Australian Government
Anti-Dumping Review Panel

ADRP Report No. 135 and 137

Aluminium Extrusions (Mill Finish) exported from Malaysia and Aluminium Extrusions (Surface Finished) exported from Malaysia

September 2021

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADN	Anti-Dumping Notice
AUD	Australian Dollar
Capral	Capral Limited
Commissioner	Commissioner of the Anti-Dumping Commission
Criterion	Criterion Industries Pty Limited
G. James	G. James Australia Pty Ltd
Goods	Aluminium Extrusions Mill and Surface Finished
GUC	Goods under consideration
INEX	Independent Extrusions Pty Ltd trading as INEX
Injury period	1 January 2016 to 31 December 2019
Investigation period	1 January 2019 to 31 December 2019
Manual	Dumping and Subsidy Manual November 2018
Milleon	Milleon Extruder Sdn. Bhd
Minister	the Minister for Industry, Science and Technology
REI	Response to Importer Questionnaire
REQ	Response to Exporter Questionnaire
REP 540	The report published by the Commission in relation to Aluminium Extrusions (Mill Finish) and dated 29 April 2021
REP 541	The report published by the Commission in relation to Aluminium Extrusions (Surface Finished) and dated 29 April 2021

Review Panel	Anti-Dumping Review Panel
Reviewable Decisions	The decisions of the Minister made on 2 July 2021 with respect to Aluminium Extrusions (Mill and Surface Finished) exported from Malaysia
SEF	Statement of Essential Facts

Summary

1. This is a review of two decisions of the Minister for Industry, Science and Technology (the Minister) made on 31 May 2021 to:

    - publish a dumping duty notice under s.269TG(1) and (2) of the *Customs Act 1901* (the Act) in respect of Aluminium Extrusions (Mill Finish) exported from Malaysia (ADN 2021/033); and

    - publish a dumping duty notice under s.269TG(1) and (2) of the Act in respect of Aluminium Extrusions (Surface Finished) exported from Malaysia (ADN 2021/035) (reviewable decisions).

2. This report collectively refers to Mill Finish and Surface Finished goods as “the goods”.

3. For the reasons set out in this report, I consider that the reviewable decisions were the correct or preferable decisions and recommend that the Minister affirm each reviewable decision.

Introduction

4. Both applicants applied for a review under s.269ZZC of the Act. Milleon sought review of the decision to publish ADN 2021/033 and Criterion sought review of both ADN 2021/033 and ADN 2021/035.

5. The applications were accepted and notice of the proposed reviews, as required by s.269ZZI, was published on 14 July 2021.

6. The Senior Member of the Anti-Dumping Review Panel (Review Panel) directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

7. Capral Limited (Capral) is an Australian manufacturer of the goods. On 6 January 2020, Capral lodged two separate applications for the publication of a dumping duty notice in respect of the goods. Milleon was one of a number of Malaysian exporters nominated by Capral in each of its applications.

8. On 24 February 2020 investigations were initiated by the Anti-Dumping Commissioner (the Commissioner) with respect to each of Capral's applications.[1] Each notice indicated the Commissioner would examine exports of the goods to Australia over the period from 1 January 2019 to 31 December 2019 (the investigation period) to determine whether dumping had occurred. The Commissioner would also examine details of the Australian market from 1 January 2016 to 31 December 2019 (injury period) for the purposes of injury analysis.

9. In coming to the reviewable decisions, the Minister accepted the Commissioner's recommendations and reasons for the recommendations, including all material findings of fact or law, set out in the Anti-Dumping Commission (ADC) Reports No. 540 (REP 540) and 541 (REP 541) both dated 29 April 2021.

10. Capral's applications for the imposition of measures each alleged that the Australian industries for the goods have suffered material injury caused by the respective goods exported to Australia from the exporters covered by the applications at dumped prices. The Commission's consideration of the applications is reflected in Consideration Reports No. 540 and No. 541, both dated 20 February 2020.

11. With respect to the application relating to Mill Finish the Consideration Report notes "the application provides information concerning Capral's production volumes of Mill finish aluminium extrusions and states that Capral is **the largest Australian manufacturer of Mill finish** aluminium extrusions" [emphasis added].[2] With respect to Capral's production of Surface Finished aluminium extrusions, the Consideration Report only noted that "the application provides information concerning Capral's production volumes of Surface Finished aluminium extrusions"[3] and did not reference Capral's relative production volume. However, the Commission in both REP 540 and in REP 541, commented "Capral is the largest domestic manufacturer of aluminium extrusions and makes up a major proportion of the total Australian industry for aluminium extrusions".[4]

[1] Anti-Dumping Notice (ADN) No. 2020/18; ADN 2020/019.
[2] Consideration Reports No. 540, 6; Consideration Reports No. 541, 6.
[3] Ibid.
[4] REP 540, 23; REP 541, 25.

12. With respect to other Australian producers of the goods, the Consideration Reports stated,

> *Capral asserts in its application that there are eight other Australian manufacturers of like goods. The majority of these entities provided letters of support for these applications and indicated they are impacted by the imports from Malaysia.*[5]

13. The Commission's subsequent investigations in fact found that there were 10 Australian producers of aluminium extrusions. REP 541 noted the following:

> *The Australian market for the goods and like goods is supplied by domestic aluminium producers such as Capral and the eight other entities referred to by Capral in its applications and Knotwood and Deco who were also confirmed as domestic producers of like goods. The 10 entities identified by the Commission are considered to constitute the Australian industry producing like goods*.[6]

Conduct of the Review

14. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision, or revoke it and substitute a specified new decision. In undertaking the review s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister, in like manner as if it were the Minister, and having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

15. Subject to certain exceptions,[7] the Review Panel is not to have regard to any information other than relevant information pursuant to s.269ZZK, i.e. information to which the Commission had regard or ought to have had regard when making its findings and recommendations to the Minister.

[5] Consideration Reports, 6.
[6] REP 541, 28.
[7] See s.269ZZK(4).

16. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at a conference to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information. Conferences were held pursuant to s.269ZZHA of the Act with representatives of the Commission on 30 July and 9 August 2021 and with representatives of Milleon on 3 August 2021. Non-confidential summaries of the information obtained at the conferences was made publicly available in accordance with s.269ZZX(1) of the Act.

17. In conducting these reviews, I have had regard to: each application for review and the documentation to which they referred; REP 540 and REP 541 together with Confidential Attachments to each report; confidential documentation provided by the Commission; submissions received pursuant to s.269ZZJ of the Act from the Commission, Capral, and Criterion, insofar as they contained conclusions based on relevant information; and, further information obtained at the conferences with which the Review Panel is permitted to have regard under s.269ZZHA(2).

Grounds of Review

18. Criterion lodged a separate application for review in relation to each reviewable decision, i.e. the Minister's decision in relation to both of the goods. Criterion's applications rely upon common Grounds of Review and arguments in support. Milleon's application for review relates only to REP 540 (Mill Finish extrusions) and the consequential Ministerial decision.

19. The Grounds of Review relied upon by the applicants, which the Review Panel accepted, are as follows:

<u>Criterion (ADN 2021/033 and ADN 2021/035)</u>

1. There is and was no evidence or sufficient evidence before the Commissioner, and consequently the Minister, that the Australian industry as a whole, as opposed to part thereof, had incurred material injury during the injury period;

2. In the absence of evidence or sufficient evidence that the Australian industry as a whole had incurred material injury, the issue of whether exports of the goods

under consideration (GUC) at 'dumped' export prices had caused material injury to that industry did not and could not arise; and

3. Even if there had been sufficient evidence that the Australian industry as a whole had incurred material injury, there was insufficient evidence that exports of the GUC had caused material injury to the Australian industry through the effects of 'dumping' as a whole during the injury period.

Milleon (ADN 2021/033)

1. The Commissioner failed to properly address the trade level difference identified by Milleon;

2. The Commissioner failed to have proper regard to the evidence of the price premium as warranting an adjustment and chose a relatively minor cutting cost for one of three special domestic customers to make an adjustment for all three customers; and

3. The Commissioner failed to make an adjustment for management costs incurred in selling activities.

Consideration of Grounds

Ground 1: Criterion

There is and was no evidence or sufficient evidence before the Commissioner, and consequently the Minister, that the Australian industry as a whole, as opposed to part thereof, had incurred material injury during the injury period

20. Capral is the major producer of the goods in Australia and alone accounts for approximately 38% of the production of Mill Finish goods in Australia and 39% of the production of Surface Finished goods.[8]

[8] The Commission's submission to the Review Panel stated at page 6 "in REP 541, Capral is represented as comprising 33% of the Australian industry's production volume (see page 83). However, upon a more recent examination and review of the data, the Commission notes that Capral actually represents closer to 38%-39% of all production of the like goods."

21. In support of its application for the imposition of anti-dumping measures, Capral relied upon letters of support from eight other Australian producers of the goods. Each of the letters: had a common content; specified each company's annual production of the goods; expressed support for Capral's application; and stated that the company was impacted by imports of the goods from Malaysia. The Commission noted that "the data provided in the letters of support to Capral's application is sufficient to estimate sales volumes"[9] for the remaining Australian industry members.

22. Following the publication of the Statement of Essential Facts (SEF) on 9 December 2020, and in a response to submissions from interested parties concerning what Criterion describes as "the lack of information and evidence before the Commission regarding whether the Australian industry as a whole had incurred material injury caused through the effects of 'dumped' exports of the GUC",[10] the Commission then sought information and evidence from the companies which had supported Capral's application. Two Australian producers, G. James Australia Pty Ltd (G. James) and Independent Extrusions Pty Ltd, trading as INEX, responded to the Commission's request and each "provided sales revenue and volume information for each year of the injury analysis period. Both entities also provided information from their audited accounts which permitted the figures provided to the Commission to be verified".[11]

23. Both REP 540 and 541 described G. James and INEX as "the two largest Australian extruders behind Capral"[12] and that "taken together, Capral, G. James and INEX represented a third of the number of industry participants and 70% of the total production output of the Australian industry."[13]

24. In its assessment of the economic condition of the industry, both REP 540 and 541 noted "that Capral's dominant position within the Australian industry is highly relevant to the task of assessing the economic condition of the Australian industry as a whole".[14] Having assessed the economic condition of G. James and INEX in

[9] REP 540, 83; REP 541, 85.
[10] Criterion's application to the Review Panel, 13.
[11] REP 540, 82; REP 541, 84.
[12] Ibid.
[13] Ibid.
[14] Ibid.

light of their production and sales data, the Commission concluded "that both companies exhibited economic performance trends comparable to Capral's" and that "Capral's economic condition is not dissimilar to the condition of other Australian industry producers who also represent a significant proportion of the Australian industry".[15] Accordingly, the Commission was satisfied that on the available evidence, material injury can be assessed, on the balance of probability, to the Australian industry as a whole.[16]

25. Criterion argues that the information and evidence obtained by the Commission from G. James and INEX was of limited scope and probative value and, therefore, of limited relevance to the investigation and, in particular, to whether the Australian industry as a whole had incurred material injury during the relevant period. According to Criterion,

> *The Commissioner had no evidence or insufficient evidence that the Australian industry as a whole had incurred material injury at the time the Commissioner reported to the Minister, let alone material injury caused through the effects of alleged dumping of exports of the GUC.*[17]

Legislative context

26. It will be convenient to now set out the statutory context of the reviewable decisions i.e. the decisions of the Minister under s.269TG(1) and (2). These provisions enable the imposition of anti-dumping measures where the Minister is satisfied, inter alia, that goods exported to Australia have been dumped and future exports of like goods may also be dumped "and because of that, **material injury to an Australian industry** … has been or is being caused or is threatened" [emphasis added]. [18]

27. In relation to the phrase "an Australian industry", s.269T(4) of Part XVB of the Act relevantly provides:

[15] REP 540, 83; REP 541, 85.
[16] Ibid.
[17] Criterion's application to the Review Panel, 14.
[18] Section 269TG(2).

(4) For the purposes of this Part, if, in relation to goods of a particular kind, there is a person or there are persons who produce like goods in Australia:

(a) there is an Australian industry in respect of those like goods; and

(b) …, the industry consists of that person or those persons.

28. Section 269TAE(1) provides that, in determining for the purposes of s.269TG whether material injury to an Australian industry has been or is being caused by the exportation of dumped goods, the Minister **may** have regard to a number of factors which include, inter-alia: the difference between the price of the goods manufactured by the Australian industry and the exported goods; the effect of the price of the dumped goods on the price of the goods produced and sold in Australia; the quantity of the goods manufactured by the Australian industry; the value of sales of goods produced or manufactured by that industry; and, the level of profits earned in that industry.

29. Section 269TAE(2AA) relevantly provides that a determination as to whether material injury to Australian industry has been or is being caused or threatened "must be based on facts and not merely on allegations, conjecture or remote possibilities".[19]

Criterion's arguments

30. In support of its argument that a finding of 'injury' must be made in relation to the Australian industry as a whole and not to any one part of it or any one member of it, Criterion placed reliance upon a judgement of the Federal Court.

31. In *Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority*[20] Lockhart J stated that:

> *In my opinion, the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria. The difficulty seems to lie,*

[19] Section 269TAE(2AA) of the Act.
[20] [1991] FCA 42, 19.

> *not in defining the expression, but in determining on the facts of the given case whether a particular industry answers the statutory description of an Australian industry. The latter is not a question of construction; it is a question of identification by the relevant fact finding body.*

32. Criterion notes that the Commission's *Dumping and Subsidy Manual* states the following:

> *The Federal Court has held that the Australian industry is the sum total of the industry in Australia (not any part, whether that part be defined biogeography, market or any other criteria) and the material injury determination must be assessed against the Australian industry as a whole. This assessment is required regardless of the size of the applicant*.[21]

33. Criterion in its review applications, argues that the Australian industry consists of the nine (sic) Australian entities producing like goods to the goods as identified in Capral's application for the imposition of anti-dumping measures. Criterion acknowledges that "it does not follow that each and every member of the Australian industry must have endured injury for the industry as a whole to have incurred injury but **it must be a majority** of members of the industry" [emphasis added].[22]

34. Consistent with the view of the Federal Court, Criterion accepts that "whether the Australian industry has incurred 'injury' is a question of fact as to whether members of the Australian industry have each incurred 'injury' that is, **reduced revenues and profits** during the injury period and, if so, what proportion of such members have incurred 'injury' and to what extent. … This is a question of fact supported by evidence. It is not a question of extrapolating injury apparently incurred by one member or several members of the industry to the remainder. That is mere speculation …" [emphasis added].[23]

The Commission's injury and causation analysis

35. The Commission's assessment of the impact of the exports of the goods upon the Australian industry as a whole was made in the context of its knowledge and

[21] Commission's *Dumping and Subsidy Manual,* November 2018, 17.
[22] Criterion's review application, 16.
[23] Ibid.

understanding of the operation of the Australian market for the goods, informed by "The Commission's examination of exporter and importer questionnaire responses by interested parties who cooperated in this investigation and Review of Measures No. 544 (Aluminium Extrusions: Malaysia and Vietnam) and Continuation Inquiry No. 543 (Aluminium Extrusions: China)".[24]

36. In the Commission's view, the information obtained in Review No. 544 was relevant as that review examined the same period as investigations 540 and 541 and the information obtained from importers and exporters in the review regarding sales, costs and selling prices was identical to that obtained in investigations 540 and 541. This enabled the Commission to build up a picture of various Australian market features such as price, volume and various supply chain connections.

37. The Commission identified the following pertinent facts relevant to the operation of the Australian market:

- Australian customers will secure multiple supply sources in order to minimise the risk of a disruption in is supply;[25]

- the Australian industry competes in the market either directly against the Malaysian exporters of dumped goods, other exporters in their sale of the goods to Australian importers, or the importers of those goods who sell onto the Australian market;[26]

- the prices of the dumped exports from Malaysia were the lowest in the Australian market[27] but represented the second largest source by volume of Surface Finished goods in the investigation period[28] and the third largest source of Mill Finish goods;[29]

[24] REP 540, 28-29; REP 541, 32.
[25] REP 540, 26; REP 541, 29.
[26] REP 540, 98; REP 541,101.
[27] REP 540,114; REP 541, 116.
[28] REP 541,104.
[29] REP 540,101.

- aluminium extrusions are a commodity product,[30] where price is one of the key determinants in a customer's purchasing decision;[31]

- goods from China represented the second largest share of the Australian market behind Australian industry;[32]

- producers from the Australian industry and China supply the largest portion of the Australian market;[33]

- within the context of a shrinking market, the Australian industry's share of the market declined across the injury analysis period and in the investigation period, in contrast to increasing market share of imports generally and in particular imports from Vietnam which increased over 100% when compared to its import volumes in 2018;[34]

- China, Malaysia and Vietnam represent the largest block of the market relating to goods sourced from overseas suppliers;[35]

- the Australian selling prices of the goods imported from China and Vietnam did not undercut a large proportion of Australian industry's sales;[36] and

- together with the Australian industry, the prices of the dumped goods were the lowest in the Australian market.[37]

38. The Commission's analysis of the economic condition of the industry had regard to the sales quantity and net sales revenue data supplied by G. James and INEX in addition to the broader range of data provided by Capral. G. James' and INEX's data encompassed the relevant terms of all sales transactions (i.e. customer, date, quantity and price). The Commission's analysis was detailed in Confidential Attachment 24.1 to REP 540 and in Confidential Attachment 29.1 to REP 541. The Commission's conclusions were set out in sections 7.7 of REP 540 and REP 541,

[30] REP 540, 27; REP 541, 30.
[31] REP 540,101; REP 541,104.
[32] REP 540, 96; REP 541, 99.
[33] Ibid.
[34] Ibid.
[35] REP 540, 98; REP 541,101.
[36] REP 540,102; REP 541, 105.
[37] Ibid.

where the Commission stated that Capral, G. James and INEX, collectively responsible for the largest volumes of the Australian industry's production, had experienced price injury caused by the dumped goods which had the effect of lowering prices and resulting in:

- reduced sales volumes;
- price depression;
- price suppression;
- reduced profit and profitability; and
- reduced revenue.

39. The key to the reviews before the Review Panel is the Commission's analysis regarding the pricing of goods from various sources, whether produced by the Australian industry or imported and the impact of such prices upon the economic condition of the Australian industry. As the Commission noted in its submission to the Review Panel

> *a primary source of information for the Commission's price effects analysis in REP 540 and REP 541 was the assessment of price undercutting. The price undercutting assessment complimented the Commission's Australian market analysis.*[38]

Price injury analysis

40. The Commission commenced its price injury analysis by having regard to the size of the Australian market for the goods and the relative market shares of the Australian industry and the dumped imports from Malaysia. Within the context of a shrinking market, the Commission found that the volume of dumped goods exported by the subject exporters from Malaysia increased over the injury period and that their volume of exports was equivalent to approximately 8% of the volume of Mill Finish

[38] Commission's submission to the Review Panel, 9.

goods sold by the Australian industry[39] and approximately 9% of the volume of Surface Finished goods.[40]

41. The Commission observed that in a price sensitive market such as those for the goods, customers in negotiations with their suppliers would seek to leverage the presence of the lowest priced goods in the market to negotiate an even lower price. The resulting price may not necessarily be the lowest price available, i.e. the supplier may not reduce its price to that of the lowest price offered in the market, "but may nonetheless reflect a price reduction which Australian industry would just have to bear".[41] I infer that in response to the lowest price in the market, the Commission believes the Australian industry may either undercut that price or reduce it to that of, or just above that of, the lowest priced good. Where the Australian industry priced at slightly above that of the dumped goods this reflected the Australian industry's ability to command a price 'premium' for local supply.

42. Further to this point, the Commission looked to Capral's selling prices to a subset of its customers, those who also purchased dumped goods. The Commission found that Capral's prices to such customers

> *were lower than the prices generally achieved by the Australian industry during the investigation period. This evidence satisfies the Commission that the Australian industry has actively competed against the prices of the goods imported from the subject exporters.*[42]

43. I agree with the Commission's assessment that in cases where the Australian industry either met, or priced at slightly above, the price of the dumped Malaysian goods, although the Australian industry may not have undercut the prices of the dumped goods, it nevertheless provides evidence in support of the Australian industry's claim that it had reduced its prices to remain competitive with the price of the dumped goods from Malaysia.

[39] REP 540, 113
[40] REP 541, 116.
[41] REP 541,104, refer also REP 540,101.
[42] REP 540,103; REP 541,106.

44. REP 541 notes that the Australian industry competes against suppliers of the goods at what it describes as "two different points in the supply chain."[43] The first point is that at which the Australian industry is in direct competition with overseas suppliers for the supply of the goods to Australian importers who are either involved in the distribution of imported goods onto the Australian market or who transform such goods into other products e.g. windows, doors. Capral refers to this point as the "Mill sales channel".

45. The second point is that at which Australian industry competes against importers of the goods who on-sell those imports on the Australian market. Capral refers to this point as the "Distribution sales channel". The Commission's submission to the Review Panel noted that "competition between Capral's like goods sales and sales by exporters of the dumped goods mostly occurred at the distribution level of trade".[44]

46. The Commission's price undercutting analysis was undertaken for each sales channel in the supply chain based upon data obtained from: Capral and G. James; cooperating importers and exporters for Review No. 544; and cooperating importers and exporters for Continuation Inquiry No. 543. The Commission was therefore able to identify, at a transactional level, the prices obtained for the goods produced by Capral and G. James, the subject Malaysian exporters and exporters from China and Vietnam.[45]

47. At the conference convened on 9 August 2021, Commission representatives stated that this analysis enabled the Commission "to start to form the picture of the volume of goods which are priced at a point which is similar to or below the price of the dumped goods and the price and volume where the sale would be slightly higher if the goods weren't dumped at all."

48. The analysis revealed that, by volume, approximately [redacted]%[46] of Capral's sales of the goods were made either at prices below the prices of aluminium extrusions from

[43] REP 541, 101, refer also REP 540, 98.
[44] Commission submission to the Review Panel, 10.
[45] In support of its price undercutting analysis the Commission provided the Review Panel with the following spreadsheets: "540-541-Capral-Verification Report-CA2 Australian Like Goods Sales (Mill Sales Channel).xlsx"; *"540-541-Capral-Verification Report-CA3 Australian Like Goods Sales (Distribution Sales Channel).xlsx"*; and *"G James CY 2019 Sales Transaction Data.xlsx"*
[46] Ibid.

China and Vietnam or which were priced at a point similar to or below the price of the dumped goods from Malaysia.

49. The Commission identified that in the Mill sales channel Capral had sold approximately [redacted] million kilograms within that price range, in direct competition with the dumped imports, and that such sales equated to approximately [redacted]% of its total sales within that channel. For anodised product (i.e. Surface Finished), the Commission identified approximately [redacted]% of Capral's sales volume had been similarly impacted.

50. The Commission carried out a similar comparison with respect to Capral's sales through its Distribution channel, noting that although the volumes impacted by the dumped goods were less, when cumulated with the volume sold through the Mill channel, the overall impact became apparent and was significant.

51. The Commission also subjected G. James' sales to the same level of analysis to which Capral's sales prices had been subject.[47] The Commission's analysis of G. James' sales revealed that, by volume, approximately [redacted][48]% of sales of the goods were made either at prices below the prices of aluminium extrusions from China and Vietnam or which were at a point similar to or below the price of the dumped goods from Malaysia.

52. At the conference convened on 9 August 2021, Commission representatives acknowledged that at the time of its transactional analysis of Capral's and G. James' sales data INEX had not provided its detailed sales transaction data, and therefore the Commission's statements and conclusions with respect to the materiality of any injury were based on G. James' and Capral's data.

53. Having observed the pricing behaviour, at a transactional level, of the participants operating within the market, and the effect of such behaviours on Capral and G. James, the Commission then moved to assess the extent of the injury caused by the dumped imports. This was achieved by conducting what the Commission described as a "but for" analysis which enabled a comparison of the current state of

[47] The G. James sales data relied upon by the Commission can be found at Confidential Attachment 29.2 of REP 541.
[48] Spreadsheet *"G James CY 2019 Sales Transaction Data.xlsx".*

the Australian industry to the state that the Australian industry would likely have been in if there had been no dumping.

54. The Commission's "but for" analysis was subject to the assumption that if Malaysian goods were offered in the Australian market at undumped prices the prices of Australian producers would need to reflect, and be restricted by, the pricing of goods from China and Vietnam. REP 541 observed that "the Australian selling price of the goods from China and Vietnam were seemingly unaffected by the availability of cheaper goods from elsewhere".[49] I take the Commission's reference to "cheaper goods from elsewhere" to be a reference to the prices of the dumped goods. The Chinese and Vietnamese exporters therefore appear to have settled at a price point below which they were not willing to drop, notwithstanding the presence in the market of significant volumes of lower priced and dumped imports from Malaysia. For its analysis, the Commission accepted that these are price points which are likely to persist in the absence of the dumped goods from Malaysia and against which the Australian producers would need to compete.

55. The implications for Australian producers were that, in the absence of dumped imports from Malaysia, their pricing would continue to be influenced, and constrained, by the presence in the market of Chinese and Vietnamese goods. Nevertheless, the Commission concluded "that the Australian industry would have been positioned to make price offers that provided a reasonable alternative, at a higher price, if the goods imported from Malaysia were not dumped".[50] I note that a "reasonable alternative" would encompass Australian produced goods supplied at higher prices equivalent to those of the Chinese and Vietnamese exported goods or at prices which would support a price 'premium' for local supply, thereby accommodating prices slightly above those of the Chinese and Vietnamese exporters.

56. The presence of Chinese and Vietnamese goods in the market would continue to remain a negative factor impacting upon the financial position of the Australian industry. However, the fact that Capral and G. James had reduced their prices below those of the Chinese and the Vietnamese exporters, in response to lower priced and dumped imports from Malaysia, demonstrated that such imports were a

[49] REP 540, 101; REP 541, 104.
[50] REP 540, 114; REP 541, 116.

factor in the injury sustained. I understand the Commission's position to be that in the absence of the dumped goods the economic condition of the Australian industry would not continue to be impacted by low priced imports but that the economic condition of the industry is not as good as it should have been because of dumping.

57. Although INEX's sales data had not been used in the Commission's earlier analysis, it did detail all sales it had made in the investigation period and the relevant terms of those sales.[51] It was therefore used by the Commission, together with the sales data provided by Capral and G. James, to identify the prices and quantum of goods sold in competition with the dumped goods and to substitute a counterfactual price i.e. a price which would have been achieved in the absence of dumped imports for each transaction. The difference between the factual and counterfactual prices represented the extent of the price injury sustained by the three producers.

58. In its submission to the Review Panel, the Commission stated,

> *the price range between the factual (dumped selling price) and counterfactual (undumped selling price) scenarios constitutes the quantum of the price injury that was (at the very least) experienced by Capral, G. James and INEX. The counterfactual selling price was expressed as a markup over the prices for a volume of sales that the three entities had achieved when in competition with dumped imports.*
>
> *Relying on the sales volumes actually achieved by Capral, G James and INEX during the investigation period, and applying the counterfactual price markup, the Commission assessed economic measures such as sales revenue forgone, profit and profitability. The Commission observed that the revenue forgone due to dumping was at least AUD$[redacted] in relation to mill finish like goods and AUD$[redacted] in relation to Surface finished like goods*.[52]

59. I find that to this point Capral's and G. James' sales data demonstrated that to compete with the dumped goods those companies had reduced their selling prices of a significant volume of their production with consequential negative impacts upon

[51] The sales data supplied by INEX can be found at Confidential Attachment 24.3 to REP 540 and Confidential Attachment 29.3 to REP 541.
[52] Commission's submission to the Review Panel, 10.

their profit and profitability. Although the presence of Chinese and Vietnamese goods in the market constrained to Capral's and G. James' pricing flexibility it was the presence of the dumped imports which had caused those producers to further reduce their selling prices.

60. Although the Commission had not subjected INEX's sales data to the same level analysis as that to which Capral's and G. James' data had been subject, from this and from other contemporaneous reviews and investigations into the goods, the Commission had a good understanding of the competitive nature of the market in which INEX was selling its goods. INEX had provided information detailing its sales and profitability. It is not in dispute that INEX, producing [redacted]% and [redacted]% of the Australian industry's production of the goods, would have been subject to the same pricing pressures from Chinese, Vietnamese and Malaysian exporters. Therefore, in order to compete with the dumped goods, INEX would have had to reduce its prices of the goods below those offered by Chinese and Vietnamese exporters. In doing so, INEX's profit and profitability was similarly negatively impacted. I note that Criterion has not argued that neither G. James nor INEX, or for that matter any other Australian producers of the goods, are immune from competition from exports from China, Malaysia or Vietnam.

61. The Commission concluded, inter alia, that "the sales and revenue forgone … due to dumping is considered material"[53] and that: with respect to Mill Finish goods "the Australian industry would have been better off by a margin of approximately 9% in terms of revenue and 7% in terms of volume had the subject goods not been dumped"[54] and with respect to Surface Finished goods, "the Australian industry would have been better off by a margin of approximately 5.5% in terms of revenue and 5% in terms of volume had the subject goods not been dumped".[55]

62. I agree with the Commission's pricing and causation analysis, and which support its conclusion that "the Australian industry's prices were generally being undercut by the price of dumped goods from the subject Malaysian exporters at the two levels of trade [i.e. Mill and Distribution sales channels] at which those goods were sold".[56]

[53] Ibid.
[54] REP 540, 115.
[55] REP 541, 118.
[56] REP 541, 104.

63. I find that in response to the presence of dumped imports from Malaysia, Capral, G. James and INEX had reduced their prices which had negatively impacted upon their profitability. These companies were operating in a shrinking market in which exports from China and Vietnam also exerted influence over market prices. In this context, I find that reduced sales revenue and its impact upon profitability were material and a direct consequence of the presence of dumped goods from Malaysia and exports in the market.

64. Notwithstanding these findings with respect to three producers, accounting for approximately 70% of the Australian industry's production of the goods, the issue before the Review Panel is whether there was sufficient evidence to support a finding under s.269TG that the dumped goods had caused material injury to the Australian industry.

Is there evidence of material injury industry to an Australian industry [as a whole]?

65. Criterion's submission to the Review Panel argues that the Commission's "determination of material injury to the Australian industry was based on part of the Australian industry and not the whole of the Australian industry as required by law" and that it was inappropriate to base such a finding "on the economic performance of one member of the Australian industry or, possibly two". Criterion is of the view that "the determination of material injury must be based on all nine members of the Australian industry and not any part thereof".[57]

66. Criterion does however concede that "it does not follow that each such entity must necessarily have incurred 'injury' for the industry as a whole to have incurred injury but it **must be a majority** of members of the industry"[58] [emphasis added]. However, Criterion is silent as to whether evidence of injury to those producers accounting for **the majority of the volume of goods produced** by the Australian industry could also constitute injury to the whole.

67. I agree with the Commission's submission to the Review Panel where the Commission noted "there is no statutory requirement to obtain the support of a

[57] Criterion's submission to the Review Panel dated 13 August 2021, 1-2.
[58] Ibid 16.

majority of members the Australian industry" and further that "there is also no requirement in the Act that all (or even a majority of) members of the Australian industry must actively participate and adduce specific evidence of injury".[59]

68. Criterion is critical of the Commission's reference in REP 541 to s.269TB(6). That section governs what is referred to as the standing requirement for an applicant to make an application for the imposition of measures. The Commission observed that one of the requirements for standing to bring an application, contained within s.269TB(6), requires Australian producers that support that application must account for 50% of the total production of the goods and account for no less than 25% of the total production of the Australian industry. Accordingly, the Commission relied upon that section to support its statement that "the evidence required to show injury to the Australian industry need not require evidence that all Australian industry members have suffered injury".[60]

69. Whilst I agree that the standing thresholds have no relevance to the determination of material injury to the Australian industry under s.269TAE and to the imposition of measures under s.269TG (i.e. the reviewable decisions), Criterion's criticism of the Commission's reference to and apparent reliance upon s.269TB is overstated. The Commission's comments must be read in context. They follow reference to criticism by Criterion and another company of the Commission's apparent sole reliance, up to the publication of the SEF, on Capral as the suitable indicator of the performance of the Australian industry as a whole.

70. Following the reference to s.269TB(6), REP 541 went on to outline that the Commission had sought economic data from two additional Australian industry produces, G. James and INEX, noting that those companies were "the two largest Australian extruders behind Capral".[61] It is apparent that the Commission's misplaced reference to s.269TB(6) was intended to suggest that in assessing material injury to the Australian industry as a whole it felt the need for additional data beyond that which had been submitted by Capral but not to the extent that it needed evidence that all of the Australian industry members had suffered injury.

[59] Commission submission to the Review Panel, 5.
[60] REP 540, 101; REP 541, 84.
[61] Ibid.

71. I note that Section 7 of REP 540 and REP 541 are each headed *"Economic Condition of the Industry"* and concludes by noting that the

> *injury assessment has taken into account approximately 70% of the total Australian industry, which is sufficient on the balance of probability to establish that it is more likely than not, that the Australian industry has suffered material injury as a whole.*[62]

In coming to this conclusion "the Commission considered that the economic data provided by Capral was a suitable indicator of the performance of a significant share of the Australian industry[63]" and that G. James and INEX both "exhibited economic performance trends comparable to Capral's".[64]

72. As noted above, the Commission's analysis of Capral's, G. James' and INEX's sales data confirm that those three entities had sustained material injury by common factors which related to sales volume, price injury, reduced profits and profitability and reduced revenue[65] and that such injury had been caused by their pricing response to the dumped imports.

73. This suggests that as producers of 70% of the Australian industry's production had sustained the requisite level of injury due to the dumped imports this was a sufficient finding to enliven the power under s.269TG to impose measures.

74. The Commission's position with respect to that part of the Australian industry which sustained the requisite level of injury is expressed slightly differently in its submission to the Review Panel. In that submission the Commission argued its position in the alternate. First, it argues that "evidence of injury to a member representing at least one third of the industry's total production [i.e. Capral] is sufficient".[66]

75. In the alternative, the Commission's submission suggests that the evidence adduced through the Commission's analysis "extended to show injury to the

[62] REP 541, 95, see also REP 540, 92;
[63] REP 540, 81; REP 541, 83.
[64] REP 540, 83; REP 541, 85.
[65] Refer para. 37 above.
[66] Commission submission to the Review Panel, 7.

dominant members [i.e. Capral, G. James and INEX] comprising up to three quarters of that industry's total production".[67] The submission goes on to assert that the three dominant members are "clearly representative of that industry and material injury to them is relevant and probative (particularly price, revenue, volume and profit injury, caused by the price of dumped goods undercutting the price of like goods sold by the Australian industry)".[68]

76. I now revert to Lockhart J's comments quoted above. Those comments followed an earlier judgement of Wilcox J in a related dispute. Prior to the passage from Lockhart J's judgement on which Criterion relies, Lockhart J cited Wilcox J's earlier judgement in which he said "a material injury to a part [of an Australian industry] may constitute a material injury to the whole".[69]

77. Lockhart J then went on to note, the determination of material injury "is not an exercise of counting heads of markets, production or distribution centres or things of this kind. It is essentially a practical exercise designed to achieve the objective of determining whether, when viewed as a whole, the relevant Australian industry is suffering material injury from the dumping of goods".[70] Importantly, Lockhart J went on to note,

> *to say that the clinker industry must be regarded throughout Australia as a whole does not mean that the threat caused by dumping only in Western Australia and which may injure only the players in the market in Western Australia, cannot constitute material injury to the Australian clinker industry as a whole. Plainly it may ... I find no difficulty with the proposition that an injury of this kind may constitute material injury to the Australian market as a whole. It depends on the facts of the case and invariably it is a question of degree that involves balancing all relevant considerations and integers before concluding whether or not the dumping constitutes a material injury to the Australian industry*.[71]

[67] Ibid.
[68] Ibid.
[69] *Swan Portland*,19.
[70] Ibid 19-20.
[71] Ibid 20.

I note the facts before Lockhart J were that the Western Australian clinker producers only accounted for approximately 10% of the national production of clinker. Therefore, if Lockhart J accepts that, in the appropriate circumstances, injury to 10% of an industry could support a finding of injury to the industry as a whole, a fortiori, injury to 70% of an industry could be similarly considered.

78. I will now consider the evidence before the Commission when it made its findings and recommendations to the Minister with respect to material injury to the Australian industry as a whole. The Commission correctly noted "that Capral's dominant position within the Australian industry is highly relevant to the task of assessing the economic condition of the Australian industry as a whole"[72] as it alone accounts for approximately 38% of the production of Mill Finish goods in Australia and 39% of the production of Surface Finished goods.

79. The Commission's pricing analysis of Capral's and G. James' data revealed that those producers had reduced their prices on a significant volume of their sales below the prevailing prices for Chinese and Vietnamese exports of the goods in the market. This price reduction was the direct response to the presence of the dumped goods in the market.

80. REP 540 and REP 541 confirm that the Commission's assessment of injury and causation involved the consideration of evidence from sources beyond one or two members of the Australian industry as alleged by Criterion. The Commission also had regard, inter-alia, to verified sales data from cooperating Malaysian exporters and importers of their goods, further verified sales data from Continuation Inquiry No. 543 (Aluminium Extrusions: China) and Review No. 544 (Aluminium Extrusions: Malaysia & Vietnam) and the production volumes of those members of the Australian industry which provided letters of support for Capral's application for the imposition of measures.

81. This broad range of evidence provided the Commission with an insight into and knowledge of the operation of the Australian market for aluminium extrusions and the interactions within that market not only of members of the Australian industry,

[72] REP 540, 82; REP 541, 84.

the subject exporters from Malaysia and their Australian importers but also that of exporters, importers and customers of Chinese and Vietnamese sourced goods.

82. This knowledge and understanding of the operations of the market formed the basis of the Commission's conclusion that as INEX had the following factors in common with both Capral and G. James, namely that it:

    - was subject to similar factors of competition, e.g. prices, material costs etc;
    - sells into the same or similar market segments; and
    - is required to compete either directly or indirectly against exports of the goods from Malaysia, China and Vietnam,

    INEX's response to the presence of the dumped goods would be similar to that of Capral and G. James, as would the consequences of such a response. I disagree with Criterion's claim that this informed judgement by the Commission could be categorised as either conjecture or a remote possibility.

83. The application of the Commission's "but for" test to actual sales of Capral, G. James and INEX assumed, in the absence of dumped goods, such sales would have occurred at higher prices which would have been approximate to those of Chinese and Vietnamese exports also competing in the market. The Commission was able to quantify the additional sales revenue which would have been generated by these higher priced sales. The quantum of the revenue forgone was viewed as material in the overall context of a declining market in which significant volumes of product from China and Vietnam were also present.

84. I agree with the Commission's findings of fact with respect to the injury caused by the dumped imports to Capral, G James and INEX.

85. As noted above, Capral's production volumes for the goods accounted for 38% and 39% of the Australian industry volume of production. If the G. James's production volumes are added to those of Capral, their combined production volumes account for [redacted]% and [redacted]% of the Australian industry's volume of production for the goods. When INEX's annual production of the goods were added to the volumes produced by Capral and G. James, the aggregated volumes of all three producers accounted for approximately 70% of the Australian industry's annual production.

86. Acknowledging, as did Lockhart J, that the amount of injury to the whole of an industry is a question of degree and balancing all relevant considerations pertaining to the operation of the market for the goods during the relevant period, I find that the evidence of injury caused by the dumped imports to Capral G James and INEX was sufficient to support the Commission's finding of injury to an Australian industry for the purposes of s.269TAE and the imposition of measures under s.269TG.

87. Accordingly, I reject this Ground of Review.

Ground 2: Criterion

In the absence of evidence or sufficient evidence that the Australian industry had incurred material injury, the issue of whether exports of the goods under consideration (GUC) at 'dumped' export prices had caused material injury to that industry did not and could not arise.

88. As I have found that there was sufficient evidence that the Australian industry had sustained material injury caused by the dumped goods this Ground of Review is no longer relevant and is rejected.

Ground 3: Criterion

Even had there been sufficient evidence that the Australian industry as a whole had incurred material injury, there was insufficient evidence that exports of the GUC through the injurious effects of 'dumping' had caused material injury to the Australian industry as a whole during the injury period.

89. As I have found that there was sufficient evidence that the Australian industry had sustained material injury caused by the dumped goods this Ground of Review is no longer relevant and is rejected.

Ground 1: Milleon

The Commissioner failed to properly address the trade level difference identified by Milleon.

90. In a conference convened on 3 August 2021, Milleon's representatives confirmed Milleon's substantive ground was argued in the alternative. The first was based upon the additional processes to which the 'special goods' were subject, all of which

were said to have had an impact upon price. Milleon's argument was that as none of the 'special goods' were exported and as 'standard goods' were not only exported but also sold in sufficient quantities on the domestic market, satisfying the ordinary course of trade test, the normal value of the exported goods should be based only upon domestic sales of the standard goods. However, the Commission had included both domestic sales of special and standard goods in the determination of normal value as the Commission determined that "there is no ability to remove certain models from the like goods determination in the circumstances Milleon describes".[73]

91. Milleon's alternate argument is that if the 'special goods' are included in the normal value determination these should be subject to an adjustment under s.269TAC(8).

92. Dealing with the issue of the incorporation of the special goods in the normal value, in cases where different models of goods exist, in determining normal values it is necessary to select domestically sold models that are most directly comparable to the particular models exported to Australia. The Commission has developed a Model Control Code (MCC) structure to assist in this comparison. The notice of initiation of the investigation[74] proposed the adoption of a MCC structure for the investigation period. The proposed structure comprised three categories (finish, alloy code and temper code) and nine subcategories. The initiation notice welcomed submissions from interested parties in relation to this proposed structure, Milleon did not respond to this invitation. The Commission notes that Milleon "first raised its level of trade claim when the Commission asked to review the draft verification report and dumping margin calculations".[75]

93. The Commission found that Milleon's exports of the goods to Australia during the investigation period fell within four of the MCCs, with code M-6A-T1 accounting for, by a considerable margin, the majority ([redacted]%) of the exported goods by volume.[76] The Commission also said that "the goods manufactured for domestic consumption are identical to, or have characteristics closely resembling, the goods exported to

[73] Commission submission to the review, 5.
[74] ADN No. 2020/18.
[75] Commission submission to the review, 4.
[76] REP 540 Confidential Attachment 7.

Australia[77]" and that during the investigation period Milleon, sold like goods which fell within two of the MCCs: M-6A-T1 and M-6C-T1.

94. Milleon argued to the Commission that its domestic sales comprised two types of goods which it described as being "standard" or "special"[78] but it had only exported "standard goods" to Australia during the relevant period. Milleon claimed that the "special" goods were: only sold on the domestic market; such goods were not of "standard profiles and lengths"; and that the selling prices of those goods "attracts a higher price, or 'premium', due to the 'special services' undertaken by Milleon in respect of these products".[79] Such services were said to include: a more rigorous quality control process than that applied to 'standard' extrusions; precision cutting to tight tolerances; holding stock in its own warehouse on behalf of customers and individual packaging of each extrusion.

95. Milleon only sold the "special" goods to three domestic customers. Two of these customers "require the entire quantity of product they purchased from Milleon" to be 'special' goods and that such purchases account for [redacted]% of Milleon's domestic sales of Mill Finish extrusions. The third customer purchased both special and standard goods. The three customers' purchases of special goods account for [redacted]% of Milleon's total domestic sales in the MCC denoted as M-6A-T1.[80]

96. In support of its claims regarding the additional tasks in relation to the production of the 'special' goods, Milleon submitted a range of evidence which included;

    - technical drawings relating to the profiles of the 'special goods';
    - details of the additional quality control processes which were said to have an incrementally higher cost of production over other like goods, including those exported to Australia;
    - price quotations to customers of the 'special goods'; and

[77] Exporter Verification Report, 5.
[78] REP 540, 59.
[79] REP 540, 58.
[80] Commission's submission to the review, 7.

- Minutes of a meeting with a 'special goods' customer in which its production and quality assurance requirements were agreed.

97. Milleon submitted that the effect of the additional processes to which the special goods are subject "is evidenced by the higher, premium prices paid by the three customers for these high-quality products as compared with the prices paid for standard products in the domestic market".[81]

98. Notwithstanding Milleon's claims with respect to the differences between 'special' and 'standard' goods, the Commission determined Milleon's normal value under s.269TAC(1) of the Act having regard to all of its domestic sales of goods falling within the MCCs which were in common with the codes within which the exported goods also fell (i.e. MCC M-6A-T1). As Milleon described the determination, "the Commission retained all sales of high-priced premium goods in the normal value determination".[82] That is, the determination "included all sales of standard profiles and all sales of the goods that had been made via the additional production process". By doing so Milleon claims the Commission did not make the correct nor preferable decision.

99. Milleon argued that as the standard goods comprised "[redacted]% of all of the domestic sales ... then normal value is worked out as a weighted average of all such sales".[83] Million claimed "this effectively 'carves out' those sales which are at the same, or substantially the same, trade level (i.e. standard profiles). This treatment of sales at different levels is permitted in the Commission's manual (page 66)".[84] Million observed that had this methodology been adopted "it follows that no adjustment for quality differential would be necessary because the special quality sales would not be part of the calculations for normal value".[85]

100. I note that Milleon's reference to the Manual refers to Section 15 which is headed "*Due Allowance*" and which governs adjustments to normal value where, inter-alia, domestic and export prices are modified in different ways by taxes or the terms or circumstances of sales to which they relate. Such allowances are given effect to by

[81] Milleon's submission to the Commission dated 27 October 2020, 4.
[82] Milleon's application to the Review Panel, 8.
[83] Ibid, 9.
[84] Ibid.
[85] Ibid.

s.269TAC(8) of the Act. Any adjustment can only be made following the identification of the like goods sold on the exporter's domestic market. In this case the Commission had determined that as the special and standard goods sold on Milleon's domestic market were both like goods to the goods exported to Australia.

101. The Commission noted that the special goods were of a length within the range between [redacted] and [redacted] metres in length. Standard goods (Mill Finish) were typically in the range between 5.50 to 6.50 metres long and represented approximately [redacted]% of the total domestic sales in the same MCC, M-6A-T1.

102. Milleon's exports of the goods under consideration (GUC) were of varying lengths, but 80% were between 5.50 to 6.50 m long and approximately [redacted]% were between 1 and 2 metres long, and the remaining 15% of export sales comprised extrusions within the 2 to 4 metre range. Thus, Milleon had exported goods of the same length as the special goods sold on its domestic market. Accordingly, the Commission reasoned "given the approach required to achieve the short length of the special like goods, the Commission held the view that the corresponding exported goods of the same length simply underwent the same production processes".[86]

103. I therefore agree with the Commission's approach to regard special and standard goods as being like goods to the goods exported to Australia and that it was appropriate that special goods be incorporated in the determination of Milleon's normal value.

104. In support for the claim for an adjustment to normal value reflecting the difference in the processes to which special and standard goods are subject, Milleon makes the following two arguments.

Milleon's first argument

105. First, the Commission is said to have failed to address the level of trade difference between the sales of the 'special goods' which were only sold on the domestic market and the 'standard goods' exported to Australia. Milleon argued the 'special goods' "trades at different levels of trade because of … important differences in quality/premium nature of the goods that are result of the additional production

[86] Commission submission to the review, 8.

process".[87] Milleon submitted "the level of trade is not a difference between the roles of the seller, rather it arises from the fact that the buyers [three customers] of high quality product are located in Malaysia. No comparable customers exist in Australia because the special products are not exported ... From the point of view of the buyer there is a difference in the level of sales between high-quality customers in Malaysia, and the customers in Australia who only buy standard grade".[88]

106. The Commission has acknowledged that the special goods were subject to additional processes beyond those involved in the production of standard goods. REP 540 considered that,

> *whilst Milleon has shown that there appears to be an post-production element … Milleon has not provided sufficient verifiable information to enable the Commission to reliably quantify the part of the price which would be relevant for an adjustment.*[89]

The Commission's submission to the review further acknowledged that "additional production processes equated to a higher cost of production … the Commission agreed, in principle, that additional functions required to produce the special like goods may have incurred additional costs".[90]

The issue for the Commission was "quantifying how often they occur and how much they cost".[91]

107. The Manual notes that s.269TAC(8) places a responsibility on the Commission to effect adjustments to normal value where evidence exists that a particular difference has affected prices comparatively. Such differences may be with respect to physical characteristics and quality where differences can be quantified. Further, exporters making adjustment claims have a responsibility to provide evidence in support. The Manual notes that any such claims should be provided in a timely manner to enable an examination of the circumstances and to verify the supporting information. The

[87] Commission submission to the review, 8.
[88] Ibid.
[89] REP 540, 64.
[90] Commission submission to the review, 8.
[91] Ibid.

Manual acknowledges that adjustments may be based upon actual costs incurred, or selling prices achieved, for the sales transactions under examination.

108. In summary, and as noted in the Manual, exporters making adjustment claims also have a responsibility to provide evidence in support to demonstrate that a difference affects the comparability of normal values and export. Such differences may be evidenced either by a demonstrated or documented difference in cost or by an observable difference in price which can be reasonably attributed to or reflective of differences in selling prices for products with different physical characteristics or quality. In the latter case, Milleon argues that the size of the price difference may be used as the basis for an adjustment. In its submission to the Commission dated 17 November 2020, Milleon stated "the price difference takes a priority over the cost difference, and nothing in s.269TAC(8) requires that an adjustment be made be based solely on a cost differential. It refers to prices".[92]

109. The Commission's position is that Milleon failed to provide evidence "of sufficient granularity"[93] with respect to cost differences or failed to demonstrate an observable difference in the prices of the goods included in the normal value (i.e. both special and standard) compared to the price of the goods exported to Australia.

110. The Commission sought additional information from Milleon as to the manner in which estimated the additional costs associated with the production of special goods. In its Request for Further Information, the Commission asked with respect to one special customer "are quality control costs captured in a particular cost centre", to which Milleon responded "it does not operate a costing system whereby costs are recorded for each department … There are no costs separately recorded for the section that performs the additional production processes.[94]" Milleon's response also went on to describe the amount of premium which attached to the special goods as "representing the premium to cover the additional production processes and to deliver a profit for those same services".[95]

111. In a submission dated 5 January 2021, Milleon again stated that the special products undergo "additional production processes [which] incur additional

[92] Milleon's submission to the Commission dated 17 November 2020, 11.
[93] Commission submission to the review, 4.
[94] Milleon's response to the Commission's Request for Further Information, 3.
[95] Ibid, 4.

production cost … these costs have not been individually recorded because Milleon's costs are recorded overall, not by each department." Milleon conceded "there is not an exact correlation between those additional production costs and the higher price paid by the three customers of the special product … because the price is the reflection of the commercial negotiation between the buyer and seller".[96]

112. I note that on page 21 of Milleon's response to the Commission's RFI, Milleon had claimed the percentage difference in prices of special goods relative to the prices of standard goods ranged between 42% and 11%. However, this claim was unsupported by reference to any calculations or evidence.[97]

113. Milleon is critical of the Commission's apparent insistence upon the production of "'evidentiary materials', such as 'price lists' or 'invoices'"[98] and questioned the "probative value or relevance any of the evidentiary materials such as 'price lists' or 'invoices' have for whether an adjustment is required in the determination of normal value in accordance with s.269TAC(8)".[99]

114. The Commission appears not to have viewed Milleon's inability to fully respond to requests for the production of 'evidentiary materials' to support its claims for adjustments to normal value as determinative. The Commission did evaluate whatever material Milleon submitted. REP 540 noted that "in relation to the premium for holding stock on hand for its customer and the need to control certain key product dimensions, whilst a meeting minute [dated 8 May 2017] provided by Milleon in relation to one customer supported its submission, the available information was not sufficient to establish the value attributed to it".[100] In a conference convened on 9 August 2021, Commission representatives noted that the minuted meeting took place in 2017, two years before the investigation period. Further, the Minutes referred to a Milleon product code which was not sold during the investigation period.

115. In support of its claims, Milleon had provided the Commission with copies of a number of quotations to its special goods customers over the period 2018 to 2019. I

[96] Milleon's submission to the Commission dated 5 January 2021, 2.
[97] Refer to the Summary of the conference with Commission representatives on 30 July 2021, [11].
[98] Milleon's application to the Review Panel, 12.
[99] Milleon's submission to the Commission dated 5 January 2021, 7.
[100] REP 540, 60.

note these quotations either refer to particular products codes, or drawing numbers and state a price (per KG or per piece) or specify prices set above or below certain monthly quantity off takes. The quotations however do not particularise the components that go into production of the special goods.

116. In the absence of cost accounts capturing the additional processes undertaken with respect to the special goods, the Commission then moved to identifying whether there was an observable and consistent difference in the pricing between special and standard goods from which it could reasonably be inferred that the price difference reflected additional costs associated with the production of the special goods. As part of its examination the Commission looked to the relative pricing of special and standard goods on both Milleon's domestic sales and its exports to Australia.

117. As noted above, special goods were between [redacted] and [redacted] metres in length, whereas standard goods, whether sold on the domestic market or exported, were typically in a range between 5.50 and 6.50 metres. The Commission observed that Milleon had exported a relatively small volume[101] of the GUC which were also in the same length range as special goods. In the Commission's experience, based upon observations of price lists obtained from other exporters in the course of the investigation, shorter length GUC are generally produced on an off-line process referred to as precision cutting incurring additional processing costs due to increased processing time and manual handling.[102] However, when the Commission compared the export prices of shorter length GUC with the longer (5.50 - 6.50 metres) length of the standard goods, prices varied by only AUD$ [redacted] per kilo, albeit with shorter length goods being at the top of price range. "The variance between top and bottom price range represented [redacted]% of the weighted-average FOB price of all goods".[103]

118. The Commission's examination of Milleon's domestic sales of special and standard goods involved plotting to a chart approximately [redacted] domestic sales of such goods falling within the MCC M-6A-T1 over the investigation period. The

[101] Representing approximately [redacted]% by volume of Milleon's exports to Australia, Commission's submission to the review, 7.
[102] Commission conference with the Review Panel on 30 July 2021.
[103] Commission submission to the review, 7.

Commission provided the Review Panel with a copy of the chart and associated tables. As expected, sales to one of the three special customers formed a noticeable band at a relatively consistent price point and which were the most expensive. In the descending order were prices to the second and third special customers, with the prices to each customer being at a relatively consistent level over the investigation period.

119. Whilst I observed from the chart that there was a clear separation in the prices between the first and second special like goods customers, the prices to second customer converged with the prices to the third customer in the latter half of the investigation period. A consistent feature of the price to the third special customer was that these prices were not distinct from the prices paid by a significant number of standard like goods customers. In fact, at one point over the investigation period, prices of both special and standard goods to the third special customer appear to have converged. Rather than depicting a clear pricing separation between the prices paid by the third special customer and those paid by standard goods customers, the chart suggested that the prices to the third special customer seemed to coexist with a significantly high number of higher priced sales of standard goods. A similar trend was observed in relation to the prices paid by the second customer in the latter half of the investigation period.

120. Therefore, with the exception of sales to the first special customer, the chart suggests, over the investigation period, there were frequent sales of standard goods at prices equivalent to those of the second and third special customer.

121. On a weighted average basis over the investigation period, accepting that the first special customer appears as a significant price outlier, the Commission's domestic sales analysis indicates that prices of both special and standard goods, ranged between RM [redacted] and RM [redacted] per kilogram. This price range was viewed by the Commission as being relatively insignificant and although it is claimed by Milleon that the difference is due to the application of addition of special processes to which the special goods were subject, Commission representatives observed that this difference could just be naturally occurring due to the specific circumstances of the sale between customer and vendor.

122. As to the sales of the first special customer, these were consistent over the investigation period, occurred within a higher price point and were clearly separated (i.e. above) prices paid by the second special customer. In a conference convened on 9 August 2021, Commission representatives acknowledged that the first special customer's position as a price outlier may be due to a culmination of factors which Milleon asserts it undertakes with respect to those products. Another factor may be the pricing arrangements between Milleon and the first special customer relating to the aluminium billet used in the production of the goods.[104]

123. In the submission dated 5 January 2021, Milleon, in support of its adjustment claim, relied upon a table which compared prices to the first special customer with prices of standard goods. This comparison was undertaken with respect to prices prevailing in May 2018 i.e. at a point in time before the investigation period and before the pricing agreement between the first special customer and Milleon which was in place throughout the investigation period. Importantly, the prices to the first special customer in May 2018 were equivalent to the weighted average prices it had paid for special goods throughout the investigation period. There was however a significant reduction in the price of standard goods between May 2018 and the weighted average prices for such goods over the investigation period. The Commission representatives suggested that this reduction reflected the 20% reduction in the London Metal Exchange reference price for primary aluminium which occurred between the two periods.

124. I find that Milleon did not properly substantiate its claim for an adjustment by reference to documents in support. It made no claim for the adjustment in its response to the Exporter Questionnaire. In response to Milleon's eventual claim, the Commission asked Milleon to substantiate it by reference to relevant documentation. The documentation eventually submitted was at a high level, lacked sufficient granularity or was irrelevant in that it predated the investigation period.

125. I therefore agree with the Commission's assessment that Milleon had not provided sufficient evidence to substantiate its claim for an adjustment.

126. Nevertheless, the Commission looked to determine if there was an observable (higher) difference in Milleon's pricing of special and standard goods on its domestic

[104] Refer Conference Summary, 15.

market. The Commission's pricing analysis called into question Milleon's claim that its selling prices to two of the three special customers were at consistently higher price points than the prices for standard goods.

127. Although one special customer's prices were consistently within a higher price band this was due to contractual arrangements put in place prior to the investigation period and related not to the special features of the production process of its special goods but to the price it had agreed to pay for a raw material input.

128. Accordingly, I reject Milleon's first argument in support of its adjustment claim.

Milleon's second argument

129. Secondly, Milleon argues that the 'special goods' ought to have been excluded from the determination of normal value as they were not sales made in the ordinary course of trade (OCOT). Milleon states "it is not the ordinary course of trade for standard goods to be sold via the additional production process" and that "the high-quality sales can reasonably be regarded as not being in the ordinary course of trade".[105] Milleon goes on to claim, "so far as Milleon is aware", the Commission, in the determination of normal values, "did not examine such ordinary course of trade issues".[106] However, REP 540 clearly did address the issue, and in some detail.

130. Milleon goes on to correctly state that "the ordinary course of trade is not defined except in relation to certain sales which are *not* be in the ordinary course of trade (when unprofitable)".[107] Milleon's argument would appear to be based upon the different and additional production processes to which 'special goods' are subject beyond those applied to the production of the 'standard goods' exported to Australia. Milleon does not argue that the terms and conditions which attach to the domestic sales of 'special goods' are in some way not normal or not commercial.

131. I noted that the phrase ordinary course of trade is also not defined in the World Trade Organization's Anti-Dumping Agreement. That said, the Appellate Body in its decision in *US-Hot Rolled Steel*[108] agreed with the proposition that:

[105] Milleon application, 11.
[106] Ibid.
[107] Milleon application, 10.
[108] WT/DS184/AB, Appellate Body report, 24 July 2001.

generally sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product … Sales which are not made 'in the ordinary course of trade' must be excluded, by investigating authorities, from the calculation of normal value … precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter. Where a sales transaction is completed on terms and conditions that are incompatible with 'normal' commercial practices for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating normal value.

132. The Appellate Body held that consideration of what is in the ordinary course of trade is not limited to a question of comparing prices, and that other terms and conditions of the transaction must be taken into account.

133. The REP 540 noted the following characteristics of the domestic sales of Milleon's "special goods":

- 'special goods' were purchased by the three customers in greater volume than the sales volumes of 'standard goods' purchased by other customers;
- one customer exclusively purchased the one kind of extrusion in either 'special' or 'standard' varieties;
- sales of 'special goods' were profitable and had been sold to unrelated customers for an extended period; and
- "prices did not fluctuate in accordance with Milleon's characterisation, i.e. low volume sales of only one product code to a single (or smaller number of) customer(s) (at a correspondingly higher price).[109]

134. Accordingly, I find Milleon's sales of the 'special goods' on the domestic market have the characteristics of being ordinary, in the sense that they reflect the operation of normal market forces, over a significant period, and as such, they appear to be ordinary and not unusual. Therefore, it cannot be said that those sales

[109] REP 540, 69.

were not in the ordinary course of trade, and I reject Milleon's argument to the contrary. It was therefore appropriate for the Commissioner to include them in the determination of normal value under s.269TAC(1) of the Act.

135. For the reasons stated above, this Ground of Review of review is rejected.

Ground 2: Milleon

The Commissioner failed to have a proper regard to the evidence of the price premium as warranting an adjustment and chose a relatively minor cutting cost for one of three special domestic customers to make an adjustment for all three customers.

136. Milleon's application to the Review Panel notes that the Commission made a downward adjustment to normal values to reflect the cost of cutting special goods into lengths shorter than the length of the standard goods. The Commission noted "the length of the special like goods appeared to the Commission to be the only criteria that could form the basis for an adjustment to the normal value of the like goods".[110]

137. Milleon is critical that the Commission based this adjustment on a documented quotation to one of its special customers which detailed the cutting cost. By doing so Milleon argues the adjustment "reflected that one customer's circumstances only … it significantly undervalues the correct adjustment required to insure a proper comparison across all three special customers. The adjustment by the Commission for the cutting cost for one customer are only part of the special additional production processes as illustrated in the Table below".[111]

138. The Table suggests that the cutting costs for Milleon's three special customers accounted for [redacted]%, [redacted]% and [redacted]% respectively of the total premium paid by those customers for their special goods. The quotation submitted by Milleon in support of its claim for an adjustment to reflect the status of the special goods related to the one customer for which the cutting costs accounted for the majority of price premium (i.e. [redacted]%). By accepting the quotation as the basis for the adjustment,

[110] Commission submission to the Review Panel, 6.
[111] Milleon's application to the Review Panel, 12-13.

Milleon alleges the Commission had made no allowance for the services or processes to which the remaining two customers' special goods were subject.

139. However, the only documented evidence as to the cutting cost available to the Commission was the quotation to a customer provided by Milleon in its RFI. The stated percentage of the cutting cost to the premiums paid by the other two special customers was, in the view of the Commission, similar to Milleon's other cost components and considered not to be "evidence of sufficient granularity for the Commission to be able to take into account".[112]

140. As noted above, the Commission was satisfied that the cutting cost to produce the shorter length special goods was likely to be more than the cost of cutting the longer (5.50-6.50 metres) standard goods "as it has been found for other exporters cooperating in the investigation".[113] Accordingly, in the absence of any other sufficient evidence as to the quantum of the cutting costs attaching to the prices of the special goods, the Commission applied the cutting cost documented in the one special goods customer's quotation as an adjustment to the domestic selling prices of all special goods. I agree with the Commission's approach to this adjustment and therefore reject this Ground of Review.

Ground 3: Milleon

The Commissioner failed to make an adjustment for management costs incurred in selling activities.

141. Milleon sought a downward adjustment to normal values to reflect a portion of its management team's time devoted to servicing non-commission domestic sales activities as commission costs were incurred in relation to its exports to Australia. REP 540 notes "the amount claimed by Milleon is based on an observation of the management team's total wages and salaries expense allocated to the company's total non-commission sales volume using an estimated allocation rate".[114]

[112] Commission submission to the Review Panel, 4.
[113] REP 540, 61.
[114] Ibid 63.

142. The Commission rejected Milleon's claim for this adjustment. The Commission considered "details regarding the allocation rate were not outlined by Milleon and the specific roles and functions of the staff relevant to the claim are unclear.[115]" The Commission viewed the management team expenses "as being indirect expenses which are relevant to all sales, not just domestic sales which do not have a Commission … As a result, these expenses are considered common across all markets and would be unlikely to affect the comparison between the price of the goods and like goods".[116]

143. In its application to the Review Panel, Milleon claims "the Commission made an error in not making an adjustment for management costs. It did not address the matter in its verification report" and that Milleon had in fact "provided details of the relevant account codes for management costs incurred in selling activities" and that "no reason has been given by the Commission for not following the policy and practice set out in the Manual for making an adjustment for management costs that are incurred in domestic sales and not in export sales".[117]

144. Milleon's claim for an adjustment for management costs were considered in a conference convened with Commission representatives on 9 August 2021. Relevant extracts from the Summary of that conference are as follows:

- *REP 540, at page 63, states "details regarding the allocation were not outlined by Milleon and its specific roles and functions of the staff relevant to the claim are unclear". Milleon claims that the allocation of management time devoted to sales was in fact disclosed closed to the Commission. Commission representatives were asked to comment on the following statements:*
    - *Milleon's submission dated 21 September 2020, at page, 8 states:*
        - *"the domestic Commission agents handle about [redacted] of the total domestic sales. The Milleon management team is directly involved in handling all the other customers which require services which are effectively the same as those undertaken by the local Commission agents. The management team is directly*

[115] Ibid.
[116] Ibid.
[117] Milleon's application to the Review Panel, 14.

involved in these sales … There is a majority of domestic sales which have to be serviced by the management team."

- *The submission at page 9 provided details of Milleon's allocation methodology with respect to management time devoted to domestic sales and states that:*
  - *"Milleon has reasonably and conservatively estimated that [redacted]% of the management team time is involved in the sales to non-Commission domestic sales."*
- *In a later submission dated 27 October 2020, at page 7, Milleon states:*
  - *"allocations can be based on certain reasonable calculations. Items such as freight, or credit can be allocated in the absence of a known actual amount… Reasonable assumptions are always being made when working out an expense or cost item. In usual accounting practice a 'charge' or expense item is often based on an allocation of an amount to account on any basis consistent with generally accepted cost accounting principles and practices."*
- *Further, Milleon's submission dated 5 January 2021, at page 9, states:*
  - *"The sales activities performed by Milleon management for these non-Commission sales are the same as the activities that are undertaken on the domestic market by a sales Commission agent. Management performing these functions receive phone calls from customers, respond to their queries and concerns regarding the supply of product including terms, conditions and prices, meet with the customers where necessary, negotiate and finalise contracts including prices, deal with subsequent issues and problems in fulfilling orders including quality issues and address issues with drawings for product profiles or new fabrications."*

1. *Commission representatives agreed that Milleon had, at a very high level, provided information to help explain how it had worked out the quantum of the adjustment it was seeking. Such information included details of the sales*

volumes relative to each market that Milleon sells into i.e. its domestic market, the Australian market and third country export markets. Although Milleon had suggested an allocation rate of [redacted]% it had not provided sufficient evidence as to the basis of how this figure was calculated.

2. *Commission representatives correctly noted that it was Milleon's responsibility to raise any claim for an adjustment to normal values and to provide sufficient evidence to substantiate any such claim. Milleon, however, did not highlight in their response to the Exporter Questionnaire that they would be seeking an adjustment for in-house management team direct selling expenses. On the contrary, the response had in fact stated that Milleon had not paid sales Commission for either domestic or export sales of the goods under consideration (GUC). When this response was examined during verification, Milleon claimed it had in fact paid sales Commission in respect of some domestic sales and amended its response to the questionnaire to include the amounts paid. These amounts were then verified and accepted by Commission offices.*

3. *Following completion of the Verification Report, the Commission provided Milleon with details of its normal value calculations. It was only at this time that Milleon first raised the issue of an adjustment for management selling expenses and included a claim for this adjustment in the submission dated 21 September 2020.*

4. *Milleon's submission provided a total figure of "the cost of the management team" which was the aggregate of three cost items: salary, Directors salary and statutory employee contributions. Milleon then estimated that [redacted]% of the management team time was involved in sales to domestic customers and allocated [redacted]% of the aggregated management team cost to such sales.*

5. *Commission representatives noted that the aggregated figure and its component elements relied upon in Milleon's submission of 21 September 2020 were taken from the amounts stated to be its indirect selling, general and administration costs listing provided in its response to the Exporter Questionnaire. Commission representatives stated that Milleon appeared to be "relying on their whole SG&A wages cost base as a starting point for allocation."*

6. *Further, such amounts included the full remuneration provided to the company's three Directors but did not detail the extent of those Directors involvement in the day-to-day operations of the company, particularly its selling operations. This was viewed by the Commission as significant as that Director's remuneration component made up approximately [redacted]% of the aggregated amount.*

7. *It was noted that the company's Organisation Chart suggests that the wages expenses included in the allocation base of the adjustment included wages paid to staff performing functions that do not relate to selling activities such as: accounts payable and receivable; human resources; and warehousing. Clearly such expenses and functions were not relevant to the activity of selling.*

8. *It was noted that whilst Milleon repeatedly referred to a "Management Team", at no stage did it provide any records from its accounts to indicate who were the members of the team and particulars of their duties. The details provided in Milleon's submission of 5 January 2021 regarding the selling functions performed by members management team were described by Commission representatives as "a range of other generic tasks" which were reflective of general administrative functions and not directly related to sales transactions.*

9. *The Commission representatives acknowledged that Milleon employed a Sales Manager and that a significant portion (but not 100%) of the functions of that position would reasonably relate to selling but Milleon had included 100% of the costs of that position in its adjustment claim. The Commission's dilemma was that although it acknowledged that there was a basis to the adjustment sought for management time devoted to sales, the amount claimed by Milleon seemed excessive and/or unjustified and the Commission did not have before it sufficient evidence upon which to quantify the appropriate adjustment.*

145. On the basis of the information detailed above and taken from the Conference Summary, I find that the Commission was correct in its rejection of Milleon's claim for an adjustment to normal value to account for what it claimed was the contribution of its management team to selling its products on the domestic market.

146. Although Milleon had provided "high level" information to help explain how it had calculated the amount of the adjustment, the Commission correctly determined that

such information was insufficiently detailed and that Milleon's claim included some items which were clearly unrelated to selling activities.

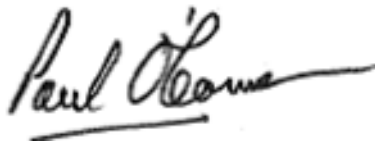
147. Accordingly, I reject this Ground of Review.

Recommendations

148. Pursuant to s.269ZZK(1) of the Act and based upon my reasons given above, I consider that the reviewable decisions were the correct or preferable decisions.

149. I therefore decline each of the applications for review.

150. I recommend that the Minister affirm each of the reviewable decisions.



Paul O'Connor
Panel Member
Anti-Dumping Review Panel
13 September 2021