distort Capral's prices and, hence, render the comparison deficient. This needs to be clarified with sales volumes and prices by finish, etc., analysed for each level of trade by MCC separately in order for a meaningful comparison to be made.

Price undercutting analysis by model

- 2.1.29 In addition to focusing on different levels of trade, the price undercutting analysis was also undertaken in relation to 'finishes'. The SEF stated that the Commission:
- "... has also undertaken the analysis by finish type (mill, anodised and powder coated). The commission's price undercutting analysis found a varying degree of undercutting at either level of trade. However, the evidence suggests that there is no consistent level of undercutting by any one exporter, country or in relation to any specific finish."* (Section 8.7.2 of the SEF, page 75)
- 2.1.30 While my clients agree with this approach in a price undercutting analysis, they contend that it does not go far enough. They consider that the analysis should have been undertaken on an MCC and product basis. This is because, each MCC and each product within an MCC at any level of trade has unique physical characteristics that render it suitable for particular end-uses but not others⁴ and, consequently, each is sold at a different price point. This renders even products within an MCC unsuitable for some end-uses that other products in the same MCC may be suitable for and vice

⁴ For example, see Capral's product brochures at: [Catalogues / Brochures | Capral Aluminium](#); and, in particular, the following brochures: [Capral Green Book Cover_Nov2015.indd](#); [Capral-Alum-Products-Catalogue.pdf](#) (copies also **attached**).

versa and also across MCCs⁵ and hence there is an absence of competition between such products within and across MCCs. Further, where there is such competition, an analysis of the cross-elasticity of demand between products within MCCs and across MCCs is required to assess at what price point a purchaser would shift purchases from one product to another within or across MCCs.

2.1.31 This analysis is missing and given the significantly limited information before the Commission⁶, clearly was not and still is not able to be undertaken.

2.1.32 In any event, the Commission found as follows regarding price undercutting at this second level of trade when comparing Capral's prices with those of PMAA, presumably at the wholesale level of trade:

"For the second level of trade, where the commission compared Australian industry prices to that sold by the verified importer, PMAA to end customers⁷, the commission also found inconsistent examples and degrees of undercutting. While there were examples of undercutting across each finish, it is difficult to see a clear pattern of specific undercutting. The commission reviewed the prices by finish sold to common customers of both PMAA and Capral. When looking at mill finish, there are multiple examples where PMAA's prices were lower and where Capral was lower. While PMAA was consistently the lowest price for anodised and powder coated finish products, these only account for a small volume of the whole aluminium extrusion market." (Section 8.7.2 of the SEF, page 76)

2.1.33 If this comparison was not of wholesale prices only and included prices at the retail level that, would materially adversely affect the comparison. This is not only because prices at the retail level of trade would include additional SG&A and profit of the supplier but also individual products would attract premium prices. For example, Capral supplies aluminium extrusion products in the retail market with high quality premium finishes, especially in anodised products, that attract significantly higher prices. This is materially different to PMAA who supplies standard finishes only. The prices at which such premium products are sold in the retail market are not comparable with prices at the wholesale level of trade however categorised.

2.1.34 It is noted that it is stated in the above extract that the Commission '*reviewed the prices by finish sold to common customers of both PMAA and Capral*', which would suggest that the comparison was at the wholesale level of trade only. If so, that was

⁵ *ibid*

⁶ It would seem that the only information before the Commission on pricing at the second level of trade was information provided by Capral and PMAA: refer Section 8.7.2 of the SEF, page 75.

⁷ Note: PMAA's customers are fabricators not end-users. Presumably, therefore, the comparison was done on wholesale prices only.

appropriate. However, it indicates that no similar analysis was undertaken at the retail level of trade, no doubt due to a dearth of information. If so, then no analysis could be undertaken of the relationship between the different levels of trade within the Australian aluminium extrusion market – that is, how each interacted with and affected, in particular, pricing and sales volumes in the others. Hence, unless and until relevant and reliable information and evidence is provided, an analysis of the Australian aluminium extrusion market and the performance of the Australian industry members within that market, both taken as a whole, is not possible. Consequently, as noted in the SEF, there exists insufficient information and evidence before you and the Commission for any conclusion to be drawn that material injury is occurring and will occur in the future.

- 2.1.35 Any price undercutting by PMAA of Capral's pricing could not be attributed to dumping. Rather, it is simply due to competitive pricing in a competitive market for commodity products.
- 2.1.36 There is no analysis or evidence that suggests that if PMBA's exports were at dumped export prices, the margin of dumping has to some extent 'flowed through' to PMAA's prices nor, if it has, to what extent that has contributed to any price under cutting by PMAA at the second level of trade.
- 2.1.37 For these reasons, my clients concur with your finding that you could not conceive of *'any particular possible scenario arising from the expiry of the measures [that] is likely to cause material injury to the Australian industry.'* (Section 8.8 of the SEF, page 80) including by PMBA's exports.

2.2 Likely volume effects of expiry of the measures

- 2.2.1 In relation to the likely effect of the expiry of the anti-dumping measures on the volume of the aluminium extrusions in question being exported at dumped prices, the Commission found that:

"The commission has considered current and historical import volumes, as well as the excess capacity of cooperating exporters the subject of this inquiry to examine the likely effect the expiry of measures would have on Australian industry volumes. The commission has found that exporters would likely continue exporting the goods to Australia, and that some have an excess production capacity. However, based on the information before it at this stage of the investigation, the commission is unable to determine whether removing the measures will likely cause material injury to the Australian industry in relation to future volumes and pricing." (underlining added; Section 8.7.3 of the SEF, page 76)

- 2.2.2 With respect, this finding is misconceived. The relevant question in fact is to what extent, if at all, (a) the expiry of the measures will lead or be likely to lead to the

continuation or recurrence of exports from the countries in question at dumped prices, and (b) because of that dumping, the prices of the Australian industry will be undercut and sales volume reduced that otherwise would have been won by the Australian industry. The loss of such sales volumes and consequent reduction in revenue and profit is the injury that the anti-dumping measures are intended to prevent, along with injury due to price effects from dumping (e.g., price suppression and/or depression).

- 2.2.3 In other words, it is the volume of exports by the exporters in question at dumped export prices that is material in this regard and not the volume of exports by such exporters *per se*. Given that exports by the exporters in question amount to no more than 2% of the total Australian aluminium extrusion market, it is difficult to see how the volume of such exports could have a material effect on the Australian aluminium extrusion market or the sales volumes of the Australian industry as a whole even at dumped export prices. No rationale has been provided how this could occur, which arguably would be mere speculation, not any evidence provided that it has occurred, either during the investigation period or at any other time.
- 2.2.4 Regardless of what effect the expiry of the anti-dumping measures would have in this respect, the question is redundant given the findings in Section 8.7.2 of the SEF concerning price undercutting. In the absence of price undercutting, the volume of exports, whether at dumped or un-dumped prices, is irrelevant as such exports will not be undercutting the Australian industry's prices and causing injury regardless of the volumes being exported.
- 2.2.5 In any event, the Commission found that the likelihood of the volume of exports materially increasing due to the expiry of the anti-dumping measures, especially exports by PMBA, to be remote at best for the reasons set out in Section 8.7.3 of the SEF. My clients concur with these findings as the facts speak for themselves. Any contention that the volume of exports of the aluminium extrusions in question would materially increase due to the expiry of the measures would be mere speculation.
- 2.2.6 Hence, the expiration of the anti-dumping measures would be unlikely to lead to the continuation or recurrence of material injury in the form of reduced profit due to loss of sales volumes and consequent diminished sales revenue because of 'dumping' of the exports the subject of this inquiry.

3. Implications of Australian industry member's non-participation in the inquiry

- 3.1 It is a significant feature of this inquiry that the only member of the Australian industry who has participated in this inquiry and provided information is Capral. Mention is made of some information being provided by G James Extrusions Co. Pty Ltd (**G James**) and INEX Independent Extrusions (**INEX**) in response to Australian

Market supplementary questionnaires but it is unclear precisely what information those companies provided. A heavily redacted response to the supplementary questionnaire from G James was placed on the public file. Further, non-confidential summaries of that information have not been placed on the Commission's electronic public file as required.

- 3.2 The Commission should arrange for such summaries to be placed on the Commission's electronic public file as a matter of urgency or, failing that, confirm that the information is being disregarded.
- 3.3 It is notable that the Australian Market supplementary questionnaire⁸ apparently was sent only to the 8 members of the Australian industry. It does not appear, for instance, that any information was obtained from interested parties, including fabricators and end-users, who could have shed light on the Australian aluminium extrusion market. This exacerbates the issues associated with the limited information available to you concerning the Australian aluminium extrusion market and the economic performance of the Australian industry in that market.
- 3.4 One source of information available, however, is the financial statements of members of the Australian industry lodged with the Australian Securities and Investments Commission (**ASIC**). While those financial statements could and should have been taken into account there is no reference to them in the SEF.
- 3.5 It is noted that the information provided by the Australian industry consisted of:

"G James and INEX provided the commission with sales volume and revenue data for each year of the analysis period from the 1 July 2016. This permitted the commission to form a more reliable estimate of the part of the Australian market held by members of the Australian industry. The combined data from Capral, G James and INEX represented approximately 66% of the total sales by the Australian industry in the inquiry period." (underlining added; Section 2.3.2 of the SEF, page 14)

- 3.6 Apparently that information did not include prices.
- 3.7 Based on this limited information, the Commission's approach to analysing the economic performance of the Australian industry was explained as follows:

"Where possible, the analysis in this chapter incorporates data from Capral, G James and INEX. Noting that detailed information about costs and other economic factors was only provided by Capral, some of the analysis is based solely on Capral's data (and this is noted in the text where relevant). The commission notes the overall consistent trends in prices achieved by the Australian industry members that provided data. The commission also notes that movements in the LME price of

⁸ Note: no template of this supplementary questionnaire was or has been placed on the Commission's electronic public file maintained pursuant to section 269ZJ ZJ of the *Customs Act 1901* details of which are set out on the Commission's website.

aluminium is the chief cost driver for all market participants, and that prices tend to reflect that cost. The commission therefore considers that changes in Capral's economic condition is likely to provide a reasonable indicator of the performance of the Australian industry generally. In any event, the commission's analysis in this chapter is not intended to demonstrate whether injury has been experienced by the Australian industry as a whole in the inquiry period; rather, it is to provide a context for judging the likelihood of injury in the event the measures were to expire (which is addressed in chapter 8).

The analysis in this chapter therefore uses:

- *verified financial, sales and cost data submitted by Capral*
- *sales data submitted by G James and INEX*
- *Capral's estimate of sales volumes by other Australian industry members*
- *import data from the ABF import database, verified importer and exporter data and*
- *information obtained from previous investigations, reviews and inquiries conducted by the commission into aluminium extrusions from Malaysia and Vietnam, as well as China."*

(underlining added; Section 5.3 of the SEF, pages 27 and 28)

- 3.8 Having regard to that information and its analysis in Section 8 of the SEF, the Commission concluded that:

"The commission's analysis in the preceding sections sets out the current absences of sufficient information to substantiate a link between the presence of the dumped goods in the market in the inquiry period and any likely material impact on the Australian industry's prices, volumes or any other injury criterion. This in turn casts doubt on the likely effects of the expiry of the measures. On the basis of the evidence currently before the commission at this stage of the inquiry, it is difficult to determine that any particular possible scenario arising from the expiry of the measures is likely to cause material injury to the Australian industry." (Section 8.8 of the SEF, page 80)

- 3.9 The foregoing raises the question of what information could possibly be provided by Capral and/or other members of the Australian industry that would or could provide the necessary causal link between the presence of dumped exports from the exporters here in question and the likelihood of any material injury to the Australian industry if the measures were allowed to expire, especially given:

- (i) the Commission's findings in Section 8 of the SEF; and

- (ii) the Australian aluminium market is a commodity product market unaffected by the presence of dumping due to the presence of anti-dumping measures applying to exports found to have been exported at dumped export prices?
- 3.10 Some of the information and evidence that is required to complete the analysis has already been identified in section 2 of this submission.
- 3.11 However, it also is noted that the Commission's analysis was "*not intended to demonstrate whether injury has been experienced by the Australian industry as a whole in the inquiry period; rather, it is to provide a context for judging the likelihood of injury in the event the measures were to expire*".
- 3.12 If the analysis is not to assess whether injury has been incurred by the Australian industry as a whole in the inquiry period (i.e., investigation period), it is difficult to understand how this limited information provides context for judging the likelihood of material injury to the Australian industry as a whole in the event that the anti-dumping measures are allowed to expire?
- 3.13 On this issue, it is instructive to refer to the following extracts from WTO jurisprudence:

*"In the original proceedings, the Appellate Body found that, in special market situations such as a fragmented industry with numerous producers, the practical constraints on an investigating authority's ability to obtain information regarding domestic producers may justify defining the domestic industry on the basis of a lower proportion than would be permissible in a less fragmented market. Nevertheless, even if it relies on a lower proportion, an investigating authority should not seek to rely exclusively or predominantly on those domestic producers that consider themselves to be injured and may thus be willing to be part of the injury sample. We recall that 'objective examination' under Article 3.1 requires that the domestic industry, and the effects of dumped imports, 'be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation'. Where an investigating authority relies on a lower proportion of domestic producers to define the domestic industry in the case of fragmented industries, it is particularly important that the process used to select domestic producers does not introduce a material risk of distortion and that, therefore, the proportion of total production included in the domestic industry definition is representative of the total domestic industry." (underlining added; Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.319)*

Further:

"These findings by the Appellate Body suggest that there is an inverse relationship between, on the one hand, the proportion of producers represented in the domestic

industry and, on the other hand, the absence of a risk of material distortion in the definition of the domestic industry and in the assessment of injury. We thus read the requirement in Article 4.1 that domestic producers' output constitute a 'major proportion' as having both quantitative and qualitative connotations.

*When the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that 'substantially reflects the total domestic production' will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1. However, if the proportion of the domestic producers' collective output included in the domestic industry definition is not sufficiently high that it can be considered as substantially reflecting the totality of the domestic production, then the qualitative element becomes crucial in establishing whether the definition of the domestic industry is consistent with Articles 4.1 and 3.1. While, in the special case of a fragmented industry with numerous producers the practical constraints on an authority's ability to obtain information may mean that what constitutes 'a major proportion' may be lower than what is ordinarily permissible, in such cases, the investigating authority bears the same obligation to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion. An investigating authority would need to make a greater effort to ensure that the selected domestic producers are representative of the total domestic production by ascertaining that the process of the domestic industry definition, and ultimately the injury determination, does not give rise to a material risk of distortion." (underlining added; Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.302-5.303)*

- 3.14 Hence, there is an issue as to whether the selection of Capral or Capral, G James and INEX as representative of the Australian industry as a whole, especially when they are the only members to come forward and claim to have incurred injury due to dumping, gives rise to a material risk of distortion to determining the likelihood of injury to the Australian industry from dumped exports if the measures are allowed to expire. This is not addressed in the SEF. It is submitted that it does give rise to such a risk.
- 3.15 Financial statements from other members of the Australian industry filed with ASIC are publicly available. They were before you and the then Minister when the Minister made his decision in Review 544 as well as Investigations 540 and 541. Those financial statements indicate that the other members of the Australian industry had been profitable during the relevant periods. It is evident that the economic performance of Capral, G James and INEX do not represent the economic performance of the Australian industry as a whole, and reliance on those members of the Australian industry crystallises the material risk of distortion referred to by the Appellate Body in the above extracts.

- 3.16 Extra effort and inquiry is required “to ensure that the selected domestic producers are representative of the total domestic production by ascertaining that the process of the domestic industry definition, and ultimately the injury determination, does not give rise to a material risk of distortion”. It is not apparent from the SEF whether and to what extent any extra effort was undertaken, .
- 3.17 It is noted that this material risk of distortion was not addressed by the Anti-Dumping Review Panel (ADRP) in its Report 135 and 137 ([2021_135137_aluminium_extrusions_-_mill_finish_and_surface_finished_-_adrp_report_-_redacted_0.pdf \(industry.gov.au\)](#)). THE ADRP clearly was unaware of the availability of the financial statements of members of the Australian Industry from ASIC and the economic performance of those members that they disclosed, nor that a number of such financial statements were before the Commissioner and the Minister when the Minister made his decision. Presumably, had the ADRP been aware of these financial statements and the information they disclosed, its assessment in ADRP Reviews 135 and 137 of injury to the Australian industry as a whole and findings may well have been different.
- 3.18 In addition, there appear to be some inconsistencies or insufficiencies in the extract at paragraph 3.6 above. While it is correct that ‘the LME price of aluminium is the chief cost driver for all market participants, and that prices tend to reflect that cost’, that is not the only role of LME prices. Industry practice is that participants apply a percentage ‘margin’ on their LME costs (i.e., on the LME prices paid for aluminium), and that percentage ‘margin’ remains unchanged regardless of whether the LME price for aluminium increases or decreases.
- 3.19 The effect of a ‘margin’ calculated as a percentage of the LME price of aluminium is that if the LME price increases, so does the ‘margin’. Conversely, a decline in LME prices means a consequent decline ‘margin’. In other words, the rise and fall of LME prices determines the price of aluminium extrusions including the amount payable in respect of the ‘margin’. This obviously affects, if not determines, the profitability of the supplier of the aluminium extrusions, as discussed below.
- 3.20 The ‘margin’ is known in the industry as the ‘spread’ in the price of aluminium extrusion prices, being the difference between the sum of the LME primary aluminium price plus a ‘premium’ comprised of billet premiums, the Major Japanese Port (MJP) premium and alloy premiums and the price of the aluminium extrusions. Th is described in Section 4.5 of the SEF. The amount of that difference (i.e., ‘spread’) is the ‘margin’ (%) that is applied to the LME prices and associated premiums and essentially covers the supplier’s fixed costs with the remaining balance being profit.

- 3.21 Accordingly, as LME prices [and associated premiums] increase, so does the amount payable in respect of the 'spread', being a fixed percentage 'margin' applied to such prices and conversely as those prices decrease. As the price of aluminium extrusions inclusive of the 'spread' rises and falls with the rise and fall of LME and associated premium prices, the proportion of the 'spread' covering fixed costs corresponding rises and falls, thereby determining the supplier's profit.
- 3.22 Obviously, sales volumes also play a role in an aluminium extrusion supplier's revenues and, therefore, ability to cover costs and consequent profitability.
- 3.23 It follows from the foregoing that the nature, extent and amount of a supplier's fixed costs that are to be recovered under the 'spread' principally determines a supplier's profitability. As those costs are fixed but the amount received in the 'spread' in the aluminium price rises and falls with the rise and fall of LME and associated premium prices, the proportion of the 'spread' to meet those costs also rises and falls, thereby determining the supplier's profitability. For example, historic average LME prices are likely to correspond with the unprofitability of a number of members of the Australian industry, whereas the current profitability of those members corresponds with exceptionally high LME prices. This obviously can be tested by matching the profitability of individual members of the Australian industry with LME prices over, say, the past five years.
- 3.24 Consequently, not having information about the 'spreads' of members of the Australian industry other than Capral, it cannot reasonably be assumed that Capral's economic performance is representative of other members of the Australian industry. Capral's business model and 'spreads' may be materially different from others in the Australian industry, as suggested by the financial statements of other members of the Australian industry filed with ASIC. In particular, it suggests that its fixed costs as a proportion of its 'spread' may be materially different from those of other members of the Australian industry and this, amongst other matters, may be the reason for the differing economic performance in the identical prevailing market conditions.
- 3.25 The reliance, therefore, on one or several members of the Australian industry, who are claiming injury and regardless of the proportion of aluminium extrusion production of the Australian industry that they are responsible for, may provide a distorted view of the Australian industry as a whole for the reasons set out in the extracts at paragraphs 3.13 above. This clearly would seem to be the case not only in this inquiry but also the original investigation.
- 3.26 Importantly, it is the role of LME and associated premium prices and 'spreads' on the economic performance of members of the Australian industry, including the ability to recover fixed costs and consequent effect of profitability. In other words,

it is the effect of the usual ebb and flow of business in the aluminium extrusion industry on members of the Australian industry due to the business models they have adopted that affects their economic performance and is the cause of their injury, not import competition. This requires further investigation, as does the use by members of the Australian industry to use up-stream overseas sources in the supply of aluminium extrusions where prevailing prices make this a commercially prudent decision, particularly if exports are from a country not subject to anti-dumping measures such as Indonesia..

3.27 Hence, the question of what information could possibly be now provided by Capral, G James, INEX and/or other members of the Australian industry that would or could provide the necessary causal link between the presence of dumped exports from the exporters here in question and the likelihood of any material injury to the Australian industry if the measures were allowed to expire without addressing the material risk of distortion through reliance on selective information. The issue to be addressed is why some members of the Australian industry have been unprofitable, whereas others have been profitable, when subject to the identical prevailing market conditions in the Australian aluminium extrusion market? What is different in their respective business models and/or conduct of their business that results in the different economic performance in the identical prevailing market conditions in the Australian aluminium extrusion market?

3.28 Unless and until sufficient information is provided that addresses these issues by all or a representative number of members of the Australian industry, including those who have been profitable when others including Capral have not, so as to provide an undistorted view of the economic performance of the Australian industry as a whole, the position stated in the SEF must remain, namely:

“On the basis of the evidence currently before the commission ..., it is difficult to determine that any particular possible scenario arising from the expiry of the measures is likely to cause material injury to the Australian industry.” (Section 8.8 of the SEF, page 80)

4 Further observations on and implications of preliminary findings

4.1 Your and the Commission’s findings in Section 8.7 of the SEF and to findings in other investigations and inquiries into exports of aluminium extrusions to Australia from not only Malaysia and Vietnam but other countries as well give rise to a number of issues regarding material injury and causation relevant to this inquiry. They are discussed below.

Material injury to the domestic industry

- 4.2 The first issue concerns what is the reason why Capral (representing the Australian industry) went from a loss of \$4 million in Financial Year 2019 to a profit of \$25.9 million in Financial Year 2020 and a net profit after tax of \$4.8 million for the first half of 2020 to a net profit after tax of \$15.9 million in the first half of 2021 (see results presentations at [Result Presentations | Capral Aluminium](#) and Annual Reports at [Annual Reports | Capral Aluminium](#))? That is, what was the cause of the change in Capral's economic performance?
- 4.3 Having regard to the information and evidence available on the Commission's electronic public file not only for this inquiry but also other investigations, reviews and inquiries concerning exports of aluminium extrusions to Australia from a number of countries including Malaysia and Vietnam as well as Capral's Annual Reports and shareholder presentations that are publicly available on Capral's website ([Annual Reports | Capral Aluminium](#) and [Result Presentations | Capral Aluminium](#)), it is evident that it had nothing or little to do with import competition but with the rise and fall in LME and associated premium prices and changes in demand for aluminium extrusions in the Australian residential construction market. That is, it reflected the usual ebb and flow of business in the aluminium extrusion industry. Public statements by Capral confirm this.⁹
- 4.4 The analysis of the structure of pricing in the aluminium extrusions production and supply industry in the SEF further support this, as shown earlier above. That is, the *'main driver of pricing is the London Metal Exchange (LME) primary aluminium base price and a premium (billet premiums, the Major Japanese Port (MJP) premium, alloy premiums)* and, increases and decreases in such costs and the 'spread' as a fixed proportion of those costs is factored into aluminium extrusions pricing as the industry standard both in Australia and in other jurisdictions. Hence the difference in prices between suppliers of aluminium extrusions and price competition between them is essentially in their 'spreads', as you acknowledge in the SEF, and which also determines their profitability in the ability to recover fixed costs.
- 4.5 It necessarily follows that if the demand for aluminium extrusions falls due to a decline in, for example, the residential construction industry and/or if LME and associated premium prices fall, which occurred in the period before 2020, then the resultant fall in sales volumes increases the unit cost to make and sell (**CTMS**) as does the proportional amount of the 'spread' to recover fixed costs, which, inevitably results in a decline in revenues and, therefore, profits. Conversely, if sales volumes increase due to for example, an increase in demand from the residential construction industry and/or if LME and associated premium prices increase, all of

⁹ Refer to the various statements by Capral's Chairman and Managing Director in Annual Reports and Presentations during the period 2017 to date, which are available on the Capral website: [Annual Reports | Capral Aluminium](#) and [Result Presentations | Capral Aluminium](#)

which has occurred since 2020 and is continuing for the foreseeable future, then revenues and profits increase without any necessary increase in prices for the reasons discussed earlier.

- 4.6 Self-evidently this is what has occurred and is occurring, as was submitted had and would occur in submissions by interested parties in prior investigations, reviews and inquiries. The expiration of the anti-dumping measures will have no effect on this market dynamic especially given the small percentage of market share (2%) that exports of the aluminium extrusions in question have of the total Australian market.
- 4.7 In other words, the 'cause' of the Australian industry's economic performance, as represented by Capral's economic performance, has been and remains based on a business model where profit is based on a cost of an input to manufacture (i.e., LME and associated premium prices) and sales volumes, neither of which it has control over. It only has control over its fixed costs and the amount of its 'spread'.
- 4.8 Similarly to its not infrequent practice regarding exporter's CTMS, benchmarking the economic performance of the members of the Australian industry that has been sub-optimal and their business model against those members of the Australian industry whose aluminium extrusion business have been and continue to be profitable, as well as the business models and economic performance of producers of aluminium extrusions in other jurisdictions. Such benchmarking should necessarily include benchmarking the nature and extent of the producers fixed costs and their recoverability under their respective business models with the consequent effect on profitability.
- 4.9 For example, this could and perhaps should be tested as follows:
- assume the size of the Australian market and sales volumes in 2019, to what extent would Capral's aluminium extrusion prices (as representing the Australian industry) need to increase on its then existing sales volumes in order for it to be profitable, that is, to what extent would it need to increase its prices comprising both the LME and associated premium prices and 'spread' components to be profitable; and
 - whether such an increase in prices in the Australian market for aluminium extrusions would be commercially feasible given that:
 - (i) that market is unaffected by dumping due to the presence of anti-dumping measures on exports found to have been at dumped export prices; and
 - (ii) that market is a market for a commodity product primarily destined for the Australian residential construction industry that principally determines sales volumes in the Australian aluminium extrusion market,

that is, to what extent, if any, is there price elasticity of demand¹⁰ in the Australian aluminium extrusion market?

- 4.10 These questions have not been addressed in the SEF and require being addressed, perhaps with the assistance of expert forensic accountants and/or economists to assist in obtaining a clear, undistorted view of the operation and prevailing conditions in the Australian aluminium extrusion market and the economic performance of members of the Australian industry in that market.

Effect of the anti-dumping measures

- 4.11 As noted in the SEF, part of the question to be addressed in assessing whether the anti-dumping measures should be allowed to expire or be continued is whether their expiry would lead or be likely to lead to the continuation or recurrence of the injury that the measures are intended to prevent. This raises the questions of not only what injury, if any, have the measures prevented since their imposition but also how the measures are intended to prevent injury.
- 4.12 Obviously, anti-dumping measures are intended to address (remedy) international price discrimination (i.e., dumping) causing injury to a domestic industry in an importing country by imposing a customs duty (i.e., dumping duty) on the importation of the exports in question in an amount not exceeding the dumping margin so as to eliminate the difference between the price at which the product enters into the commerce of the importing country (i.e., the export price) and its 'normal value (i.e., the price at which the product is sold in the country of export). This is expected to flow through to the market in the importing country in the form of higher prices and thereby obviate the injurious price effects of dumping (e.g., price depression, price suppressions and reduced sales volumes) which are the causal links to the injury incurred by the domestic industry in the form of reduced sales revenues and, consequently, profit.
- 4.13 The question is whether this has occurred as a result of the imposition of the anti-dumping measures and the consequent payment of interim dumping duties on imports of the exports in question using the fixed and variable method? That is, have not only the price at which such exports entered into the commerce of Australia increased but, importantly, has this in turn resulted in an increase in the prices of aluminium extrusions in the Australian market and, if so, to what extent and, if not, why? Without addressing these questions and obtaining the requisite and sufficient information, it is not possible to assess whether the expiry of the

¹⁰ Price elasticity of demand being "how much the quantity demanded responds to a change in price. Demand for a good is said to be elastic if the quantity demanded responds substantially to changes in the price. Demand is said to be inelastic if the quantity demanded responds only slightly to changes in the price". (N Gregory Mankiw, *Principles of Economics*, 9th Ed, Cengage Learning Inc., Boston, USA, 2021, p. 88)

measures would lead or be likely to lead to the continuation or recurrence of the material in jury that the 'measures are intended to prevent'. That is, if the measures have not prevented injury from dumping in the past, on what basis could it be contended that they would do so in the future?

- 4.14 This also gives rise to the question that if the imposition of the anti-dumping measures did not have the intended effect of causing the requisite rise in prices in the Australian aluminium extrusion market, then what effect did the imposition of the measures have?
- 4.15 In this regard, it is to be noted that the method of working out the interim dumping duty payable on the exports in question is the fixed and variable method. The fixed component operates by applying the dumping margin to the 'actual export price' of particular shipments of the exports being imported, that is, in effect to their customs value, thereby increasing the prices of such exports as they enter into the commerce of Australia. However, if the prices in the Australian market do not increase as a result so as to enable such imports to compete with the Australian industry at competitive market prices unaffected by dumping, then the prices of such exports would be higher than prevailing market prices and, presumably, excluding such exports from the market. Obviously, the objective of the anti-dumping measures is not to exclude exports from competing in the Australian market but rather to ensure competition in the market is at prevailing market prices unaffected by dumping.
- 4.16 If the imposition of anti-dumping (or their continuation) will not or is unlikely to increase prices in the relevant market in the importing country due to price inelasticity in the market and this is known at the time of imposition (continuation) of the measures, then clearly the decision to impose (continue) the measures is for an improper purpose and, therefore, unlawful. It also raises concerns in relation to section 46 of the *Competition and Consumer Act 2010* if those seeing the imposition (continuation) of anti-dumping measures possess significant market power in the relevant Australian market, either individually or collectively, are purposely doing so to exclude competition from that market.¹¹

¹¹ In *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90; [2004] HCA 48, the High Court of Australia stated that:

"[T]o suggest that there is a distinction between taking advantage of market power and taking advantage of a property right is to suggest a false dichotomy, which lacks any basis in the language of s.46 ... property rights can be a source of market power attracting liability under s. 46 ..." (at para 125).

Obviously, the section being referred to by the High Court is section 46 of the *Competition and Consumer Act 2010* and the prohibition contained in that section

- 4.17 This would seem a relevant consideration pursuant to section 269TAE(2A)(d) of the *Customs Act 1901*.

MCCs and like goods

- 4.18 Section 3 of the SEF addresses ‘the goods, like goods and the Australian Industry’ and Section 3.4 of the SEF addresses ‘like goods’ and, specifically, the Commission’s “assessment of whether the locally produced goods are identical to, or closely resemble, the goods under consideration and whether they are, therefore, ‘like goods’”.

- 4.19 It is unclear why this assessment was undertaken or, at least, it was not explained in the SEF. Presumably, the relevance is whether there continues to exist an ‘Australian industry producing like goods’ for the purposes of determining whether the expiry of the anti-dumping measures would lead or be likely to lead to the continuation or recurrence of material injury to the ‘Australian industry producing like goods’ caused by exports of the goods in question, that is the ‘goods under consideration or ‘GUC’ at dumped export prices.

- 4.20 If so, then presumably this necessarily requires an assessment of whether the description of goods as specified in the dumping duty notice imposing the anti-dumping measures, that is, the GUC, in the original investigation remains current? That threshold assessment is missing from the SEF. That is, there is no assessment as to whether the GUC as originally described in the dumping duty notice continue to be exported to Australia. If not or if not the same range of such goods or the same range of like goods is not produced domestically, then arguably there would be no basis to continue the anti-dumping measures.

- 4.21 The GUC specified in the dumping duty notice imposing the anti-dumping measures was:

“Aluminium extrusions produced via an extrusion process, of alloys having metallic elements falling within the alloy designations published by The Aluminium

and the reference to ‘property rights’ can readily be replaced by ‘statutory rights’ such as, for example:

“What does it matter whether the source of the ability to engage in discretionary behaviour lies in a contract, statute or intellectual property right? If the result of that right, a corporation has a substantial degree of power in a market and it uses that power to eliminate or substantially damage a competitor or competition in that or any other market, then s.46 will be breached.” (Alex Bruce, ‘Australian Competition Law’, 3rd Ed, LexisNexis Butterworths, Australia, 2018, para. 8.21.)

Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness or diameter greater than 0.5 mm, with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421 mm”.

- 4.22 That, of course, is an incomplete description as it refers only to the physical product or products. It does not include the countries from which that product or products is exported from to Australia or the exporters exporting those products from those countries to Australia, all of which are an integral part of the description of the GUC.
- 4.23 The physical description of the GUC is not to a discrete product but to a range of products. That is, aluminium extrusions of different alloys, finishes, thicknesses, etc. This was recognised, in effect by the adoption of Model Control Codes (**MCCs**). The MCCs are set out in Section 3.3.2 of the SEF and see Attachment A.
- 4.24 The rationale for the adoption of MCCs was set out in Australian Dumping Notice (ADN) No. 2021/119 ([AUSTRALIAN CUSTOMS DUMPING NOTICE NO \(industry.gov.au\)](https://www.industry.gov.au)):

“The commission undertakes model matching using a Model Control Code (MCC) structure to identify key characteristics that will be used to compare the goods exported to Australia and the like goods sold domestically in the country of export. In developing the MCC structure the commission will have regard to differences in physical characteristics that give rise to distinguishable and material differences in price.” (page 7)

The footnote to the above extract states that: *“Further information regarding the application of MCC structures is provided at Chapter 14 in the Anti-Dumping Commission Dumping and Subsidy Manual”* available at [Dumping and Subsidy Manual | Department of Industry, Science, Energy and Resources](#).

- 4.25 Presumably, in the consideration of the application for the anti-dumping measures in the original investigation it was verified that this range of physical products comprised in the GUC was actually being exported to Australia from the countries and by the exporters in question. It is noted that Part XVB of the *Customs Act 1901* does not define what may or may not be the ‘goods under consideration’ the subject of an application for the imposition of anti-dumping measures.
- 4.26 Rather, section 269TB(1) of the *Customs Act 1901* states that a person may apply for the imposition of anti-dumping measures if ‘a consignment of goods’ has been or is likely to be exported to Australia and that person believes that there are reasonable grounds for the publication of a dumping duty notice in respect of such goods. That is, there is considerable latitude in describing the goods the subject of the

application provided that that description accurately describes the ‘consignment of goods’ that has been or is likely to be exported to Australia and there is an Australian industry producing like goods.

- 4.27 This latitude has been recognised in WTO jurisprudence in considering Article 2.6 of the WTO Anti-Dumping Agreement concerning the definition of ‘like goods’:

“Article 2.6 therefore defines the basis on which the product to be compared to the ‘product under consideration’ is to be determined, that is, a product which is either identical to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. As the definition of ‘like product’ implies a comparison with another product, it seems clear to us that the starting point can only be the ‘other product’, being the allegedly dumped product. Therefore, once the product under consideration is defined, the ‘like product’ to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the AD Agreement, we could not find any guidance on the way in which the ‘product under consideration’ should be determined.” (Panel Report, *US – Softwood Lumber V*, para. 7.153)

and:

“[T]he subject of Article 2.6 is not the scope of the product that is the subject of an anti-dumping investigation at all. Rather, the purpose of Article 2.6, apparent from its plain language, is to define the term ‘like product’ for purposes of the AD Agreement. ... China’s position would, in our view, require that any difference between categories of goods, and potentially even between individual goods, within a product under consideration would require that each such category or individual good be treated individually, as a separate product under consideration. This would be problematic, as, given that a ‘domestic industry’ for purposes of the AD Agreement is defined as producers of a like product, such a fragmented product under consideration, and correspondingly fragmented like products, would result in the definition of, and determination of injury to, multiple, narrowly defined ‘industries’ which may bear little if any resemblance to the economic realities of the production of those goods in the importing country. ...

While it seems self-evident to us that an investigating authority must, at the time it initiates an anti-dumping investigation, make a decision as to the scope of that investigation, and give notice of the “product involved”, we are not persuaded that either Article 2.1 or Article 2.6 of the AD Agreement establishes a requirement for making an elaborated determination in that regard.” (Panel Report, *EC – Fasteners (China)*, paras. 7.267-7.268)

but:

“In considering the price effects of dumped imports, nothing in the Anti-Dumping Agreement stipulates how an investigating authority should proceed. Certainly there is nothing that would explicitly require an investigating authority to consider the degree or nature of competition between the dumped imports and the domestic like product. We recall that Article 2.6 of the Anti-Dumping Agreement defines the like product as a product which is either 'alike in all respects' to, or has 'characteristics closely resembling' those of the imported products subject to the investigation. Based on this definition, it would be expected that allegedly dumped imports compete with the domestic like product. Indeed, if they did not, it is difficult to imagine on what basis a domestic industry could properly allege that dumped imports were causing injury to the domestic industry producing the like product, so as to justify the initiation of an investigation. However, the fact that allegedly dumped imports compete with the domestic like product in this broader sense does not necessarily mean that the dumped imports will have an effect on domestic like product prices. Competition in the market for the goods in question may depend on a multitude of factors.” (underlining added; Panel Report, Korea – Pneumatic Valves, para. 7.275)

- 4.28 Having regard to this WTO jurisprudence, there would appear to be two questions that need to be addressed, namely:
- (i) what MCCs comprised in the GUC have been and are continuing to be exported to Australia and compete with the products produced by the Australian industry; and
 - (ii) if exported at dumped export prices, to what extent do such MCCs comprised in the GUC have an effect on domestic like product prices?
- 4.29 Regarding the first question, Capral recently applied for the imposition of anti-dumping measures separately on aluminium extrusions (mill finish) and aluminium extrusions (surface finish) exported from Malaysia by exporters otherwise exempt from measures (refer Investigations 540 and 541¹²). Both applications were accepted and investigated separately by you and anti-dumping measures separately imposed on each such aluminium extrusions by the Minister. Clearly aluminium extrusions with ‘mill finish’ and with ‘surface finish’ are considered as distinct and separate articles of commerce, each warranting separate investigations and anti-dumping measures. In other words, one does not compete with the other, no doubt due to their different physical characteristics rendering them unsuitable for substitution of one for the other. At least there has been no cross-elasticity of demand between such products.

¹² See: [540 | Investigation | Department of Industry, Science, Energy and Resources](#) and [541 | Investigation | Department of Industry, Science, Energy and Resources](#)

- 4.30 In addition, a review of the Commission’s electronic public file discloses some twelve applications for exemptions from anti-dumping measures applying to aluminium extrusions. These applications are based on the contention that the aluminium extrusions the subject of the application and relevant anti-dumping measures are not sold in Australia, whether by the Australian industry or anyone else, that is:
- “like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.”* (Section 8(a) of the *Customs Tariff (Anti-Dumping) Act 1975*)
- 4.31 It is evident that the description of the GUC, which is common in the description for all anti-dumping measures imposed on aluminium extrusions regardless of exporting country and exporter includes goods that neither the Australian industry nor anyone else sells in Australia. Clearly the description is excessively broad. If the description were sufficiently precise, there would be no opportunity to apply for an exemption under Section 8(a) of the *Customs Tariff (Anti-Dumping) Act 1975* – the Australian industry, as well as others, would be selling the full range of goods described in the description imposing the measures as applied for by the applicant.
- 4.32 This appears not to have been the case and continues not to be the case. Hence the question whether the expiry of the anti-dumping measures will lead to or be likely to lead to a continuation or recurrence of exports of goods described in the description imposing the anti-dumping measures at dumped export prices and subsequently sold in Australia and, if so, which ones. Further and consequently, whether such exports, if the measures are allowed to expire, would cause material injury to an Australian industry producing like goods to the allegedly dumped exports, that is, having the identical physical characteristics as identified by the MCCs or, in the absence of identical goods, having closely resembling characteristics similarly identified?¹³
- 4.33 Finally, it is noted from Capral’s product brochures on its website, a significant array of different extruded aluminium products are made by it consisting of different finishes, alloys, tempering, etc. (see: [Catalogues / Brochures | Capral Aluminium](#)). No doubt these products each has its own price point depending upon, amongst other things its composition, but the question is whether a product made from a particular alloy and finish is substitutable for a similar product made from a different alloy and finish and, if so, what is the cross-elasticity of demand between those

¹³ Note: the use of the word ‘or’ in the definition of ‘like goods’ necessarily means that if there are identical goods to the goods under consideration, there is no need to inquire further because, obviously, goods with characteristics closely resembling the goods under consideration necessarily includes identical goods making the reference to identical goods in the definition redundant if the word ‘or’ is to be read as ‘and’.

products. That is, to what extent do they compete with one another and, if so, to what extent on price?

- 4.34 This question does not appear to have been addressed in the SEF in the analysis of price undercutting at the second level of trade. It is submitted that it should be so as to assess, at least at an MCC level if not individual products, the extent if any to which the exported and domestically produced aluminium extrusions compete at the second level of trade and the extent if any to which the former undercut the prices of the latter.
- 4.35 These matters are not addressed in the Commission's assessment of 'like goods' in the SEF. Indeed, there is no assessment and the SEF is deficient in this regard.
- 4.36 Further, in assessing price undercutting at Section 8.7.2 of the SEF, the Commission undertook its analysis of price undercutting at each level of trade as follows:
- "The commission has undertaken this analysis across all aluminium extrusions (without categorising by finish type). It has also undertaken the analysis by finish type (mill, anodised and powder coated). The commission's price undercutting analysis found a varying degree of undercutting at either level of trade. However, the evidence suggests that there is no consistent level of undercutting by any one exporter, country or in relation to any specific finish."* (page 75)
- 4.37 However, it does not appear that the Commission considered or analysed whether and to what extent individual MCCs competed with other MCCs, if at all. That is, whether and to what extent there was any cross-elasticity of demand between MCCs. Namely, an analysis of the relationship between two or more MCCs when the price in one MCC changes (i.e., increases/decreases), to what extent, if any, it affects the price in other MCCs and the change in demand for the other MCCs, if at all, if the price of another rises or falls.¹⁴
- 4.38 This, of course, assumes that one MCC is substitutable for another. If not, then there can be no cross elasticity of demand between the MCCs. They are separate, discrete articles of commerce.
- 4.39 Given that each MCC has unique physical characteristics that no doubt determines its use(s) and each has its price points, which was the reason for the adoption of MCCs, then an assessment of what effect the GUC has on the prices of the Australian industry's products (i.e., like goods) necessarily requires an analysis of the cross elasticity of demand between MCCs as not all MCCs compete with all other MCCs and each MCC has its own price points.

¹⁴ N Gregory Mankiw, 'Principles of Economics', 9th Ed, Cengage Learning Inc., Boston, USA, 2021, p. 96.

- 4.40 Such an analysis has not been undertaken. Unless and until undertaken it further supports the position in the SEF that:

“The commission’s analysis in the preceding sections sets out the current absences of sufficient information to substantiate a link between the presence of the dumped goods in the market in the inquiry period and any likely material impact on the Australian industry’s prices, volumes or any other injury criterion.” (Section 8.8 of the SEF, page 80)

- 4.41 Were members of the Australian industry minded to provide information and evidence to purportedly ‘substantiate a link between *the presence of the dumped goods in the market in the inquiry period and any likely material impact on the Australian industry’s prices*’, it would necessarily need to include information that addressed the foregoing issues.

5. Continuation of anti-dumping measures on category of ‘all other exporters’

- 5.1 In the SEF you indicate that you propose recommending to the Minister the continuation of the anti-dumping measures applying to exports of aluminium extrusions from Malaysia by ‘exporters’ falling within the category of ‘all other exporters’. The rate of dumping duty applicable to such exports has been preliminarily determined to be 27% and calculated as follows:

“The commission has determined an export price pursuant to section 269TAB(3), having regard to all relevant information. Specifically, the commission has had regard to the lowest weighted average export price in the inquiry period of cooperating exporters from Malaysia.

The commission has determined the normal value for the uncooperative exporters pursuant to section 269TAC(6) after having regard to all relevant information. Specifically, the commission has used the highest weighted average normal value from cooperating exporters from Malaysia in the inquiry period.” (Section 6.6.1 of the SEF, page 53)

- 5.2 Section 6.2.2 of the SEF set out how ‘uncooperative exporters’ was determined but how ‘all other exporters’ was determined was not similarly set out, nor were any ‘exporters’ falling within the category of ‘all other exporters’ identified either as having exported during the investigation period or at any other time.
- 5.3 For the purposes of determining whether the expiry of the anti-dumping measures would lead or be likely to lead to the continuation or recurrence of dumping of exports from Malaysia by exporters falling within the category of ‘all other exporters’, there can be no likelihood of such continuance or recurrence as there have been no such exports during the investigation or at any other time or are

reasonably foreseeable as occurring at any time after the due date for expiry of the measures.

- 5.4 The Commission's Dumping and Subsidy Manual (December 2021) defines out who the Commission considers to fall within the 'all other exporters' category, namely:

"The 'all other exporters' rate'

The Commission will generally determine an 'all other exporters' rate in investigations, reviews and continuation inquiries, as relevant. The 'all other exporters' rate applies to any exporters not known, or which did not exist, at the time of the investigation, and applies to any new exporters. In practice the Commission generally calculates one rate for uncooperative and all other exporters known as the 'the uncooperative and all other exporters rate'." (at page 122)

- 5.5 If an entity did not exist or was unknown at the, it is difficult to comprehend how that entity could be an 'exporter' of the goods in respect of which anti-dumping measures are being imposed at the time anti-dumping measures are imposed.
- 5.6 The 'all others' rate referred to in the WTO Anti-Dumping Agreement is in Article 9.4:

The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6." (See Appellate Body Report, US – Hot-Rolled Steel, para. 116)

- 5.7 Clearly Article 9.4 of the WTO Anti-Dumping Agreement refers to exporters who do exist and existed at the time of the investigation and provided information in the investigation but was not investigated.
- 5.8 If reliance is being had to the 'new shipper' provision in the WTO Anti-Dumping Agreement, namely, Article 9.5, it relevantly provides:

"If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." (underlining added)

- 5.9 That Article operates on a condition precedent, namely, that 'a product must be subject to anti-dumping duties imposed by the importing country' that must be satisfied in order for the remaining provisions of that Article to have any application.

Accordingly, it is necessary to identify where in the WTO Anti-Dumping Agreement provision is made for the imposition of anti-dumping measures by an importing country on a 'country-wide' basis.

- 5.10 The only provision of the WTO Anti-Dumping Agreement that permits the imposition of anti-dumping measures on a 'country-wide' basis is Article 9.2, which relevantly provides:

“9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.” (underlining added)

- 5.11 There was no evidence and is no evidence either when the anti-dumping measures were originally imposed or when the Minister made the reviewable decision that it was 'impractical' to name 'all exporters' of aluminium extrusions from Malaysia and Vietnam to Australia. Hence that provision permitting the imposition of 'country-wide' anti-dumping measures did not and cannot apply.
- 5.12 The imposition and, therefore, continuance of anti-dumping measures on exports by exporters falling within the category of 'all other exporters' is in effect the imposition of measures on a 'country-wide' basis. To do so is contrary to Article 9.2 of the WTO Anti-Dumping Agreement on an 'as applied' basis except in the limited permitted exception that does not apply here.
- 5.13 Further, if the rationale for imposing anti-dumping measures on 'all other exporters' is because if some exporters whose exports have been investigated are found to have been at dumped export prices, then it is reasonable to conclude that exports by 'all other exporters' from that exporting country if and when occurring are likely to be at dumped export prices, then it must be equally logical to impose measures on a global basis. That is, if exports from a number of countries from which exports have been investigated and have been found to be at dumped export prices, then it is reasonable to conclude that exports from 'all other countries' if and when occurring are likely to be at dumped export prices. If it is appropriate to impose and, therefore, continue anti-dumping measures on a 'country-wide' basis, why is it not equally appropriate to impose and continue measures on a global basis?

- 5.14 In any event, the effect of imposing ‘country-wide’ anti-dumping measures on exports from Malaysia is, in effect, to impose a customs duty¹⁵ on aluminium extrusions exported from Malaysia to Australia under the guise of a dumping duty, in breach of Australia’s obligations under the *General Agreement on Tariffs and Trade 1994* (**GATT94**) incorporating the *General Agreement on Tariffs and Trade 1947* (**GATT47**) and, in particular, in breach of its most favoured nation (**MFN**) obligations under Article I of GATT47 and its ‘bound tariff’ obligations under Article II of GATT47.

Conclusion

- 5.8 It is evident from the foregoing that there is no basis for the anti-dumping measures to be continued in respect of the ‘all other exporters’ category. Rather, the anti-dumping measures applying to that category must be allowed to expire.

6. Conclusion

For the reasons set out above, my clients concur with your proposed recommendation to the Minister that the anti-dumping measures be allowed to expire on 27 June 2022.

If you have any questions, please let me know.

Yours faithfully,



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¹⁵ Note: dumping duties are ‘special duties of customs. As such they are imposed on the importation of the goods in question on importation with the amount of interim dumping duty being worked out (i.e. payable) in accordance with the fixed and variable duty method. A ‘country-wide’ dumping duty has the effect of imposing a dumping duty on all exports from the exporting country at the highest rate of duty, with named exporters receiving their respective ‘referential’ rate of duty. Not dissimilar to imposition of customs duties that are imposed by Schedule 3 (general rate of duty) and, where applicable, Schedule 4 (preferential/concessional rate of duty) by the *Customs Tariff Act 1995*.

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Attachment A

Modle Code Comparison (MCC)

<i>Category</i>	<i>Sub-category</i>		<i>Sales Data</i>	<i>Cost Data</i>
Finish	A	Anodised	Mandatory	Mandatory
	BD	Bright Dip		
	M	Mill		
	PC	Powder Coating		
	MC	Mill		
	W	Wood Grain		
Alloy Code	6A	6060, 6063	Mandatory	Optional
	6B	6106		
	6C	6101, 1350, 6082, 6351, 6061		
	6D	6005A		
	O	Other		
Temper Code	T1	T1, T4, T5, T6	Optional	Optional
	T50	T591, T595, T52		
	O	Other		
Anodising Microns	O	Not Anodised	Optional	Optional
	1	<20 µm		
	2	>20 µm		