



Australian Government

Anti-Dumping Review Panel

ADRP Decision No. 59

Certain Aluminium Extrusions Exported to
Australia from Malaysia and the Socialist
Republic of Vietnam

1 September 2017

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Abbreviation

Term	Meaning
Act	<i>Customs Act 1901</i>
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
Assistant Minister	Assistant Minister to the Minister for Industry, Innovation and Science (the Minister)
Capral	Capral Limited
Commissioner	The Commissioner of the Anti-Dumping Commission
LBA	LB Aluminium Berhad
Mien Hua	Mien Hua Precision Mechanical Co., Ltd
Minister	Minister for Industry, Innovation and Science
PAD	Preliminary Affirmative Decision
Parliamentary Secretary	The Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Minister)
PMAA	Press Metal Aluminium (Australia) Pty Ltd
PMB	Press Metal Berhad
Review Panel	The Anti-Dumping Review Panel
Reviewable Decision	The decision of the Commissioner made on 24 May 2017
SEF	Statement of Essential Facts
Superb	Superb Aluminium Industries Sdn Bhd
Vietnam	Socialist Republic of Vietnam

Summary

1. For the reasons set out below, I do not consider that the applicant has established that the decision of the Commissioner of the Anti-Dumping Commission (“ADC”) was not the correct or preferable decision.

Introduction

2. This is an application for review by Capral Limited (“Capral”) of the decision by the Commissioner to terminate part of an investigation. The decision by the Commissioner was a termination decision as defined by s.269ZZN of the *Customs Act 1901* (“the Act”) and hence is reviewable by the Anti-Dumping Review Panel (“the Review Panel”).
3. The termination decision was made by the Commissioner on 24 May 2017 and notified by publication of the Anti-Dumping Notice on that date¹. The application for review was received by the Review Panel on 23 June 2017, within the prescribed time for such an application.
4. The application for review was not rejected under s.269ZZQA of the Act and the Review Panel accepted the reviewable grounds in the application. As required by s.269ZZRC, notice that the Review Panel intended to conduct a review was published on the Review Panel’s website on 7 July 2017.
5. Pursuant to s.269ZZT of the Act, the Review Panel is required to make a decision on the application within 60 days of giving the notice under s.269ZZRC that it intended to conduct a review.
6. As Senior Member, I specified in a written direction pursuant to s.269ZYA that the Review Panel for this review was to be constituted by me.

Background

7. On 16 August 2016 the Commissioner initiated an investigation into the alleged dumping and subsidisation of certain aluminium extrusions exported to Australia from Malaysia and the Socialist Republic of Vietnam (“Vietnam”). The initiation of the investigation followed an application by Capral on 28 June 2016 alleging that the Australian industry had suffered material injury caused by the export of aluminium extrusions from Malaysia and Vietnam at dumped and subsidised prices.
8. The investigation period for the purpose of assessing dumping and subsidisation was 1 July 2015 to 30 June 2016 and the injury analysis period was from 1 July

¹ ADN No. 2017/74.

2012. A preliminary affirmative determination (“PAD”) was made by the ADC on 17 October 2016 and securities taken. A Statement of Essential Facts (“SEF”) was published on 9 April 2017.

9. On 24 May 2017 the Commissioner terminated part of the anti-dumping investigation in relation to certain exporters from Malaysia and the countervailing investigation in relation to Malaysia and Vietnam.
10. With respect to the anti-dumping investigation the Commissioner relevantly found that:
 - a. for the goods exported to Australia by Press Metal Berhad (“PMB”) and Superb Aluminium Industries Sdn Bhd (“Superb”), there was no evidence that dumping had occurred; and
 - b. the dumping margin for the goods exported to Australia by LB Aluminium Berhad (“LBA”) and the category of ‘residual exporters’ from Malaysia, being Milleon Extruder Sdn Bhd, Genesis Aluminium Industries Sdn Bhd and Kamco Aluminium Sdn Bhd, was negligible (less than 2 per cent).
11. With respect to the countervailing investigation, the ADC found that:
 - a. PMB, LBA, Superb and the category of ‘residual exporters’ from Malaysia had received a countervailable subsidy in respect of some or all of the goods exported to Australia but the subsidy never at any time during the investigation period exceeded the negligible level of a countervailable subsidy under subsection 269TDA(16) of the Act;
 - b. Mien Hua Precision Mechanical Co., Ltd (“Mien Hua”) from Vietnam had not received a countervailable subsidy in respect of any of the goods exported to Australia; and
 - c. all exporters from Vietnam (except Mien Hua) had received a countervailable subsidy in respect of some or all of the goods exported to Australia but the subsidy did not exceed the negligible level of countervailable subsidy under subsection 269TDA(16).
12. The application for review is with respect to the termination decision as it related to the export of the goods by PMB, Superb and LBA.

Conduct of the Review

13. S.269ZZT(1) of the Act provides that if an application for review of a termination decision is not rejected, the Review Panel must make a decision on the application by:
 - a. affirming the reviewable decision; or
 - b. revoking the reviewable decision.
14. In making a decision under s.269ZZT(1), the Review Panel must, with limited exceptions², have regard only to information that was before the ADC when the ADC made the decision. Except as noted below, in conducting this review I have had regard to the application for review and the documents referenced in the application and to other documents provided to the Review Panel by the ADC which were before the Commissioner when the reviewable decision was made.
15. S.269ZZRB of the Act allows the Review Panel to seek further information from the ADC in relation to information that was before the Commissioner when the reviewable decision was made and to have regard to that further information. Copies of documents which were before the Commissioner when the reviewable decision was made were requested from the ADC.
16. S.269ZZRA allows the Review Panel to hold conferences for the purpose of obtaining further information in relation to the application or review. No conferences were held under s.269ZZRA.

Grounds for Review

17. In its application, Capral listed six grounds for the review. These grounds were:
 - a. The Commissioner failed or refused to consider Capral's representations that goods sold by Press Metal Aluminium (Australia) Pty Ltd ("PMAA") were sold at a loss during the investigation period;
 - b. The Commissioner failed or refused to adequately test whether export prices by Superb were arms-length by not validating with its sole Australian customer whether rebates were paid (or some other form of compensation was remitted) during the investigation period to enable the customer to compete with dumped prices from Vietnam;

² S.269ZZRA(2) and s.269ZZRB(2)

- c. The Commissioner failed or refused to adequately test whether export prices by LBA were arms-length by not validating with its Australian customers whether rebates were paid (or some other form of compensation remitted) during the investigation period;
 - d. The re-assessment of normal values for PMB, Superb and LBA to take account of the above matters the subject of review would influence the normal values, export prices and dumping margins determined for Malaysian exporters termed 'residual exporters';
 - e. The Commissioner failed to adequately investigate whether any of the goods exported from Malaysia were 'transhipped' goods originating from China; and
 - f. The Commissioner erred in his decision concerning the determination of the subsidy amount(s) calculated under programs 4 and 6 for LBA, Superb and residual Malaysian exporters of the goods.
18. The fourth ground relied upon by Capral follows as a consequence from the first three and does not need to be considered unless Capral succeeds on one of the first three grounds. For the reasons given below, I did not agree with the submission by Capral in relation to the first three grounds and therefore I have not made findings in relation to the fourth ground.

Consideration of application

Ground 1 - Sales by PMAA

19. In the course of the investigation the ADC conducted a verification visit to PMB and elected not to conduct an on-site verification visit to PMAA. This was because, according to the Verification Report for PMAA³, during the exporter visit to PMB a significant amount of information was collected relating to PMAA's imports.
20. Capral takes issue with the finding by the ADC that the import transactions between PMAA and PMB were arms length transactions. Capral contends that this finding did not address the serious concerns raised by Capral that PMAA was selling aluminium extrusions at prices which undercut the Australian industry and which were at levels that matched prices from Vietnam. Capral's application also refers to information it provided to the ADC which it submits showed that PMAA's selling prices were made at a loss.

³ EPR 362 Document 051

21. By not conducting a verification visit with PMAA, Capral argues that the ADC could not confidently confirm whether the prices provided by Capral to the ADC in its application and submission of 24 November 2016 were prices for aluminium extrusion sold by PMAA at a loss. This was because the ADC only had access to PMAA's high level financial extracts and the ADC was not able to validate the cost incurred for each transacted sale by PMAA during the investigation period. Capral argues that given the selling prices of PMAA it would seem possible that PMAA was in receipt of rebates from its parent company to enable it to compete with declining dumped prices from Vietnam.
22. The submission by Capral with respect to PMB and PMAA contains an error. The submission states that the beneficial owner at the time of importation was PMAA. It then proceeds on the basis that the importer of the goods was PMAA. In fact, the ADC did not find that PMAA was the importer. The finding was that PMB was the beneficial owner of the goods at the time of importation and hence was the importer as defined by the Act.⁴ Given this, the ADC established the export price for PMB under s.269TAB(1)(c) using the invoiced price from PMB to its Australian customers, less deductions to take it to the FOB level as required.
23. It is Capral's submission that the ADC should have found that the transactions between PMB and PMAA were not arms-length and that the export price for PMB's exports should have been determined in accordance with s.269TAB(1)(b). However, because PMB was found to be the importer, s.269TAB(1)(b) could not apply. This is because that subparagraph only applies if the goods have been exported to Australia otherwise than by the importer.
24. In any event, the ADC did address the concerns raised by Capral. It did consider whether or not the sales between PMB and PMAA were arms-length and whether the sales by PMAA were at a loss. In respect of the latter, it found that "PMAA's sales of aluminium extrusions sourced from PMB during the investigation period were not sold by PMAA in Australia at a loss".⁵
25. Capral's submission that a verification visit was necessary is based on speculation that sales by PMAA in Australia were at a loss and that PMAA was possibly in receipt of rebates from its parent to compete with declining dumped prices from Vietnam. The evidence for this is the prices being offered for PMB product at levels matching dumped prices for Vietnamese exports.
26. I have examined the material which was before the Commissioner setting out the prices at which the aluminium extrusions were sold by PMB to its customers in

⁴ TER 362, section 3.5.2 at page 17

⁵ As above, section 3.5.3 at page 20

Australia⁶. These prices do not support the argument that sales by PMAA must have been at a loss, even given the pricing information supplied by Capral.

27. Given the findings by the ADC, the explanation for such findings and the export prices for PMB's exports, I do not consider that there is a basis for the speculation by Capral or that there was an error in not conducting a verification visit to PMAA's premises.

Ground 2 - Sales by Superb

28. As with its submission on PMB's export prices, Capral complains that the ADC team did not conduct a verification visit to Superb's customer in Australia and therefore it could not confirm whether or not Superb provided rebates to that customer during the investigation period. Contrary to Capral's submission, the ADC team did not conduct a verification visit to Superb's premises in Malaysia either. The decision not to visit was based on the volume of Superb's exports relative to the total export volume from Malaysia and Vietnam during the investigation period.⁷
29. Unlike the situation with PMB and PMAA, there is no allegation that Superb and its Australian customer are related parties. In the absence of any evidence that the relationship between Superb and its Australian customer was other than arms-length, I do not consider that the ADC erred in not conducting a verification visit to the Australian customer. As has been recognized by the Federal Court, there is a limit on the duty of the ADC to investigate.⁸
30. I note that Capral's submission contends that the export prices for Superb should have been determined under s.269TAB(1)(b). As Superb was found to have been the importer of the aluminium extrusions, the export price could not have been determined under that paragraph.

Ground 3 - Sales by LBA

31. Capral makes a similar complaint with respect to the prices determined for LBA's exports as it did with PMB's export prices, namely that the ADC should have conducted a verification visit with LBA's customers to determine whether rebates, or some other form of compensation, were made to the importers to compete with declining import prices. However, no evidence was provided by Capral to support

⁶ Confidential Attachment 1 to TER 362

⁷ Verification Report EPR 362 Document 63, section 1.2 at page 3

⁸ *Al Abudullatif Industrial Group Ltd v Minister for Justice and Customs* [2000] FCA 758

the contention that a verification visit was necessary to confirm that no compensation was provided.

32. The ADC found that LBA's exports to Australia had been exported to Australia otherwise than by the importer and were purchased in an arms length transaction by the importer from the exporter. The export prices were determined under s.269TAB(1)(a). There is nothing in the material which I have reviewed which indicates that this was not the appropriate finding or that a verification visit to LBA's customers in Australia was necessary.

Ground 5 - Transshipping

33. During the investigation, Capral raised a concern with the ADC that certain aluminium extrusions exported from Malaysia to Australia were of Chinese origin, that is they were transshipped though Malaysia. Capral submits that the ADC did not adequately investigate such transshipping. The information provided by Capral to the ADC was confidential. [REDACTED].

34. [REDACTED]

35. Indeed, from the confidential submission which was made by Capral to the ADC during the investigation, I understand that it is not disputed that the exporter is a producer of aluminium extrusions exported to Australia. Rather, the concern raised by Capral is that there are exports to Australia of aluminium extrusions which originated in the People's Republic of China but which are being transshipped through Malaysia in order to avoid anti-dumping measures on such exports.

36. While it may be that the material provided by Capral to the ADC could be grounds for an anti-circumvention inquiry under Division 5A of the Act, such material could not affect the investigation into the exports of aluminium extrusions produced by the exporter concerned and exported to Australia during the investigation period. The concern raised by Capral does not make the decision of the Commissioner not the correct or preferable decision.

Ground 6 - Subsidy Investigation

37. With this ground, Capral argued that the Commissioner's decision erred in the determination of the subsidy amounts calculated under assistance programs known as Programs 4 and 6. Capral's application makes submissions with respect to the calculation of the benefit received by LBA and Superb under Program 6. However, there is no submission made in relation to the calculation of any amounts under Program 4.
38. Program 6 was described as a reinvestment allowance and in effect gives tax relief for capital expenditure on a factory, plant or machinery for a qualifying project. The reinvestment allowance is available for a period of 15 consecutive years beginning from the year of assessment in which the first reinvestment is made. Information regarding the program was provided by the Government of Malaysia in response to a supplementary questionnaire.⁹
39. With Program 6, Capral notes that the tax years for LBA and Superb did not align with the investigation period and the ADC did not have either company's tax returns for the full investigation period and relied upon tax "computation" records to calculate the benefit received. Capral's concerns are that it is not clear:
- a. whether the ADC used the computation records to determine an equivalent benefit for the whole investigation period, or whether the exporters supplied the ADC with information for the remaining part of the investigation period; and
 - b. whether the ADC contrasted the tax computation data for earlier periods with that in an annual return.
40. The ADC determined that Program 6 was a countervailable subsidy.¹⁰ The ADC determined that LBA and Superb had received a benefit from the subsidy during the investigation period. For LBA the benefit was calculated at 0.82%, well below the 2% negligible level for the purpose of s.269TDA of the Act. The benefit for Superb was calculated at 0.90%, also well below the negligible level.
41. With regard to LBA, the ADC had available the 2016 tax return and also the returns for the years 2013 to 2015. The tax year for LBA was the year ended 30 April 2016 and the investigation period ended 30 June 2016. Consequently, there was a two month period of the investigation period not covered by the tax return. For Superb, the ADC had the tax returns for 2013 to 2015. The ADC did not have a tax return

⁹ Government of Malaysia Supplementary Questionnaire EPR 362 Document 73.

¹⁰ TER 362, Appendix A, section A8.6 at page 58.

covering the investigation period but relied upon the tax computations for 2016 to calculate the benefit. I note that the ADC team had regard to the 2015 return for Superb.¹¹

42. Given the nature of the assistance program (tax relief based on capital expenditure), there appears to have been sufficient information for the ADC to calculate the benefit. Also given the nature of the program, I think that it was unlikely that there would have been any benefit received over and above that disclosed by the returns or computations to the extent that it would have increased the benefit above the negligible level. In particular, comments made by the ADC team regarding the nature of the investment by Superb in 2015, which was the basis for its claim for the reinvestment allowance, make it unlikely any claim for its 2016 tax year would be at a countervailable level.¹²
43. The ADC had to rely on the best information available regarding Program 6. However, it would have been preferable if the ADC had provided more information regarding how it calculated the benefits received by LBA and Superb under Program 6. Notwithstanding this, based on the material reviewed, I do not consider that the concerns put forward by Capral establish that the decision by the Commissioner was not the correct or preferable decision.

Conclusion

44. For the reasons given above, I do not consider that the application for review by Capral establishes that the decision by the Commissioner was not the correct or preferable decision.
45. Accordingly, pursuant to s.269ZZT of the Act, I affirm the termination decision of the ADC made on 24 May 2017.



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Joan Fitzhenry
Senior Member
1 September 2017

¹¹ Confidential Attachment 1 to the Exporter Verification Report for Superb Aluminium Industries SDN BHD.
¹² As above.