Percival Legal

Non-confidential]

Date: 19 December 2022

By Email

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

Dear Commissioner,

RE: Continuation Inquiry No 591 –Exports of Aluminium Extrusions from Malaysia and Vietnam – Reinvestigation

As you know, I act for Press Metal Aluminium Australia Pty Limited (**PMAA**) and for its related bodies corporate, including PMB Aluminium Sdn Bhd (**PMBA**), in relation to Continuation Inquiry 591 (**Inquiry**).

My clients are concerned with a number of matters concerning the reinvestigation that you were instructed to undertake by Panel Member Ms Jaclyne Fisher of the Anti-Dumping Review Panel (**ADRP**) in her letter of instruction of 5 October 2022, which was notified on the Anti-Dumping Commission's (**Commission**) electronic public file on 21 October 2022.

Specifically, there are two matters of concern, namely:

1. the conduct of the reinvestigation, that is, the procedures to be adopted and observed in the conduct of the reinvestigation; and
2. the rationale proffered by the Panel Member in the letter of instruction as warranting the reinvestigation, and why that rational cannot justify a different decision.

These matters are addressed below.

1. Conduct of the reinvestigation

No procedures are statutorily proscribed for the conduct of a reinvestigation, particularly as to what information may or may not be taken into account in a reinvestigation. Nor are these matters addressed in the Panel Member's letter of instruction to you, nor in the notice published on the Commission's public file for the reinvestigation, nor in the Commission's Dumping and Subsidy Manual.

The only matter referred to is in the notice published on the Commission's public file that you intend to publish a preliminary reinvestigation report before reporting to the Panel Member, and to which interested parties will be invited to make submissions within 14 days.

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The term 'reinvestigation' naturally connotes the seeking of additional information and evidence relevant to the issue being 'reinvestigated', as opposed to simply a 'review' of relevant information which is already available to the ADRP.

Against that background my letter of 9 December 2022 sought clarification on this matter, particularly given the two submissions from Capral Limited (**Capral**) that seemingly sought to introduce into the reinvestigation 'new information'.

2. Reasons why the Panel Members grounds for reinvestigation cannot justify a different decision

The second matter of concern to my clients are the reasons given by the Panel Member for a reinvestigation of the finding that '*material injury to the Australian industry is not likely to continue or recur in the absence of measures*'. Those reasons essentially were that:

- there was an error in the methodology used in the price undercutting analysis at the so-called first level of trade;
- determination of a non-injurious price may provide additional information on material injury;
- sources of pricing information by the Australian industry; and
- dumping theory could indicate a change in importer pricing behaviour depending on the facts and evidence.

None of these were grounds raised by Capral in its application that the reviewable decision was not the correct or preferred decision. Rather they were unilaterally raised by the Panel Member on analysis of the findings in Report 591.

These issues are addressed further below and in **Attachment A**.

3. Reasons for the reinvestigation in the letter of instruction

The letter of instruction instructs that the following finding made in Continuation Inquiry 591 be reinvestigated:

> *"The finding that material injury to the Australian industry is not likely to continue or recur in the absence of measures. "*

This finding may be expressed slightly differently, consistent with the statutory test, as that '*the expiry of the anti-dumping measures will not lead to or be likely to lead to the material injury that the measures are intended to prevent, that is, material injury caused or threatened by dumping*'.

Of course, only 'material injury' caused or threatened by 'dumping' is the 'material injury' that the anti-dumping measures can be intended to prevent. That is the sole object of anti-dumping measures, to prevent material injury from being caused to a domestic industry by dumping, as you be aware.

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This finding is to be reinvestigated seemingly on the basis of the contention that there is '*no demonstrable connection*' between:

(i) the price advantage that 'dumping' gives to exporters from Malaysia and Vietnam and

(ii) the economic condition of the Australian industry, specifically in terms of how the Australian industry sets prices that are '*not attributable to the influence of other sources*'.

For the reasons set out in the letter of instruction, the Panel Member expressed concern with this conclusion. However, my clients respectfully submit that for the following reasons you should find that the concerns are misplaced.

Regardless of whether importers paid dumped or un-dumped prices for the goods under investigation, there is no evidence that those prices provided importers with a competitive advantage in the Australian market as against the Australian industry, either at the so-called first and second levels of trade.

The findings of fact (supported by evidence) as set out in Section 8.7.3 of Report 591 are diametrically opposite. They make clear that sales to importers at the so-called second level of trade in the Australian market exhibit no pattern of price undercutting that can be attributed to the price at which they are purchased from exporters. They also make clear that the Australian industry, and Capral and f Independent Extrusions Limited's (**INEX**) in particular, were undercutting the prices of others in the market, including importers and, presumably, other members of the Australian industry.

The position is no different at the so-called first level of trade. That is, regardless of whether the comparison between exports and the domestically produced product sold to importers is based on price or into-store costs, there is no pattern of the former being less than the latter that exhibits a competitive price advantage being provided to importers by exports over the Australian industry.

Whatever errors that there may have been in the methodology used in the price undercutting analysis at the so-called first level of trade, and there were fundamental errors, as set out in **Attachment A** that were not identified by the Panel Member, the prices paid by importers to exporters did not confer on the importers a competitive advantage when selling in the Australian market. Rather, prices of importers were being undercut by members of the Australian industry as, presumably, was also happening to other members of the Australian industry.

The pricing behaviour found to exist in Report 591 is reflective of what would be expected to occur in an open, competitive market. That is, that participants in the market would undercut some or all of the prices of other participants on some products but not others depending upon a variety of market factors such as sales volumes of a particular product, niche products, etc.

Clearly, the subject exports from Malaysia and Vietnam, with approximately 2% market share respectively, could not set prices in the market, especially when being undercut by members of the Australian industry such as, for example, Capral and INEX with substantially greater market share – approximately 26% in the case of Capral.

Unless those findings of fact supported by evidence contained in Report 591 are factually incorrect and/or not supported by evidence, which would seem unlikely, then there is no basis for the reviewable decision to be altered, despite the concerns expressed by the Panel Member.

Further, there is no view expressed in the Panel Member's letter of instruction that those findings of fact in Report 591 were factually incorrect, nor is it suggested any submission made by Capral either in the continuation inquiry, or in its application to the ADRP or in its submissions to the Commission in the reinvestigation. Further, the submissions made by Capral in this reinvestigation not only do not address the 'insufficiency of evidence' found in Report 591 but also do not address the grounds or reasons set out in the Panel Member's letter of instruction for the reinvestigation.

As noted, these matters are further addressed in **Attachment A**.

4. Reinvestigation and dumping

As was submitted to the Panel Member by my clients following the initiation of Review 155, there was no evidence that exports by PMBA had been at dumped export prices once erroneous findings in Accelerated Review 577 and Review 591 had been corrected and, consequently, there was no basis for a finding supported by evidence that exports would be or would likely continue to be or recur at dumped export prices on expiry of the anti-dumping measures. Hence there was no likelihood of such exports causing the material injury that the anti-dumping measures were intended to prevent on their expiry.

While the Panel Member did not include this as a reason for the reinvestigation and while the Panel Member did note in the letter of instruction that dumping was not a ground raised by Capral in its application for a review of the reviewable decision, which is understandable, there is nothing to preclude you from reinvestigating this matter in the reinvestigation of whether expiry of the measures would lead or likely lead to a continuation or recurrence of the material injury that the measures were intended to prevent, that is, material injury caused by dumping.

Given that the reinvestigation provides you with the opportunity to consider these matters and, specifically, the errors identified in the Korda Mentha report concerning the level of trade adjustment in the dumping determination for PMBA's exports, it is submitted that you should and are required to do so, especially since the time to fully consider that report in the continuation inquiry is now available to you. It also is consistent with good administrative governance to correct errors that you are aware of.

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This, of course, would reinforce and confirm that the reviewable decision was the correct and preferred decision at least in so far as concerning exports by PMBA.

5. Conclusion

In light of the foregoing and the observations made in **Attachment A**, my clients submit that

- the only finding available supported by the evidence is that '*the expiry of the anti-dumping measures will not lead to or be likely to lead to the material injury that the measures are intended to prevent, that is, material injury caused or threatened by dumping*'.

Hence it is my clients' contention that in your report to the Panel Member you should affirm your finding in Report 591 that that '*the expiry of the anti-dumping measures will not lead to or be likely to lead to the material injury that the measures are intended to prevent, that is, material injury caused or threatened by dumping*'.

Please note that this document and the observations and submissions made in it, including in **Attachments A** and **B** contain no 'new information', that is, information that is not 'relevant information' as that term is defined in section 269ZZK(6) of the *Customs Act 1901*.

This letter, including **Attachments A** and **B**, may be placed on the Commission's electronic public file for this reinvestigation.

If you have any questions, please let me know.

Yours faithfully,

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Attachment A

Observations on matters raised in the Letter of Instruction

The following are observations on matters raised by the Panel Member in the letter of instruction as the reasons for the Commissioner to reinvestigate the finding that '*material injury to the Australian industry is not likely to continue or recur in the absence of measures*'.

1. Observations on price undercutting analysis

The principle reason for the instruction from the Panel Member for the reinvestigation apparently was an error or deficiency in the price undercutting analysis that was undertaken in respect of the so-called first level of trade:

> "*At conference, certain information used by the ADC in REP 591 as part of the price undercutting analysis was found to have been compared at an incorrect level. The comparison of the first level of trade selling prices in REP 591 reflected the selling prices of importers (onto the Australian market) rather than the exporters LDPIS cost to the importers.*" (footnote omitted)

There were, however, a number of other more fundamental errors and deficiencies with the price undercutting analysis that appear to have escaped the Panel Member. They are enumerated below in summary:

(i) (***existence of levels of trade***): the price undercutting analysis proceeds on the assumption that levels of trade exist in the Australian aluminium extrusions market, that there are two such levels of trade and the differences in price between the levels of trade are material. There has, however, been no analysis and findings of fact supported by evidence of the existence of any of the levels of trade referred to in Report 591, that any levels of trade in the Australian market are confined to the two levels of trade referred to in Report 591 and that price differences between the two levels of trade referred to in Report 591 are 'material'. This to be contrasted with the level of trade analysis undertaken in relation to the subject exports from Malaysia and, in particular, by PMBA. Why analysis of levels of trade is required in connection with the determination of dumping margins for exports but is not warranted for the determination of material injury and causation in connection with the Australian is unclear and was not explained.

In any event, no analysis was undertaken to identify whether and what levels of trade existed in the Australian aluminium extrusion market, nor whether there were additional levels of trade such as the supply of aluminium extrusion products to distributors, fabricators, fabricators/customers and end-users and whether 'price' differences in the sale of aluminium extrusion products were 'material' and, if they were, using what criteria to measure the 'materiality' of the differences and

whether there were other differences that characterised the differences in the levels of trade;

(ii) (***competition***): similar to the absence of analysis of the existence of levels of trade within the Australian aluminium extrusion products market, there was no analysis of whether exports compete with the domestic aluminium extrusion products at whatever levels of trade exist and, if so, on what basis they actually compete. This presumably is due to the lack of participation of importers, distributors, fabricators, etc., as well as members of the Australian industry in the continuation inquiry to provide evidence relevant to such issues. In the case of the so-called first level of trade; where one importer (PMAA) participated in the inquiry, there was no evidence or, at least, none referred to that its purchase of the subject exports from Malaysia competed with its purchases of aluminium extrusions from the Australian industry or that they competed on 'price'. While price obviously was significant consideration in purchases from the Australian industry, it was not the reason for purchases from the Australia industry and not from exporters. The decision to purchase from the Australian industry and not exporters was driven by other commercial considerations in the conduct of its business as the Commission would no doubt be aware from verification of information submitted to it;

(iii) (***price undercutting analysis not undertaken on 'price'***): the price undercutting analysis at the so-called first level of trade was not undertaken on 'price'. The 'landed duty paid into store price' (**LDPIS**) was not, in fact, a 'price'. No importers paid to exporters an 'LDPIS price' (i.e., referred to in Incoterms as a DDP terms) in their purchase of aluminium extrusion products from exporters. PMAA did not as has been verified. Hence the so-called 'price undercutting analysis' did not compare export prices to importers with prices payable in purchases of aluminium extrusion products by importers from the Australian industry, if any. Rather, the comparison was of the importers' into-store costs of aluminium extrusion products imported by them with into-store costs of aluminium extrusion products purchased from the Australian industry. This, of course, assumes that such into-store costs have been accurately calculated and are supported by evidence and reflected and accounted for in the accounts and financial records of the importers. There was no mention in Report 591 that this was the case and how any such verification was obtained is unclear given the lack of participation of importers in the continuation inquiry apart from PMAA.

Further, the relevance of such into-store costs is unclear and unexplained. That is, whether importers decision whether to source products from overseas or local sources and at what prices was determined by into-store costs or whether it was determined by whether the products could be on-sold into the Australian market profitably and the extent of that profit. In other words, it was the market prices that were achievable in the Australian market that determined both the source from which importers obtained their supply of aluminium extrusion products and the

prices at which they so obtained such supplies. Again, there was no analysis of these issues.

In any event, regardless of whether the analysis is undertaken in 'price' or on 'cost', it is equally evident that regardless of the price at which importers purchased aluminium extrusion products from exporters, that is, whether at dumped or un-dumped prices. It conferred no comparative advantage, namely competitive price advantage in either purchasing from the Australian industry or in on selling into the Australian market in competition with the Australian industry;

(iv) (***export versus domestic sale of goods transactions***): the so-called price undercutting analysis in Report 591 appears to proceed on the assumption that the prices paid in international sale of goods transactions are comparable with the prices paid in domestic sale of goods transactions. No reasons supported by evidence that this is the case was proffered. It is well known that the commercial, legal and other risk profiles of international and domestic sale of goods transactions are materially different, as set out in detail and extensively discussed in standard texts on the subject.[1] For example, the recent COVID pandemic highlighted the different risk profiles in international versus domestic supply chains if any such evidence was required. These differences have led to different regulatory regimes such as, in the case of:

- [international sale of goods, the United Nations Convention on the International Sale of Goods (**UNCISG**) that has been adopted into Australian domestic law by enactments such as the *Sale of Goods (Vienna Convention) Act 1986 (NSW)*, as well as in private international law by, for example, INCOTERMs and the UNIDROIT Principles of International Commercial Contracts; and
- domestic sale of goods, the *Sale of Goods Act 1923 (NSW)* and relevant provisions in the *Competition and Consumer Act 2010 (Cth)*.

Due to the differences in the risk profiles between international and domestic sale of goods transactions, the terms and conditions governing such transactions will be different, as will their respective prices. Hence any purported comparison between the prices in such international and domestic sale of goods must take into account the extent to which the prices in each are differently affected by the terms and circumstances of the sales to which they relate. See, by way of comparison and example and for guidance, section 269TAC(8) of the *Customs Act 1901*. Such

[1] See: C. Murray, 'Scmittoff's Export Trade: The Law and Practice of International Trade', 11th Ed., Thomson, Sweet & Maxwell, London 2007; R. Goode, 'Commercial Law', 3rd Ed., Penguin Books, London, 2004; R. Burnett and V. Bath, 'Law of International Business in Australasia', The Federation Press, Sydney, 2009; J. Chuah, 'Law of International Trade', Thomson, Sweet & Maxwell, London. 2005; I. Carr. 'International Trade Law'. 3rd Ed., Cavendish Press, London, 2005; D. Greig and N. Gunningham, 'Commercial Law', 3rd Ed., Butterworths, Sydney, 1988; E. Baskind, G. Osborne and L. Roach, 'Commercial Law', 4th Ed., Oxford Uni Press, Oxford, 2022; and I. Schwenker, C. Fountoulakis and M. Dimsey, 'International Sales Law: A Guide to the CISG', 3rd Ed., Hart Publishing, Oxford, 2019.

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differences in prices due to the transactions to which they relate does not appear to have been considered, let alone taken into account with appropriate and necessary adjustments made to ensure a proper comparison;

(v) (***market definition***): the errors and deficiencies identified above are reflected in the absence of a substantive identification of the Australian aluminium extrusion market and the market forces prevailing in that market. Not only is the structure of the Australian aluminium extrusion market not set out, including the participants in that market and the aluminium extrusion products being supplied into that market, but also the market forces determining sales volumes and prices in that market such the end-users of aluminium extrusion products (e.g., the construction industry) whose demand for aluminium extrusions, which rises and falls in regular cycles, has historically set sales volumes and prices. In place of such market analysis it is frequently asserted that the aluminium extrusion market is a 'highly price sensitive market'. However, all markets are price sensitive – that is a defining characteristic of a 'market'. What makes the aluminium extrusion products market 'highly' price sensitive, that is, in what ways and to what extent and what evidence is there that it is 'highly' sensitive as compared with other commodity product markets? Finally, if it is a 'highly price sensitive' market, what drives prices in that market supported by what evidence? In this connection, exports, of course, compete with other exports in export markets, whereas imports of exports compete with domestically produced products in the domestic market in the importing country. This seems to have been confused in the price undercutting analysis;

In light of the above, regardless of deficiencies in the price undercutting analysis, it is evident that regardless of the price at which importers purchased aluminium extrusion products from exporters, that is, whether at dumped or un-dumped prices. It conferred no comparative advantage, namely competitive price advantage in either purchasing from the Australian industry or in on selling into the Australian market in competition with the Australian industry. There is nothing in the panel Member's letter of instruction o in Capral's submissions that indicates that this is factually incorrect.

2 Price analysis – pricing behaviour of exporters, importers and the Australian industry

In the letter of instruction, the Panel Member expressed reservations concerning the following statement made in Report 591:

> "*Taken together, this causes the commission to conclude that, in the absence of measures, there would likely be little change to pricing behaviours by exporters and importers.*"

The reservation the Panel Member had concerned whether there would be a change in behaviour by importers following expiry of the anti-dumping measures. Specifically:

> "*I also note that the analysis of prices of importers during the inquiry period is limited, as only one importer's information was verified during the inquiry. In my view, it is not apparent how the ADC concluded that importers' pricing behaviour will not change with the expiration of measures. I acknowledge that there are a number of complexities associated with analysing prices in the aluminium extrusions domestic market. However, <u>there must be a factual base to the consideration of what is likely to happen</u>. <u>Given the dumping theory outlined above, it is more likely than not, in a price sensitive market, that importers would change prices should the measures expire</u>.*" (underlining added)

In other words, notwithstanding that an assessment of what would likely occur regarding importers behaviour on the expiry of the measures must be factually based, the Panel Member speculates that based on 'dumping theory' it is '*more likely than not*' (i.e., probable) that importers would change their pricing behaviour in the absence of the anti-dumping measures. No factual basis supported by evidence is given for that assertion.

There are, however, a number of misconceptions with the Panel Member's reasons for concern that importers' pricing behaviour may change on expiration of the anti-dumping measures, which misconceptions have led to those concerns being misplaced. They include the following:

(i) (***exporters' versus importers' pricing behaviour***): the relevance of a change in the pricing behaviour of importers versus exporters is unclear. Importers are not the exporters and it is the behaviour of exporters with which dumping is concerned, not importers and this was made clear by the Panel Member earlier in the letter of instruction when '*reflecting on the theory underpinning the impact of taking anti-dumping measures*'. The only expectation of importers is that they pass on any interim dumping duties imposed on their imports in the form of higher prices. This, however, is not part of dumping as there is no obligation under the WTO Anti-Dumping Agreement for importers to pass on such measures in the form of increased prices. That is a matter for commercial decision by the importer. It is noted, however, that Australia has legislated to provide that a failure to do so may constitute circumvention of the anti-dumping measures by the importer. Whether it does amount to circumvention and whether such legislative provision is consistent with international legal obligations under the WTO Anti-Dumping Agreement is to be determined[and not relevant for present purposes;

(ii) (***theoretical underpinning of dumping***): the Panel Member expressed reservations on the Commission's findings concerning pricing behaviour based on the '*theory underpinning the impact of taking anti-dumping measures*'. Specifically, the Panel Member explained that dumping theory is to the effect that:

> "*When dumping measures are imposed, it is expected that one of two behaviours result. Firstly, exporters will increase their prices to a non-dumped level increasing their own revenues and ceasing dumping. The domestic industry will no longer be subject to dumped prices and the market will return to one not affected by dumped prices as the exporter increases the price to the importer which flows through to the domestic market.*
>
> *Alternatively, if exporters do not increase export prices, importers subject to dumping duties (to the extent of the dumping), will have additional costs (the dumping duty) and will respond by increasing their prices onto the domestic market to reflect the additional costs. Again, it is expected that the domestic market will no longer be impacted by the dumped exports as the prices will rise to a non-dumped level. The price in the domestic market is increased by the extent of the dumping margin.*"

While an accurate summary of dumping theory, it, unfortunately, fails to take into account the effect of the anti-dumping measures actually imposed. That is, what effect or likely effect do the actual anti-dumping measures have on pricing behaviour as opposed to the theoretical effect – do the anti-dumping measures as imposed actually operate as an incentive or a disincentive for a change in behaviour? This was not addressed by the Panel Member.

Regrettably, there also has been a marked and persistent resistance to investigate the effectiveness of anti-dumping measures, that is, to assess whether such measures operate to give effect to the theoretical underpinning on which the measures are imposed and, if not, why not? Consequently, there is no rigorous, disciplined inquiries or studies into the effectiveness of anti-dumping measures. It is not known as a question of fact supported by evidence that anti-dumping measures achieve what they are intended to achieve, that is, to prevent the injurious effects of dumping, Rather, any such assessment is, at best, anecdotal and, as such, at best reliant on coincidence, which, of course, is not probative.

In any event, as is typically the case in Australia, interim dumping duty payable on imports is usually worked out using the '*fixed and variable duty*

method': regulation 5 of the *Customs Tariff (Anti-Dumping) Regulation 2013* (see extract at **Attachment B**). As noted earlier above, that method provides for the working out of the interim dumping duty payable by applying the dumping margin worked out in regulation 5(2) to the **greater of**:

(a) the <u>export price</u> of the particular goods, that is, the export price of the goods in a particular shipment imported into Australia; and

(b) the <u>export price</u> as ascertained or last ascertained by the Minister.

The dumping margin, therefore, is to be applied to the 'export price' of the particular goods, with 'export prices' being, of course, determined in accordance with section 269TAB of the *Customs Act 1901*.

In practice, the effect of application of such anti-dumping measures (i.e., interim dumping duty) is that it operates as a disincentive for exporters to increase their export prices to un-dumped export prices and for importers to purchase from exporters at un-dumped export prices. That is, there is no commercial incentive in doing so in so far as the exports remain competitive when on-sold at duty inclusive prices (i.e., at un-dumped prices).

From an exporter's perspective, if it has been exporting at prices that are profitable to it, which is typically the case, why would it increase its export prices following the imposition of anti-dumping measures? An exporter pays no dumping duties and increasing its export prices would simply render its customers, the Australian importers, less or un-competitive, especially when the fixed component of the interim dumping duty is calculated on the increased 'un-dumped' export price, as opposed applying the fixed component of the interim dumping duty to the 'dumped' export price to increase it to an 'un-dumped export price'. Hence there is no commercial incentive for exporters to increase export prices to un-dumped export prices when interim dumping duty is to be worked out using the fixed and variable duty method.

From an Australian importer's perspective there also is no benefit to it in an exporter increasing its export prices to it. As noted, the effect of such an increase in export prices would result in the dumping margin being applied to the higher (greater) export price for the particular shipment resulting in a greater amount of interim dumping duty being payable than if applied to 'dumped' export prices, which greater amount of interim dumping would then need to be recovered from its customers in higher prices than would or should otherwise be the case. This could render the importer uncompetitive in the Australian market because it would be on-selling a product to which, for example, the dumping margin had been applied to an un-dumped export

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price due to the manner in which the fixed and variable method of duty is applied.

If, on the other hand, export prices remain the same, then the amount of interim dumping duty payable would be less, which would be recovered from the importer's customers in the price it on-sells the product to its customers. In such circumstances, the prices at which the importer on-sells the imported products would not only be un-dumped due to being inclusive of the interim dumping duty paid but also more likely to be competitive. In other words, the importer would be continuing to compete in the Australian market but at un-dumped prices.

Accordingly, so long as its duty inclusive prices remained relatively competitive in the Australian market, there is no benefit to an Australian importer for an exporter increasing its export prices. Rather, the opposite is the case. Given that the subject exports have remained competitive in the Australian market despite being on-sold into the Australian market at duty inclusive prices, which also remain profitable for importers, there is no commercial detriment to importers. They recover the interim dumping duties paid in the prices at which they on-sell the subject exports into the Australian market.

The position, however, changes markedly upon expiry of the anti-dumping measures. With the expiry of the anti-dumping measures, there is no incentive for either exporters or importers to reduce their respective prices. Rather, the opposite is the case.

For example, for the exporter, an increase in its export prices to importers would likely be beneficial as it would mitigate/eliminate the risk of exports being at dumped export prices, as well as increase its sales revenues and profits but without increasing the amount of interim dumping duty payable because the measures would have expired. For the importer, if it is selling into the Australian market competitively at duty inclusive prices, then it could continue to sell at those higher prices except no interim dumping duty would now be payable and, instead, the duties that would have previously been payable would consist of additional profit. If an exporter increased its export prices and an importer did not alter its prices when on-selling, then the expiry of the measures could simply result in exporters and importers both increasing their profits without increasing prices when the subject exports are on-sold into the Australian market.

This is recognised by the Panel Member in that if the anti-dumping measures expire, an importer may continue to compete in the domestic market at the un-dumped price with the interim dumping duty previously

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payable now providing it with a higher return. If it is able to continue to compete at that higher price, what is the commercial incentive for it to lower its price unilaterally for lower returns?

Further, because the Australian market had become acclimatised to the higher prices, there would be no incentive for importers to substantially reduce prices as to do so would create uncertainty in the market and could erode revenues and profits.

It, therefore, would seem that the operation of the 'fixed and variable duty method' would have the opposite effect to the '*theory underpinning the impact of taking anti-dumping measures*' as postulated by the Panel Member in the letter of instruction;

(iii) (***factual basis for pricing behaviour***): despite the foregoing, the Panel Member stated that

"*In my view, it is not apparent how the ADC concluded that importers' pricing behaviour will not change with the expiration of measures. I acknowledge that there are a number of complexities associated with analysing prices in the aluminium extrusions domestic market. However, there must be a factual base to the consideration of what is likely to happen. Given the dumping theory outlined above, it is more likely than not, in a price sensitive market, that importers would change prices should the measures expire.*" (underlining added)

Again, there is no factual basis supported by evidence for this assertion. Nor is that assertion supported by the nature and operation of the anti-dumping measures here in question, that is, the '*fixed and variable duty method*'.

Importantly, the Panel Member in the above extract suggests that 'importers' would change their pricing behaviour on expiration of anti-dumping measures. However, whether they do so or not is largely irrelevant as importers' prices into the Australian market are after the exports in question have been imported and passed through the customs barrier into home (domestic) consumption. Dumping does not seek to regulate that behaviour. It seeks to regulate the behaviour of 'exporters' and the 'export prices' of their exports to Australia. The focus of dumping, as the Panel Member, would be aware is on the exporter and its export prices, not the importer and its prices into the domestic market, which may not reflect the prices at which it purchases exports for on-supply into the Australian market.

In any event, for the reasons set out in section 8.7.4 of Report 591 and, specifically, in relation to PMBA, it was found that the expiry of the anti-

dumping measures "*would make little difference to PMBA's export volumes to the Australian market*" – a finding of fact supported by evidence. For similar reasons, the expiration of the measures would make little difference to PMBA's prices or to PMAA's prices when on-selling into the Australian market aluminium extrusion products it purchased from PMBA.

Hence, it is '*more likely than not*' that export prices do not increase while the measures are in force as there is no incentive for such prices to be increased and, it is '*more likely than not*' that export prices will increase on expiry of the measures as there will then be an incentive for the exporter to increase its prices while the importer maintains its prices into the Australian market. There is no evidence to the contrary and none referred to by the Panel Member. This is the relevant and likely pricing behaviour of exporters and importers based on fact and supported by evidence; and

(iv) (***Australian industry pricing behaviour***): possibly of more relevance is the likely pricing behaviour of the Australian industry on the expiration of the anti-dumping measures given its price undercutting of prices of other participants in the Australian market, including those of its own members, while the measures were in force, thereby depressing and supressing prices in the Australian aluminium extrusion market. The likely response by the Australian industry to the expiration of the measures would seem likely to be to not only to continue its price undercutting but also to deepen that price undercutting on the irrational commercial pretext that the expiry of the measures would lead to importers reducing prices of the subject exports. It would be commercially irrational for the Australian industry to further price undercut on expiration of the measures given that, for the reasons given earlier above, importers are unlikely to reduce their prices into the Australian market and given that exports from the subject countries only hold about 2% market share as compared with the majority market share held by members of the Australian industry.

Consequently, on the available evidence and as a question of fact, as opposed to theory, the expiration of the anti-dumping measures would unlikely lead to a change in pricing behaviour by exporters and/or importers. There would be no commercial or financial benefit in their doing so or, at least, none identified supported by evidence. Rather, as discussed, a change in pricing behaviour is more likely to occur with the Australian industry.

3. Price analysis - 'high degree of price sensitivity' in the Australian market

In the letter of instruction, after referring to the Commission's Dumping and Subsidy Manual, the Panel Member observed that:

> “*In circumstances where there is a high degree of price sensitivity in the market, an analysis of the NIP of exports relative to the selling prices of the Australian industry provides an indication of whether injurious dumping is occurring. It is acknowledged that this does not necessarily mean it is material injury.*” (underlining added)

It is unclear what constitutes a ‘*high degree of price sensitivity*’ in a market. That is not explained, nor elaborated on. Specifically, how and to what extent does the ‘*high degree of price sensitivity*’ manifest itself in the Australian aluminium extrusion products market, if at all?

Presumably all markets are ‘*price sensitive*’ as this is what defines a ’market’ and, in particular, an open and competitive market, as well as being sensitive to other market forces. Hence, what distinguishes differences in price sensitivity between particular markets, how does such ‘sensitivity; manifest itself, if at all, and how is it measured and measured objectively on evidence and what is its relevance here?

It would be expected that all participants in the Australian aluminium extrusion products market would be aware of prices in that market, that is, the structure of prices for aluminium extrusion products, the prevailing market prices for the different aluminium extrusion products being offered for sale, including at the different levels of trade and to different customers in the market, as well as other terms and circumstances affecting prices such as regional differences and volumes being purchased. It would be commercially naïve to assume otherwise.

Hence it is unclear what ‘price sensitivity’ is being referred to when it is asserted without qualification or explanation that the market possesses a ‘high degree of price sensitivity’. Certainly there has been no detailed, disciplined economic or financial analysis of the Australian aluminium extrusion market or, at least, none referred to in in investigations, reviews and inquiries. Rather, anecdotal evidence and coincidence appears to be relied upon as opposed to, for example, analysis based on usual economic analysis of markets such as price elasticity of demand within the market, particularly in assessing competition within a market between and among imported and domestically produced products[2]. Indeed there appears to have been no attempt to define the nature, structure or operation of the Australian aluminium extrusion products market, let alone pricing within that market.

It, therefore, is unclear to what the Panel Member is referring to when referring to the Australian aluminium extrusion product market as possessing a ‘*high degree of price sensitivity*’, nor what evidence that the Panel Member is basing that statement on. Hence, its relevance, if any, is unclear and not explained.

4 Observations on sources of pricing by the Australian industry

[2] There would of course not necessarily be any price elasticity of demand between MCCs or between products within an MCC as individual products may not be substitutable by other products due to their unique end-use requirements rendering other products unsuitable as substitutes.

Capral, as, apparently, representative of the Australian industry, claims that it sets its prices on, amongst other things, the prices of imports including prices of the imports from Malaysia and Vietnam.

If this is correct, it is unclear why and to what extent Capral and, for that matter, other members of the Australian industry would set their prices to the import prices at which exports are imported into Australia – that is, why and to what extent such import prices would influence prices of members of the Australian industry? No demonstrable connection was found between the prices of the subject exports and those of the Australian industry supported by evidence and, certainly, no evidence of any such connection was provided by Capral either to the Commission or in its application to the ADRP or in its subsequent submissions.

Given how prices for aluminium extrusion products are determined, particularly in the Australian market (e.g., LME price plus MJP premium plus 'spread'), it is unclear what guidance or influence import prices of exports would have on members of the Australian industry when the respective business models of exporters, importers and members of the Australian industry would be materially different from each other and therefore the nature, structure and amount of their respective 'spreads'? What guidance would import prices provide the Australian industry in setting their 'spreads' in establishing their prices when these would be materially different to those of exporters and materially different from importers, as well as materially different between the members of the Australian industry with their different business models? This is not explained by Capral or anyone else.

Further, given that information from import databases, specifically, import data obtained from the Australian Bureau of Statistics does not identify import prices by individual aluminium extrusion product or even by MCC, it is unclear what guidance such import price data could reasonably provide. It also is unclear what relevance import price data on exports from the subject countries that hold about 2% market share respectively could provide to the Australian industry with its dominance of the Australian market and its price undercutting of the price of participants in that market.

This is not to suggest that participants in the Australian aluminium extrusion market would not have regard to prices in that market of its competitors, as well as other market forces affecting prices and sales volumes. But why would import prices from one country and/or by one exporter have more influence than those from another country and/or exporter particularly when ABS statistics do not distinguish between different aluminium extrusion products and when the exports do not hold a significant market share and are unlikely to obtain a significant market share?

Nor why would import prices have more influence on market prices than those of the Australian industry with its greater market share? This does not appear to have been addressed, as well as other market factors affecting prices such as the performance of the Australian construction industry and, in particular the residential construction industry, that

determines demand for aluminium extrusion products. There does not appear to be a substantive market analysis to identify and assess the factors affecting and the extent affecting the pricing of aluminium d=extrusions in the Australian market.

With imports from Malaysia and Vietnam each holding about 2% of the Australian market, it would seem highly improbable that their prices would or could influence prices in the Australian market. In any event, the has been no systemic, disciplined inquiry into what are the factors influencing prices in the Australian aluminium extrusion market and to what extent. All that apparently exists is an unsubstantiated assertion based, at best, on anecdotal claims that the Australian market is 'highly price sensitive', whatever that means as discussed earlier above.

5. Observations on non-injurious price (NIP)

In the letter of instruction, the Panel Member suggests that an analysis of the NIPs '*may provide <u>additional price information</u> regarding whether material injury is likely to continue or recur from dumped exports*' (underlining added).

Presumably the Panel Member is not suggesting that the analysis will provide '*additional information*' to the '*relevant information*' but, rather, the analysis may assist in determining whether '*material injury is likely to continue or recur from dumped exports*' in the absence of the anti-dumping measures, such analysis being based on 'relevant information'.

In any event, the Panel Member's suggestion that an analysis of the NIP may provide additional information on whether material injury is likely to continue or recur from dumped exports from the subject countries is misplaced for the following reasons:

(i) (***analysis of the unsuppressed selling price (USP)***): an NIP analysis based on the so-called 'unsuppressed selling price (**USP**), being the 'price' at which the Australian industry would commence to incur injury, is misconceived because:

(a) the USP is not a 'price' but an amount calculated a purported 'representative' of the domestic industry's (e.g., here Capral's) on the cost to make and sell the 'product' under investigation plus an amount for profit;
(b) there is no evidence that the USP could be reasonably be expected to be obtained in a market, whether or not affected by dumping, as there is no market analysis necessary to establish whether that price is in fact obtainable and, if it is not, why not and, in particular, whether because of factors unrelated to dumping;
(c) the USP is not in relation to any specific aluminium extrusion products or MCCs and, therefore, it is unclear to which aluminium extrusion products it is intended to apply to or how a USP could be a 'price' that could be reasonably be expected to be obtained when it does not relate to a specific product;
(d) no evidence is advanced that if the Australian industry sold aluminium extrusion products below the USP it would necessarily incur injury given that it is common

industry practice to sell products below their cost to make and sell or with no or minimal profit for a variety of strategic commercial reasons – no such assessment is made but instead it is simply assumed, without evidence, that sales below a USP must necessarily result in injury; and

(e) there has been no assessment of whether the anti-dumping measures have been effective in achieving their intended objective of preventing the injurious effects of dumping and, if ineffective, why, when and to what extent the measures have been ineffective. Accordingly, there is no basis supported by evidence of in what circumstances, that is, at what levels the anti-dumping measures do and do not achieve their intended objective of preventing the injurious effects of dumping;

(ii) (***USP and LME prices***): given that an USP for aluminium extrusion prices must necessarily include as a cost component the price of aluminium, which is based on London Metal Exchange (**LME**) prices that are constantly changing with changing market conditions, the prices for aluminium extrusion products continually rises and falls with the rise and fall in LME prices. Hence, an USP based on an LME price is probably out of date by the time it is calculated as LME prices and, therefore, aluminium extrusion prices would have change. This fluctuation in aluminium extrusion prices is not factored into the determination of USPs and unless taken into account an USP is of limited utility in assessing what is a non-injurious price (NIP) – it will be out-of-date as soon as calculated;

(iii) (**USP and the spread**): the only component of an USP that would be constant is the 'spread' but the 'spread' will vary from product-to-product and between each member of the Australian industry depending upon their respective business models and hence the spread of one member of the Australian industry is unlikely to be representative of all members of the Australian industry or for all aluminium extrusion products produced and sold in Australia by the Australian industry. This is evident from the audited financial statements that members of the Australian industry file with the Australian Securities and Investments Commission (**ASIC**) in accordance with the *Corporations Act 2001 (Cth)*, copies of which are publicly available and have been provided to the Commission.[3] Addressing such differences in the business models and, consequently, spreads between Australian industry members would necessarily need to be addressed in a NIP analysis;

[3] Any suggestion by the Commission that the financial statements do not reflect the economic performance of the company's aluminium extrusion business is necessarily misconceived when the financial statements are required and do reflect the economic performance of the company in the conduct of its principal business as disclosed in the financial statements. See: Part 2M.3, Division 1, especially sections 292, 295, 296, 297, 299 and 299A of the *Corporations Act 2001 (Cth)*. Hence, the financial statements would accurately reflect the economic performance of the company's principal business as disclosed in the financial statements, which, of course, are audited. Absent any evidence to the contrary, this must be accepted as accurately reflecting the economic performance of the company in the operation of its principal business. It is noted that such financial statements were not taken into account in Reviews 135 and 137 by the ADRP.

(iv) (***USP and normal values (NVs)***): a NIP analysis based on USPs is necessarily flawed if it does not address the question of whether the subject exports if exported at export prices equal to their normal value (**NV**), that is, whether exports at un-dumped prices would cause material injury to the Australian industry. If they would, then such injury is not being caused by dumping and, consequently, what difference in injury would be being caused by dumped exports as opposed to un-dumped exports in such circumstances and when (i.e., at what point) would dumping commence to cause injury that is distinguishable from un-dumped exports?. If, on the other hand, un-dumped exports would not cause injury in such circumstances, then at what point would dumped exports commence to cause injury that is attributable to dumping and not some other factor(s)?;

(v) (***USP and landed duty paid prices***): a NIP that is based on a comparison between USPs and the 'landed duty paid into store price' of exports may be flawed because, as discussed earlier, the 'landed duty-paid into-store price' is typically not a 'price' and, certainly not an export price unless the price paid to the exporter is a DDP price. Rather, it is a calculated amount and it may be incorrectly calculated by applying the dumping margin to the import price of the subject imports, as opposed to their export price as the 'import price) (i.e., customs value)and export price are not necessarily the same being determined under different provisions in the *Customs Act 1901* with different requirements for each consistent with respective WTO obligations. In any event, the issue is whether the export price payable by importers on the introduction of the product under investigation not the commerce of Australia provides the importer with a competitive pricing advantage when competing with the domestic products of the Australian industry on price in the domestic market in Australia and the required focus is on this issue – that is, 'prices', not 'costs'; and

(vi) (***USP and market prices***): given the extensive price undercutting by the Australian Industry and its profitability despite such price undercutting, the question necessarily arises as to whether the actual unsuppressed selling price of the Australian industry is the weighted average of its current selling prices for aluminium extrusion products into the Australian market – that is, the actual USP is the Australian industry's current market prices, especially given that any price suppression and/or price depression in the market would be attributable to its price undercutting.

These matters, of course, would need to be addressed in an NIP analysis.

Attachment B

Extracts from Regulation 5 of the *Customs Tariff (Anti-Dumping) Regulation 2013*

"5 Methods of working out interim dumping duty

(1) For subsection 8(5BB) of the Act, this section prescribes methods for working out the amount of interim dumping duty payable on goods the subject of a notice under subsection 269TG(1) or (2) of the Customs Act 1901.

Combination of fixed and variable duty method

(2) A method is:

(a) work out the amount of the difference between:

(i) the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; and

(ii) the normal value of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; and

(b) if the export price of the particular goods is less than the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice, work out the amount of the difference; and

(c) add the amounts worked out under paragraphs (a) and (b) to obtain the interim dumping duty payable on the goods.

(3) The amount worked out under paragraph (2)(a) must be:

(a) ascertained as a proportion of the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice, and ***applied to the greater of***:

(i) the export price of the particular goods; and

(ii) the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; or

(b) applied by reference to a measure of the quantity of the particular goods; or

(c) applied by reference to a combination of a proportion mentioned in paragraph (a) and the quantity mentioned in paragraph (b)."

(*emphasis added*)

[***Note****: the reference to the 'export price of the particular goods' in the regulation is the 'export price' of the imported goods in respect of which the interim dumping duty is payable and that 'export price' is the export price for those goods determined under section 269TAB of the Customs Act 1901, which is not necessarily the same as the customs value (i.e., import price) of those goods determined under section 159 of Division 2 of Part VIII of the Customs Act 1901 and declared in an import declaration*. There appears to be no administrative process for determining 'export prices' for particular shipments for the purposes of import declarations and determination of the amount, if any, of interim dumping duty payable]

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