Australian Government
Anti-Dumping Review Panel

Application for review of a Commissioner's decision

Customs Act 1901 s 269ZZQ

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 June 2021 for a review of a reviewable decision of the Commissioner of the Anti-Dumping Commission.

Section 269ZZO of the *Customs Act 1901* sets out who may make an application to the ADRP for a review of a decision of the Commissioner.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after the applicant was notified of the reviewable decision.

Conferences
The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

Further application information
You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 10, 11, 12 and/or 13 of this application form (s269ZZQA(1)). See the ADRP website for more information.

Withdrawal
You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

Contact
If you have any questions about what is required in an application, refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

[1] By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

PART A: APPLICANT INFORMATION

1. **Applicant's details**

Applicant's name: Metal Manufactures Pty Ltd trading as "MM Kembla".
Address: 30 Gloucester Boulevarde, Port Kembla NSW 2505.
Type of entity (trade union, corporation, government etc.): Company

2. **Contact person for applicant**

Full name: John O'Connor
Position: Director
Email address: jmoconnor@optusnet.com.au
Telephone number:+61 7 3342 1921

3. **Set out the basis on which the applicant considers it is entitled to apply for review to the ADRP under section 269ZZO**

Section 269T of the *Customs Act 1901* ("the Act") defines "interested party" for the purposes of an anti-dumping investigation includes "a person or body representing, or representing a portion o, the industry producing, or likely to be established to produce, like goods".

MM Kembla is an Australian manufacturer of the goods to which the termination decision of the Commissioner relates in Investigation No. 557. MM Kembla is therefore an interested party for the purposes of the Act and this application.

4. **Is the applicant represented?**

Yes ☒ **No** ☐

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. **Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:**

☐ Subsection 269TC(1) or (2) – *a negative prima facie decision*

☒ Subsection 269TDA(1) – *a termination decision*

☐ Subsection 269TDA(2) – *a termination decision*

☐ Subsection 269TDA(3) – *a termination decision*

☐ Subsection 269TDA(7) – *a termination decision*

☐ Subsection 269TDA(13) – *a termination decision*

☐ Subsection 269TDA(13A) – *a termination decision*

☐ Subsection 269TDA(14) – *a termination decision*

☐ Subsection 269TDA(14A) – *a termination decision*

☐ Subsection 269X(6)(b) or (c) – *a negative preliminary decision*

☐ Subsection 269YA(2), (3), or (4) – *a rejection decision*

☐ Subsection 269ZDBEA(1) or (2) – *an anti-circumvention inquiry termination decision*

Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed**.

This application relates to the Termination decision under section 269TDA(1)(b)(ii) of the Act in respect of the dumping margin by the Korean exporter Nungwon Metal Ind Co., Ltd of Korea which were determined as less than 2 per cent for its exports of seamless copper tube exported to Australia.

6. **Provide a full description of the goods which were the subject of the reviewable decision:**

The goods the subject of the reviewable decision as detailed in Termination Report 557 are:

> *Round seamless copper tube complying with Australian Standards AS 1432, Australian and New Zealand Standard AS/NZ 1571, or Australian Standard AS 1572 with an outside nominal diameter between 9.52 mm and 53.98 mm, and a nominal wall thickness between 0.71 mm and 1.83 mm, including coated tube.*

Goods specifically excluded from the goods description are:

- Thermally insulated copper tube, such as Pair Coil
- Annealed coils
- Layer Wound Packs/Level Wound Coils
- Copper alloy tube.

7. **Provide the tariff classifications/statistical codes of the imported goods:**

The tariff classifications of the imported goods is tariff subheading 7411.10.00 (statistical code 11) in Schedule 3 to the *Customs Tariff Act 1995*.

8. **If applicable, provide the Anti-Dumping Notice (ADN) number of the reviewable decision:**

Anti-Dumping Notice (ADN) number: 2021/144 (Refer Non-Confidential Attachment 1)
Date ADN was published: 12 November 2021

9. **Provide the date the applicant received notice of the reviewable decision:**

MM Kembla was notified of the Commissioner's decision on 12 November 2021.

Attach a copy of the notice of the reviewable decision to the application

PART C: GROUNDS FOR YOUR APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be highlighted in yellow, and the document marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☐

10. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

Refer Confidential Attachment 2.

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10:

Refer Confidential Attachment 2.

12. Set out how the grounds raised in question 10 support the making of the proposed correct or preferable decision:

Refer Confidential Attachment 2.

13. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision:

Only answer question 13 if this application is in relation to a reviewable decision made under subsection 269X(6)(b) or (c) of the Customs Act 1901. Refer Confidential Attachment 2.

14. Please list all attachments provided in support of this application:

Non-Confidential Attachment 1 – ADN 2021/144; Confidential Attachment 2 – MM Kembla's Application – Grounds (Non-Confidential);

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* beginning to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:

Name: Tony Bova

Position: Executive General Manager

Organisation: Metal Manufactures Pty Ltd

Date: 10 / 12 / 2021

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative: John O'Connor
Organisation: John O'Connor and Associates Pty Ltd
Address: P.O. Box 329, Coorparoo QLD 4151
Email address: jmoconnor@optusnet.com.au
Telephone number: (07) 3342 1921

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:

(Applicant's authorised officer)

Name: Tony Bova

Position: Executive General Manager

Organisation: Metal Manufactures Pty Ltd

Date: 10 / 12 / 2021

Customs Act 1901 – Part XVB

ANTI-DUMPING NOTICE NO 2021/144

Copper tube

exported to Australia from the People's Republic of China and the Republic of Korea

Termination of Investigation No 557

Public notice under section 269TDA(15) of the Customs Act 1901

On 13 July 2020, Mr Dale Seymour, the then Commissioner of the Anti-Dumping Commission (Commissioner),[1] initiated an investigation into the:

- alleged dumping and alleged subsidisation of copper tube (the goods) exported to Australia from the People's Republic of China (China)
- alleged dumping of the goods exported to Australia from the Republic of Korea (ROK).

The investigation followed an application lodged under section 269TB(1) of the *Customs Act 1901* (Cth) (the Act) by Metal Manufacturers Pty Ltd trading as MM Kembla.

Public notice of the then Commissioner's decision to initiate the investigation (Anti-Dumping Notice No. 2020/71 refers) was published on 13 July 2020 on the Anti-Dumping Commission (commission) website (www.adcommission.gov.au).

As a result of the commission's investigation, I, Dr Bradley Armstrong PSM, the Commissioner of the Anti-Dumping Commission, am satisfied that:

- there has been no dumping from China of any of the goods and therefore, terminate the investigation in accordance with section 269TDA(1)(b)(i) of the Act
- the total volume of goods that have been exported to Australia over a reasonable examination period from China that have been dumped is negligible and therefore, terminate the investigation in accordance with sections 269TDA(3) and (4) of the Act
- there has been a countervailable subsidy received in respect of some or all of the goods from China but it never, at any time during the investigation period, exceeded the negligible level of counteravailable subsidy under section 269TDA(16) of the Act and therefore, terminate the investigation in accordance with section 269TDA(2)(b)(ii) of the Act

[1] On 10 February 2021, the Minister for Industry, Science and Technology appointed Dr Bradley Armstrong as the new Commissioner of the Anti-Dumping Commission. Mr Dale Seymour finished his position as Commissioner on 18 February 2021.

- there has been dumping by Nungwon Metal Ind. Co., Ltd from the ROK of the goods but the dumping margin by that exporter is less than 2%, and therefore, terminate the investigation in accordance with section 269TDA(1)(b)(ii) of the Act, so far as it relates to that exporter
- there has been dumping by Daejin Copper Pipe & Tube Manufacturing Co., Ltd, residual exporters and uncooperative exporters of the goods from the ROK but the injury, if any, to the Australian industry, that has been caused by those exporters is negligible and therefore, terminate the investigation so far as it relates to those exporters in accordance with section 269TDA(13) of the Act.

In making the decision to terminate this investigation, I have had regard to the application, submissions from interested parties, *Statement of Essential Facts No 557* (SEF 557), submissions in response to SEF 557 and *Termination Report No 557*.

Termination Report No 557, which sets out my reasons for the termination decisions, including the material findings of fact or law upon which the decisions are based, has been placed on the commission's public record at: www.adcommission.gov.au

The applicant may request a review of this decision to terminate the investigation by lodging an application with the Anti-Dumping Review Panel in the approved form and manner within 30 days of the publication of this notice.

Enquiries about this notice may be directed to the case manager on telephone number (03) 8539 2440 or via email at: investigations2@adcommission.gov.au

Dr Bradley Armstrong PSM
Commissioner
Anti-Dumping Commission

12 November 2021

A. Introduction

On 29 May 2020, MM Kembla lodged an application for anti-dumping measures alleging that the Australian industry had experienced material injury caused by copper tube exported to Australia from The People's Republic of China ("China") at dumped and subsidized prices, and from The Republic of Korea ("Korea") at dumped prices.

Having considered the application and further information provided by MM Kembla, the Commissioner decided not to reject the application. On 13 July 2020 the then Commissioner initiated an investigation (Investigation No. 557) into the alleged dumping and subsidization pf copper tube from China, and the alleged dumping of copper tube from Korea.

The investigation period for Investigation No. 557 Anti-Dumping Commission ('the Commission") notified the commencement of an investigation on 6 February 2020 (refer ADN 2020/13 and Consideration Report No. 542).

The investigation period for assessing dumping was 1 July 2019 to 30 June 2020. The injury analysis period was from 1 July 2016.

MM Kembla is the sole Australian manufacturer of copper tube ("the goods") at its Port Kembla manufacturing facility.

The Anti-Dumping Commission ("the Commission") was unable to visit MM Kembla at its manufacturing site due to the Covid 19 Pandemic restrictions. All verifications – for the Australian industry, exporters and importers - were conducted via video conferencing and follow-up emails.

The Statement of Essential Facts No. 557 ("SEF 557") was published on 14 September 2021. SEF 557 notified that the Commissioner had established the following margins of dumping for the subject goods:

Country	Exporter	Dumping Margin
China	Zhejiang Hailiang Copper Co., Ltd	-4.7%
	Residual exporters	-4.3%
	Uncooperative exporters	-4.3%
Korea	Daejin Copper Pipe & Tube Manufacturing Co., Ltd	6.0%
	Nungwon Metal Ind. Co. Ltd	0.9%
	Residual exporters	6.0%
	Uncooperative exporters	6.0%

SEF 557 also notified the preliminary results of the Commissioner's subsidization inquiries. The Commissioner established the following subsidy margins for Chinese exporters of the goods:

Country	Exporter	Subsidy Margin
China	Zhejiang Hailiang Copper Co., Ltd	0.4%
	Non-selected exporters	0.7%
	Non-cooperative and all other exporters	0.7%

The Commissioner further established in SEF 557 that while the Australian industry had suffered injury during the investigation period it could not be attributed to the dumping of the goods from Korea (by Daejin Copper Pipe & Tube Manufacturing Co., Ltd "Daejin" and the residual and uncooperative Korean exporters). The Commissioner recommended that the investigation be terminated.

Having considered representations in response to SEF 557, the Commissioner terminated the investigation into exports from China and Korea on 12 November 2021.

MM Kembla disagrees with the Commissioner's decision to terminate Investigation 557 and seeks a review by the Anti-Dumping Review Panel ("ADRP") under subsection 269ZZN(b) of the decision of the Commissioner to terminate the investigation into exports of copper tube from China and Korea.

MM Kembla has identified the following grounds of appeal concerning the Commissioner's termination decision in respect of the goods exported to Australia from ***China.***

I. Grounds for appeal – all Chinese exporters

A. First Ground – The Commissioner's decision with respect to the selection of invoice date for fair comparison purposes was not correct or preferable decision

10. Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

The Commission calculated the dumping margins for Zhejiang Hailiang Copper Co., Ltd "Zhejiang Hailiang" based on a comparison of quarterly weighted average export prices with the corresponding quarterly weighted-average normal value for the investigation period (as per subsection 269TACB(2)(a)). The date for fair comparison selected by the Commissioner was the ***invoice date***.

The Dumping and Subsidy Manual "the Manual" (at Section 15.3) discusses "establishing the date of sale". The Manual notes that "*the Commission will normally use the date of invoice as it best reflects the material terms of sale*". The Manual also states that where "*a date other the date of invoice better reflects the date of sale, the Commission will examine the evidence provided*."

MM Kembla contends that the Commissioner has failed to give due consideration to the evidence provided by MM Kembla regarding the volatility of copper pricing that is priced differently for domestic and export sales when date of invoice is used for fair comparison purposes.

MM Kembla has demonstrated that copper pricing is more relevantly (and accurately) aligned at order date where the terms of sale are well established.

In its response to SEF 557, MM Kembla demonstrated the volatility of copper pricing and how comparing a domestic and export sale at invoice date would likely result in substantially different raw material copper input prices for the copper tube (see below further at Ground 2 Section VI).

MM Kembla acknowledges that the Commission's methodology is considered reasonable ***if*** the same copper price time basis is used in the sales for domestic and export. In reality however, this is **not** the case. Given the variability of the copper commodity price and the exposure risk this creates when domestic and export orders are priced (at date of order), the industry accepted practice of hedging copper prices at the time of order, results in an alignment of the cost of copper for the manufacturer and what the customer pays for the copper component of the pricing model.

Importantly, the order date provides for a more comparable date for domestic and export sales where the cost of the raw material input copper (that accounts for up to 95 per cent of the cost of copper tube) is known for both domestic and export sales (whereas sales compared at invoice date have different agreed copper prices).

During the period of the investigation[1] the LME copper price reduced by nearly xx% from January 2020 to May 2020. The timing difference between pricing dates of the copper cost and invoice date for domestic and export sales had a material impact on the comparative quarterly weighted average export price and domestic sale and a misalignment between the invoice price and product cost.

The table below demonstrates the impact of this 3-month lag of invoicing vs pricing of export orders. Over the 12 months of the investigation period there was an impact that caused the inflating of export prices on average by $xxx/t.

[1] The investigation period in Investigation No. 557 was 1 July 2019 to 30 June 2020.

[*Removed - Commercially sensitive pricing information on copper price movements by quarter in Table form, and represented in graphic form*].

The differential in the above table is depicted in the following graph.

The Commission considered the timing difference between the order placement date and invoice date for both the domestic and export sales for the exporters the subject of this investigation. The evidence before the Commission led it to conclude that the timing difference for exported copper tube is substantially less than the 3 months as submitted by MM Kembla and, in the Commission's opinion, of itself, is not significant.

MM Kembla submitted in Investigation No. 557[2] –details on copper price volatility during the investigation period. The following table below was included in MM Kembla's 9 November 2021 submission:

[2] MM Kembla submission, 9 November 2021, P. 7-8.

[*Removed – commercially sensitive copper movement prices month on month in Investigation period*]

This table demonstrates the volatility impact on copper pricing that was evident during the investigation period was between US$xxx/t to US$xxxx/t. The inter-month volatility was very significant and further supports why it is not reasonable to compare domestic sales with export sales at the date of invoice even if the timing difference is less than 3 months as suggested by the Commission. To suggest this is not significant or material is incorrect when you consider the economics of manufacturing and selling copper tube when the raw material accounts for more than 90 per cent of the selling price.

The foregoing demonstrates that the Commission should, based on the evidence before it as provided by MM Kembla and readily available from third party industry analysis in relation to domestic and global copper markets, have concluded that:

- the volatility in the copper price during the period of investigation was significant and material;
- the timing of when the copper price is set and has a material impact on normal values and export prices (as evidenced in Zhejiang Haliang's export prices to Australia);

- a comparison of quarterly weighted average normal values and export prices is NOT appropriate; and
- to accurately compare export sales prices with domestic prices the Commission must make due allowance under subsection 269TAC(8) to address differences in copper pricing between the two markets.

A more appropriate basis for fair comparison purposes that was available to the Commissioner and more accurately reflects the commercial terms and industry practices for copper tube sales involves a transaction by transaction comparison of domestic and export prices utilizing order date (as per subsection 269TACB(3)).

The Commission's failure to accurately assess the volatility in the copper price during the investigation period has contributed to an understatement of the exporter's actual costs to make and sell the exported goods. The exclusion of an adjustment to correctly price copper in the exporter's normal value for fair comparison purposes with export prices understates the actual margin of dumping for exports from China by Zhejiang Hailiang.

The movement in copper price from the date of order placement to invoice can be substantial and, given the longer lead time (up to three months) for export sales, it is not reasonable to compare domestic sales with export sales at date of invoice due to the volatility in the copper price that evolves over this period.

The Commission stated that "*for each of the subject exporters, the Commission is satisfied that there are no material differences in the determination of price for export and domestic sales. Moreover, the evidence demonstrates that sales quantities may differ between the date of order placement and the date of invoice*". MM Kembla accepts that quantity in the order advice can change by up to xx% (this is normal practice); but the **price** set at order date based on a copper benchmark used on the order does not change. The Commission has failed to demonstrate when and with what regularity the price change it evidenced had occurred. MM Kembla provided evidence[3] to the Commission of its own imported copper purchases from the same exporters showing the lag between order date and invoice date, and that prices do not change.

MM Kembla has demonstrated in its response to SEF 557 to the Commission that the terms of sale are more accurately reflected on the date of order placement for copper tube that is exported to Australia. At that time the terms of the contract (i.e. the three-month forward price of copper is used) and this can be correctly compared and contrasted with domestic sales that reflect a similar copper input price (and are not subject to the variations in copper pricing that are evident when invoice date is used for fair comparison purposes).

The Commissioner's decision to use invoice date for fair comparison purposes is not the correct or preferable decision.

11. Grounds in support of the decision

Set out how the grounds raised in Question 10 support the making of the proposed correct or preferable decision.

Where the cost of the raw material input (i.e. copper) accounts for as much as 95 per cent of the cost of the exported goods (or 90% of the invoice price) and there is high volatility surrounding raw material pricing, it is appropriate to select the date for fair comparison purposes where the terms of the sales for domestic and export sales are best aligned. This occurs when the copper benchmark for pricing is agreed. In nearly all cases this occurs at order date.

The selection of invoice date as used by the Commission allows for significant movement in prices for the raw material between the order date and invoice date (i.e. up to three months for export sales). The Commission thus compared export sales with domestic sales in which prices had been set at

[3] MM Kembla submission in response to SEF 557, 4 October 2021, Confidential Attachment 2.

different times and the key determinant of price – the cost of copper – was likely to have been quite different.

12. Material difference between the decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

The material difference in using the date of order as the comparison date for domestic and export sales more readily aligns the terms of sales in the different markets and removes the vagaries of subsequent movements in copper prices that inevitably occurs between setting of the copper benchmark, date of order, and invoice date.

MM Kembla has demonstrated that the volatility impact on pricing during the investigation period was between US$xxx/t to US$xxxx/t. This is significant and material when the economics of manufacturing and selling copper tube are considered and correcting this error will result in higher, positive dumping margins for the exporters.

B. Second Ground – The Commissioner's decision concerning the determination of normal values under subsection 269TAC(1) was not the correct or preferable decision

10. Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

It is MM Kembla's informed view that the Commissioner's decision as to the determination of normal values for Zhejiang Hailiang (and consequently all other Chinese exporters) is incorrect and not the preferred decision.

The Commission dismissed MM Kembla's representations concerning required adjustments to permit a fair comparison between normal value (determined under subsection 269TAC(1)) and the export prices for Chinese exporters. As a consequence the Minister's decision on normal value determination has failed to take account of:

- to take account of the cost of scrap copper in the domestic sales;
- the impact of the applicable International Standards on domestic and export sales respectively, that result in different costs to make copper tube in the domestic and export markets respectively;
- the exporter's practice to draw thin in copper tube production for sales on the domestic market, resulting in a lower CTM than applies for exported goods;
- actual capping and cleaning costs for refrigeration copper tube models;
- hedging costs that impact domestic and export selling prices for copper tube.

MM Kembla provided the Commission with detailed explanations and quantifications concerning the required adjustments to normal values for Chinese exporters. The representations demonstrated numerous shortcomings with the acceptance of Chinese normal values based upon inferior, lower cost copper tube when contrasted with the goods exported to Australia that meet AS/NZ Standards.

The Commission elected to disregard each matter raised by MM Kembla (and its more than 100 years experience producing seamless copper tube) in preference to responses from the Chinese exporter Zhejiang Hailiang. MM Kembla did not receive any follow-up questions in responses to written submissions from the Commission during the conduct of the prolonged, five-times extended investigation.

I. Particular market situation

The Commissioner has determined normal values for exporters in China and Korea under subsection 269TAC(1) of the *Customs Act 1901* ("the Act").

MM Kembla asserted that a "*particular market situation*" existed in respect of copper tube sold domestically in China. MM Kembla's assertions followed a finding by the Canadian Border Services Agency ("CBSA") that domestic sales of copper tube in China could not be considered to have been determined on a competitive basis due to the influence of the Government of China ("GOC") on copper prices in China.

In the CBSA's Statement of Reasons concerning the dumping and subsidisation of certain copper tube originating from China[4], the CBSA confirmed that there exists a wide range of measures applied by the Government of China ("GOC") that have resulted in a significant influence on the Chinese non-ferrous industry including the copper sector, which includes copper tube[5]. These influences caused CBSA to be

[4] Statement of Reasons, Certain Copper Tube Originating In or Exported from the Federative Republic of Brazil, The Hellenic Republic, The People's Republic of China, The Republic of Korea and the United Mexican States, and the subsidizing of Certain Copper Tube Exported from The People's Republic of China, 3 December 2013.
[5] MM Kembla recognises that the CBSA decision was made at the end of 2013 however MM Kembla noted in its response to SEF 557 (dated 4 October 2021) that the GOC continues to exert significant influence on the domestic Chinese copper market including supporting the Govt-owned largest copper smelter and holding and

of the opinion that[6]:

- domestic prices are substantially determined by the GOC; and
- there is sufficient reason to believe that the domestic prices are not substantially the same as they would be in a competitive market.

The CBSA formed the view that the GOC influenced domestic selling prices in China for copper tube having identified the existence of government plans and policies that impact the non-ferrous industry in China. The relevant factors considered by CBSA are included in MM Kembla's application for measures at Part B-3, P. 39-41. A significant factor was the CBSA analysis confirming that there were discrepancies in the copper prices on the London Metals Exchange ("LME"), Shanghai Metals Exchange ("SHFE") and COMEX (copper futures prices) that indicated the "*domestic prices of copper in China are not determined under competitive market conditions"*. The CBSA identified that copper prices in China were low and thereby impacted the selling prices of copper tube (as copper accounts for up to 95 per cent of the cost of the tube).

As the copper represents such a significant proportion of the cost of tube, even small deviations in copper pricing away from the LME can have a significant impact on copper tube pricing.

The US also imposed anti-dumping and countervailing measures on copper tube exported from China. The measures in the US continue to apply.

MM Kembla relied upon the CBSA's findings concerning the particular market situation allegation. The Anti-Dumping Commission ('the Commission'), in response to MM Kembla's submissions, concluded in Termination Report No. 557 ("Term 557") that "*domestic prices of raw materials are set with reference to domestic copper costs and that the SHFE reflects the domestic cathode copper costs in China*[7]".

The Commission also found that "*the cathode copper price on the SHFE is higher than that on the LME in each month of the period examined*".

The Commission found that copper purchases by Zhejiang Hailiang in all but two months of the investigation period were higher than the LME. For Zhejiang Naile Copper Co., Ltd ("Naile"), selling prices followed a "similar trend" to the Zhejiang Hailiang's prices.

MM Kembla is concerned by the Commission's analysis as:

- the Commission's LME pricing analysis appears limited to pricing at the "EXW" terms;
- there is an absence of commentary surrounding the terms of the SHFE prices examined by the Commission (only states that it reflects "domestic cathode copper price";
- there is no reference to the import CIF port premium eg Yangshan Copper Premium - used as a premium for warehouse warrant over LME price that is payable in addition to the LME cash price; and
- it is unclear whether the SHFE "domestic price" is a delivered price to customer in China.

MM Kembla does not consider that the Commission's comparison of domestic selling prices for cathode copper in China can be relied upon. The Commissioner's decision that a particular market situation did not exist for copper tube sold domestically in China is not the correct or preferable decision.

releasing reserves of copper as appropriate (refer to Confidential Attachment 14, MM Kembla response to SEF 557, 4 October 2021).

[6] *Ibid*, P. 22.

[7] Termination Report No. 557, Paragraph A5.2, P.77.

II. Cost of scrap copper

An additional concern arises from the Commission's absence of analysis of the cost of scrap copper in China, which is a raw material input in the domestic copper tube production – the basis for the verified cost to make and sell copper tube at Zhejiang Hailiang.

MM Kembla understands that only cathode copper is used in the manufacture of goods exported to Australia (so that the goods meet the AS/NZ Standards), whereas copper tube sold in China can be manufactured to a lower standard and is manufactured from both cathode and scrap copper. This is confirmed by the Commission in its verification report for Zhejiang Hailiang where it states[8]:

> "• *have production likeness – the goods in both markets are produced at the same facilities and have the same manufacturing process. However, there is a difference in the cost of production as Zhejiang Hailiang utilizes the 'import processing scheme' for the raw material inputs in the manufacture of the exported goods, while for domestic goods it uses domestic priced raw materials*."

This statement should have triggered an adjustment to Zhejiang Hailiang's normal value, as it was recognized that there was a difference in costs for the goods sold domestically versus those exported to Australia.

In its 15 October submission Zhejiang Hailiang states[9]:

> '*Zhejiang Hailiang confirms that scrap was used in the production of copper billet which was then used in the production of both domestic and export sales*".

Zhejiang Hailiang's submission of 15 October 2021 contradicts its earlier representations to the Commission's investigation team where it confirmed that copper sourced for export sales was imported copper only. This admission raises considerable doubt as to the reliability of Zhejiang Hailiang's claimed copper costs as accepted by the verification team and demonstrates that the Commission has erred by not adjusting the exporter's normal value for differences in the copper costs used in domestic versus export sales.

There is clearly an absence of analysis by the Commission to correctly address the actual cost of copper for goods sold on the domestic market (scrap and cathode) versus the goods exported to Australia (allegedly in the first instance, cathode only). An adjustment to normal value is required (based upon the percentage and cost of scrap copper used in the production of copper tube for the domestic market) to account for the higher cost cathode used solely in the export sales[10].

The acceptance of the Chinese exporter production costs by the Commission as reflective of the CTMS for the exported goods is therefore incorrect and should not have been relied upon as the costs for producing copper tube for sale on the domestic market is lower than the cost of producing copper tube for the export market (to meet the required AS/NZ Standards).

The Commissioner's decision to accept the Chinese exporters' cost of copper as verified for the purposes of determining the CTMS the goods exported to Australia was not the correct or preferable decision.

III. Model Control Codes and International Standards

MM Kembla does not dispute that it manufactures goods that are alike to the goods exported to Australia from China and Korea. MM Kembla concurs with the Commission that the goods manufactured by it possess "characteristics closely resembling" the imported goods.

[8] Zhejiang Hailiang Exporter Verification Report, Paragraph 2.5, P.8.
[9] Zhejiang Hailiang submission, 15 October 2021, EPR Document 041) P. 12.
[10] See further MM Kembla's submission in response to SEF 557 at P.23.

However, the locally produced goods and the imported goods are not identical. It is therefore essential for fair comparison purposes that the normal values assessed by the Commission for the goods sold in China be adjusted to align with the goods that are exported to Australia.

The normal values for Chinese exporters as determined by the Commissioner in Term 557 are for generic copper tube that have been manufactured to a lower standard and possess physical characteristics that involve a lower cost of production (and selling price) than the goods exported to Australia.

The Commissioner has failed to adjust normal values to account for the less stringent physical characteristics that are evident in the Chinese domestic sales of copper tube. These physical differences include product dimensions, product quality, copper content, product cleanliness and chemical composition. Ultimately, the lower standards applicable in China result in a lower cost of production for the subject goods that, without appropriate adjustment, cannot properly be compared with the goods exported to Australia (which are required to meet the AS/NZ Standards involving a higher cost of production).

A number of the physical differences are generated by the Standard that applies to the goods. The Australian Standard (for the exported goods) differs greatly to the Chinese Standard (for the domestic goods). The Chinese Standards are not mandatory whereas the Australian Standards are.

In its submission dated 9 September 2021 in response to the release of the Nungwon Metal Ind Co., Ltd ("Nungwon") exporter verification report, MM Kembla provided a detailed analysis of the difference between the applicable domestic standards in Korea, the non-compulsory Chinese Standards and the mandated Australian Standards for the exported goods[11]. The Commissioner has had little regard to MM Kembla's representations in its assessment of normal value for Chinese (and Korean) exporters, thereby resulting in the determination of normal values that are under-valued (and hence negative or only small dumping margins have been calculated).

For example, MM Kembla made the following comments in its submission concerning the Nungwon exporter verification report[12]:

> "*The copper tube manufactured by Nungwon and sold domestically are not identical to the goods produced and exported to Australia. Consistent with the Commission's findings in the exporter verification report for Guilin International Wire and Cable Co Ltd in PVC Electrical Cables exported from China, the locally produced goods differ from the exported goods due to the latter being manufactured to Australian Standard AS 1432 and AS/NZ 1571 whereas the locally produced goods are manufactured to a Korean Standard KS D5301 (which is essentially the same as the Japanese Standard JIS H3300). The Korean Standard KS D5301 requires a completely different range of outside diameter and wall thicknesses for its pipe and tube. This range while falling into the definitions of the MCC the majority of OD and wall thicknesses are larger than the closest AS1432 comparable size. Across the entire range (Type L) the average kg/metre of Nungwon's seamless copper pipe and tube is 19% higher than AS1432 type B.*
>
> *The thinner the wall thickness and lower the total weight of the product the conversion cost increases on a $/T basis. In MM Kembla's experience every x% increase in weight equates to $xx/T reduction in variable conversion cost. The xx% difference equates to $xxx/t difference across the range due to the difference in the KS D5301 standard and AS1432. This equates to ~xx% difference at the current LME copper cost. This is a material difference and should be a positive adjustment to the Nungwon normal value (so that the dumping margin truly reflects like difference in copper content between the domestic and export sales)."*

MM Kembla further detailed to the Commission that the differences in the applicable standards for seamless copper tube manufactured in China (and Korea) translated to differences in the costs of production of the goods sold domestically in both countries. These differences include:

[11] Refer EPR Document No. 034.
[12] Refer EPR Document No. 034, P.2.

- physical differences in applicable standards;
- safe working pressures;
- manufacturing wall thickness tolerances;
- manufacturing outside diameter (“OD”) tolerance.

MM Kembla detailed the impact of the identified differences on the cost of the goods manufactured as follows[13]:

(i) Made to different standards

The local standard has different Outside Diameter and Wall Thickness dimensions compared to the goods sold in Australia. The domestic standard appears to be a Korean standard KSD 5301 which is comparable to JIS H3300 (Japanese Standard) and ASTM B88 (American Standard).

Refer product sizing table (Non-Confidential Attachment 1) that show the differences in Outside Diameter (“OD”) and Wall thickness (“WT”) between Australian goods produced to AS 1432 standard. There is very little alignment in sizing of OD above 19.05mm and no direct comparisons on WT.

(ii) Made to different working pressures

As a result of the differing standards and product dimensions in (i), the safe working pressures are different across sizes due to the calculation between OD and WT dimensions.

Point 1 illustrates the product sold in the domestic market is not considered identical (and hence costs are not the same) to the product exported to Australia.

Subsequently the tube chosen will have varying safe working pressures and may/may not be suitable for the same application in local/export markets. These should not be considered comparable for normal value purposes as safe working pressures are a critical determining factor in the selection of product for an application.

(iii) Made to different manufacturing wall thickness tolerance

The local product standard not only has varying dimensions but also varying allowable min and max. tolerances of the tube wall thickness.

Min and max tolerances in the local standard can range between 9% and 18.5%. In the standard exported to Australia, tolerances range between 13.7% and 15.4%.

(iv) Made to different manufacturing mean outside diameter tolerance

The local product standard not only has varying dimensions but also varying allowable min and max. tolerances of the tube mean outside diameter.

Minimum mean OD tolerances for the local standard range between 0.1 - 0.3%, in the Australian standard they range between 0.3 – 0.6%.

Maximum mean OD tolerances for the local standard range between 0.1 - 0.3%, in the Australian standard, there is no allowable tolerance from the specified OD.

The Commissioner failed to consider the significance of the differing International Standards that apply to domestically sold copper tube in China (and Korea) with the exported goods (to Australian Standards). Additionally, the Commissioner failed to comply with his obligation to calculate and apply adjustments to determine normal values to ensure fair comparison between normal values and export prices.

[13] Refer RPR Document No. 034, P.3.

As demonstrated, the resulting normal values for copper tube sold in China are manifestly under-stated due to the failure to adjust normal values for the identified physical differences evident between goods sold domestically and the exported goods.

IV. Drawing thin

MM Kembla highlighted with the Commission (in exporter briefings) the practice of “drawing thin” whereby a manufacturer can reduce the wall thickness (“WT”) and outside diameter (“OD”) of copper tube. The result is that a piece of copper tube that is sold to a less-stringent Chinese Standard on the domestic market in China incorporates between xx and xx per cent less copper than a similar length of tube exported to Australia that complies with the relevant AS/NZ Standard. Hence the cost of production of Chinese domestic copper tube is substantially lower than the cost of production of the exported goods.

MM Kembla raised[14] with the Commission that in “*price negotiations with* [redacted] *on a range of copper tube products they have regularly raised the option of buying the “lite” product with thinner wall thickness and lower copper content to reduce costs.*”

This issue was also raised with the Commission in the Zhejiang Hailiang exporter briefing.

As the Chinese copper tube standards differ with the Australian Standards and the Chinese Standards are not compulsory, customers in China can and do negotiate to purchase copper tube using customer-defined specifications. Customers in the Chinese domestic market are highly motivated to set their own wall thickness specifications, well below the Chinese Standard, due to the high cost of copper as a percentage of total costs.

MM Kembla indicated that the increased draw thin percentage was “*in the order of an additional x per cent saving in copper cost*”. MM Kembla quantified the saving based upon an average cost of copper of US$xxxx per metric tonne across the investigation period, this is a US$xxx per tonne saving (or $Axxx per metric tonne).

The Commissioner has incorrectly accepted the Chinese exporter’s CTMS for all goods (i.e. domestic and exports) which reflects the Chinese manufacturer’s benefit of drawing thin.

The Commissioner’s decision does not take account of an adjustment required to normal value to permit a fair comparison between the domestic copper tube (that is drawn thin) versus the exported goods (with a thickness that complies with Australian Standards) is not the correct or preferable decision.

V. Capping and Cleaning

Termination Report 557 does not discuss the costs of capping and cleaning associated with refrigeration tube. MM Kembla provided the Commission with a submission[15] demonstrating that the cost of cleaning and capping was not insignificant or immaterial, and that it should be included as an upward adjustment cost associated with the export of the refrigeration copper tube exported to Australia (that are required to be cleaned and capped).

MM Kembla notes the Commission’s comments at Paragraph 6.2.2 of Term 557 including:

> “*In response to adjustments to conversion costs, the commission notes that each exporter has provided, and the commission has verified, the costs for each specific model. The commission has examined the specific models included in each MCC category and is satisfied that these contain both domestic and export models. The Commission has analysed the WA cost for each MCC used in the dumping margin calculations and compared these with the cost to produce each specific model within that MCC category. On each occasion, the commission has found that the highest cost within the MCC is for a domestic model and the WA cost closely aligns with the costs for each specific exported model. On this basis, the*

[14] MM Kembla submission in response to SEF 557, 4 October 2021, P. 24.
[15] MM Kembla submission dated 11 May 2021.

> *commission is satisfied that through calculating the cost to make (CTM) using the MCCs gives consideration to both domestic and export models and therefore, no adjustment to the normal value is required*."

The Commission required Zhejiang Hailiang to revise its domestic and Australian CTM to reflect the cost of capping based upon a quarterly cost. Initially, Zhejiang Hailiang indicated that its cost of capping was included in its overhead costs, resulting in the costs being allocated across all production. The Commission's requirement of Zhejiang Hailiang followed its assessment that the capping costs did not affect prices[16].

The Commission's comments suggest that capping costs are immaterial. MM Kembla submits that the Commission has not sighted the full capping and cleaning costs as represented in its submission of 11 May 2021 and that the Commissioner has incorrectly concluded that all capping and cleaning costs have been verified. MM Kembla further quantified the capping and cleaning costs in its SEF 557 response submission[17] to demonstrate the costs were not immaterial.

MM Kembla considers that the Commissioner has ignored MM Kembla's representations concerning capping and cleaning costs. These costs cannot be considered insignificant or immaterial and certainly do have an impact on the price of the goods sold in Australia. For example, there is a variation of approximately $xxx/t in cost of manufacture and xx% ($xxx/t) in price between refrigeration tube AS1572 (cleaned and capped product) and plumbing AS1342 (Uncapped and lower level of cleaning required). The Commissioner's decision that the capping and cleaning costs have been adequately incorporated into the CTM for the relevant model of MCC is incorrect and not the preferable decision.

VI. Copper volatility

The Commission did not make any adjustment to normal value to account for the volatility in the raw material copper price. Such an adjustment is required in the absence of fair comparison between domestic and export sales at order placement date.

The Commission stated that it[18]

> "*assessed the volatility of the copper prices on a quarterly basis on the LME and notes that these are in the range of approximately 5% and increases of approximately 2%. The Commission has also assessed the difference in the cathode copper price on the LME on a monthly basis and has found that the differences are both increases and falls of under 2% in the majority of months during the investigation period. The commission does not consider these changes in copper prices to be significant and therefore, a comparison of quarterly weighted average (WA) normal values and export prices is appropriate*."

The Commission then stated that, to make an adjustment for copper volatility, it would require "*evidence to suggest that copper price volatility affects price comparability between domestic and export markets*."

In its 9 November 2021 submission to the Commission, MM Kembla demonstrated the volatility on copper pricing to be between US$xxx/t to US$xxxx/t. MM Kembla included (at Confidential Attachment 3 to the 9 November 2021 submission) the inter-monthly movements, monthly average movements, inter-month Low-High movements for copper across the investigation period which averaged xxx%, xxx% and xxx%. When examined on a quarterly basis the quarterly average movement in the LME copper price was xxx% and the inter-quarter Low-High movement was xxxx %.

The volatility in the LME copper price during the 2019-20 investigation period far exceeded the Commission's claimed "falls of under 2%".

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[16] Refer Table 1, Zhejiang Hailiang Exporter Verification Report, P.6.
[17] MM Kembla submission in response to SEF 557, 4 October 2021, P. 25-26.
[18] SEF 557, Paragraphs 6.2.2, P. 33.

MM Kembla demonstrated that copper pricing was volatile during the 2019-20 investigation period in Investigation 557. The Commission failed to take account of MM Kembla's representations and therefore the decision to not adjust normal values for copper volatility is not the correct or preferable decision.

VII. Hedging costs

In its response to SEF 557 MM Kembla detailed the use of copper hedging by copper tube manufacturers. MM Kembla explained[19]:

> *Export sales of fixed price copper tube expose the tube manufacturer to the risk that the copper price will increase between the time at which the sales order price is fixed and the invoice date.*
>
> *The international copper tube markets use a benchmark of three months lead time between fixing the price on an export order to invoicing that order. Tube manufacturers will hedge this risk by buying forward derivative contracts on the LME that match the expected physical delivery date or adjusting the hedge book. Gains and losses on the hedge contract or hedge book adjustment will offset the exposure created by taking the fixed price sales order.*
>
> *If the copper price falls, then the losses on the hedge contract or hedge book will offset the gains generated by the fixed price sales transaction. These hedge or hedge book gains and losses can be directly associated with the underlying fixed price sales order.*
>
> *When fixed price export sales orders are being negotiated between the manufacturer and the export customer this will normally be done on a shipping container by container basis. The export customer will contact the tube producer and request a quote on the copper price basis. The manufacturer will closely monitor live LME copper prices, using platforms like Bloomberg. The manufacturer will use the live 3-month LME copper price, at that instant, as the pricing basis to make an offer to the export customer. When the export customer accepts the pricing offer, the tube manufacturer will immediately hedge the copper exposure by buying forward 3-month LME contracts, or by making the necessary adjustments to the hedge book. The agreed fabrication premiums above LME for each tube product are then added to the agreed fixed copper price to form the total fixed price for the respective different tube sizes. Discounts and rebates may then adjust the net pricing.*
>
> *The selling price is fixed until the sale is invoiced, regardless of subsequent copper price fluctuations on the LME. The copper hedge contract or hedge book adjustment remains in place until it is settled at maturity.*
>
> *Export sales are predominantly made at fixed price across the international tube market.*

Zhejiang Hailiang is involved in copper hedging contracts with all hedging undertaken via its related party Hong Kong Hailiang Metal Trading Limited ("HK Hailiang") Hong Kong. MM Kembla highlighted that HK Hailiang incurred significant hedge losses during the investigation period. The Commission stated in Term 557 that it "*does not consider that there is a price comparability issue associated with hedging, such that an adjustment is warranted under section 269TAC(8)*". Contrary to MM Kembla's explanation above, the Commission did not consider that "*gains or losses on hedging has any relevance to the setting of prices"*.

It is irrefutable that industry practice involves the hedging of copper and the setting or prices for sale by copper tube manufacturers.

Zhejiang Hailiang have directly stated that "*The copper hedge contracts are designed solely to eliminate the risks to profits of future sales for from copper price fluctuation, **by locking in a purchase price at future sales price[20]**.*" This further supports and confirms why it is appropriate to use the order date for comparison between normal value and export prices as the correct basis for

[19] MM Kembla submission in response to SEF 557, 4 October 2021, P 4-5.
[20] Zhejiang Hailiang submission, 15 October 2021, P. 3 (EPR Document 041).

comparison, as this is when copper pricing hedges are put in place and the significant volatility in copper prices is material otherwise hedging would not be required.

MM Kembla provided the Commission with examples of the impact of hedging on copper tube contracts. The Commission dismissed MM Kembla's representations and accepted the explanations of the Chinese exporter. The Commission's stance to ignore the costs of hedging as material and to consider the hedging practices as not relevant to pricing determinations is misguided and incorrect.

The Commission's decision to not account for hedging gains/losses on export sales via the application of reasonable and proportionate adjustments to normal value is incorrect and not the preferable decision.

VIII. Conclusion - Normal value adjustments

The Commissioner's decision to determine normal values based upon domestic selling prices in the ordinary course of trade on the domestic market in China is not the correct or preferable decision. Even if those prices can be used as a basis for normal value, the Commissioner failed to take full account of MM Kembla's representations concerning adjustments required that impact selling prices that would have resulted in normal values determined at much higher levels (that are consistent with the quality and specifications of copper tube exported to Australia).

11. Grounds in support of the decision

Set out how the grounds raised in Question 10 support the making of the proposed correct or preferable decision.

The grounds addressed in question 10 support the making of the proposed correct or preferable decision by adjusting normal values to take account of the factors identified in Question 10 to ensure the correctly adjusted normal value(s) may be fairly compared with the actual export prices for the goods exported to Australia.

12. Material difference between the decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

The proposed decision is materially different to the reviewable decision, as the proposed decision involves the determination of revised normal values that, when compared with export prices for the goods, would demonstrate the existence of dumping margins above negligible levels and support the publication of notices under Sections 269TG(1) and (2) of the Act.

C. Third Ground – not the correct or preferable decision involving arms length sales between Hailiang Hong Kong and Hailiang Australia

10. Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

The Commissioner determined in Term 557 that he was "satisfied" of the arms length nature of export sales between HK Hailiang and the related importer Hailiang Australia Pty Ltd; however, he was not satisfied of the arms length nature of the transaction between Zhejiang Hailiang and HK Hailiang.

To address the Commission's concerns with the export price between Zhejiang Hailiang and HK Hailiang, which did not appear to be sufficient to cover its selling, general and administration (SG&A) expenses, the Commission calculated the export price for Zhejiang Hailiang by using "*the price paid by the importer less an amount of HK Hailiang's SG&A costs and other prescribed deductions for costs arising after exportation*".

MM Kembla contends that the Commissioner's recommendation on export price for Zhejiang Hailiang is not the correct or preferable decision.

Subsection 269TAA(1) of *the Act* states:

> *"For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:*
>
> *(a) There is any consideration payable for or in respect of the goods other than their price; or*
> *(b) The price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or*
> *(c) In the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price."*

The existence of rebates paid by the exporter to Australian customers (see further below), along with the fact that the selling price from Zhejiang Hailiang to HK Hailiang did not recover all costs, categorises the export sales by Zhejiang Hailiang as 'non arms length'. The Commission rejected MM Kembla's representations on these points and maintained that the selling price from HK Hailiang to Hailiang Australia could be considered arms-length. This was incorrect.

The Commission contends that it "*is in possession of actual costs and selling prices that were used in Hailiang Australia's profitability assessment*[21]". The Commission stated "*that off-invoice rebates have been considered in its assessment of the 'arms length' nature of transactions and in profitability calculations of the importer*[22]". MM Kembla disagrees.

It is not in the interests of the importer Hailiang Australia to indicate the full extent of rebates provided by its related-party Chinese exporter of the goods. MM Kembla notified the Commission in the context of exporter briefings in Investigation 557 that Zhejiang Hailiang provides rebates to some Australian customers. The rebates range from $xx to $xxx per tonne. At the top end, that is an approximately xxx per cent discount on the Australian customer selling price.

It is evident that the off-invoice rebates represent a consideration other than price and that at least one of the provisions of s 269TAA(1) has been met. A further requirement, identified in s 269TAA(1)(b), is also met as the selling price between Zhejiang Hailiang and HK Hailiang clearly affects the selling price as it is determined at less than full cost recovery.

[21] Termination Report No. 557, Paragraph 6.3.2, P. 36.
[22] Termination Report No. 557, Paragraph 6.3.2, P. 37.

The Commissioner's acceptance that the selling price from HK Hailiang to Hailiang Australia is arms length is incorrect. It is not in the interests of Hailiang Australia to provide full disclosure of off-invoice rebates. MM Kembla has had a commercial relationship with Zhejiang Hailiang (as reflected in the exchanges with Zhejiang Hailiang in the exporter briefing confirming the payments of off-invoice rebates).

The payment of the off-invoice rebates renders selling prices between Hailiang HK and Hailiang Aust non arms length. MM Kembla firmly views the Commissioner's decision as incorrect and not the preferable decision.

In light of the available evidence that questions the decision to accept the selling prices between HK Hailiang and Hailiang Australia as arms length, MM Kembla would like to also bring to the attention of the ADRP the deductive export price calculations included in MM Kembla's response to SEF 557 (at Confidential Attachment 1). MM Kembla has demonstrated that, based upon prevailing selling prices for imported seamless copper tube sold by Hailiang Australia during the investigation period, the importer was not recovering all costs, including the cost of copper as determined by prevailing LME copper prices.

The Commission has refused to consider MM Kembla's representations that Hailiang Australia's selling prices are not arms length, prefering instead to examine only whether the selling price from HK Hailiang to Hailiang Australia is recovered in Hailiang Australia's customer selling prices. The Commission's methodology fails to consider the full effects of the export transactions from the manufacturer (Zhejiang Hailiang) via its related-party trader and related party Australian importer.

MM Kembla has demonstrated that, by virtue of the off-invoice rebates paid by Zhejiang Hailiang and the below cost selling price from Zhejiang Hailiang to HK Hailiang, the export selling prices for goods manufactured by Zhejiang Hailiang are non-arms length. The decision is, therefore, not the correct or preferable decision.

11. Grounds in support of the decision

Set out how the grounds raised in Question 10 support the making of the proposed correct or preferable decision.

The grounds raised in Question 10 confirm that the export price from Zhejiang Hailiang to HK Hailiang is influenced by the commercial relationship between the related parties. Further, the off invoice rebates that are paid by Zhejiang Hailiang confirms that there is a consideration payable other than the selling price and that export prices cannot be determined based upon price paid by the Australian importer less deductions and the SG&A amount not included in the selling price between Zhejiang Hailiang and HK Hailiang.

12. Material difference between the decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

The acceptance of the selling price between HK Hailiang and Hailiang Australia as 'arms length' is incorrect as it is an artificially determined selling price between two related parties that when contrasted with a deductive export price calculation does not recover all costs associated with the manufacture and sale of the exported goods.

MM Kembla has maintained that a deductive export price methodology in the circumstances of sales affected by a commercial relationship (i.e. Zhejiang Hailiang via HK Haliang to Hailiang Australia) will result in a lower determined export price that does not recover all of the costs associated with the manufacture and export of the goods to Australia (and is lower than the export prices that have been declared by the exporter).

D. Fourth Ground – not the correct or preferable decision involving the determination of material injury

10. Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

The Commissioner's decision that dumping (and subsidization) had not caused material injury to the Australian industry is not the correct or preferable decision.

The decision is premised on the Commission's finding that exports of seamless copper tube from China were not exported to Australia at dumped prices. MM Kembla submits that had the Minister correctly determined normal values for Chinese exporters that adequately considered Grounds of Appeal 1,2 and 3, (and Korean exporters in Grounds 1 and 2 (see below)) the Commissioner could not have reached the conclusion that he did in relation to material injury.

The Commission correctly assessed that the selling prices of imported seamless copper tube undercut the Australian industry's selling prices by between 7 and 55 per cent. The Commission also concluded that MM Kembla had suffered injury in the form of price depression, price suppression, reduced profit and profitability in the investigation period.

Once it is accepted (as it should be for reasons outlined above) that the price undercutting was achieved to a significant extent by dumping (and subsidization) of exports of seamless copper tube to Australia, the conclusion is inescapable that the injury found by the Commission was attributable at least in part to dumping.

The decision that the Australian industry has not suffered material injury from the dumped (and subsidization) is not the correct or preferable decision.

11. Grounds in support of the decision

Set out how the grounds raised in Question 10 support the making of the proposed correct or preferable decision.

Correctly understood, the price undercutting of between 7 and 55 per cent confirmed by the Commissioner during the 2019-20 investigation period was at least in part attributable to dumping at significant margins. That dumping is thus a cause of the injury identified by the Commission, which is material.

12. Material difference between the decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

Because the Commission's analysis of material injury was premised on an absence of dumping (but found, correctly, that injury had occurred), the result of the analysis will necessarily be different – leading to a conclusion that material injury has been caused by dumping – if some or all of MM Kembla's arguments above in relation to the ascertainment of normal value and export price are accepted. This would lead to a decision not to terminate the investigation.

MM Kembla has identified the following grounds of appeal concerning the Commissioner's termination decision concerning exports of the goods from ***Korea***.

IX. Grounds of appeal – all Korean exporters

A. First Ground – not correct or preferable decision concerning the selection of invoice date for fair comparison purposes

10. Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

The Commission calculated the dumping margins for Nungwon Metal Ind. Co Ltd "Nungwon" and Daejin based on a comparison of quarterly weighted average export prices with the corresponding quarterly weighted-average normal value for the investigation period (as per subsection 269TACB(2)(a)). The date for fair comparison was the ***invoice date***.

The Dumping and Subsidy Manual "the Manual" (at Section 15.3) discusses "establishing the date of sale". The Manual notes that "*the Commission will normally use the date of invoice as it best reflects the material terms of sale*". The Manual also states that where "*a date other the date of invoice better reflects the date of sale, the Commission will examine the evidence provided*."

MM Kembla contends that the Commissioner has failed to give due consideration to the evidence provided by MM Kembla regarding the volatility of copper pricing that is priced differently for domestic and export sales when date of invoice is used for fair comparison purposes.

MM Kembla has demonstrated that copper pricing is more relevantly (and accurately) aligned at order date where the terms of sale are well established.

In its response to SEF 557, MM Kembla demonstrated the volatility of copper pricing and how comparing a domestic and export sale at invoice date would likely result in substantially different raw material copper input prices for the copper tube (see below further at Ground 2 Section IV).

The Commission's methodology is considered reasonable ***if*** the same copper price time basis is used in the sales for domestic and export. In reality however, this is **<u>not</u>** the case. Given the variability of the copper commodity and the exposure risk this creates when domestic and export orders are priced (at date of order), the industry accepted practice of hedging copper prices at the time of order, results in an alignment of the cost of copper for the manufacturer and what the customer pays for the copper component of the pricing model.

Importantly, the order date provides for a more comparable date for domestic and export sales where the cost of the raw material input copper (that accounts for up to 95 per cent of the cost of copper tube) is known.

During the period of the investigation[23] the LME copper price reduced by nearly xx% from January 2020 to May 2020. The timing difference between pricing dates of the copper cost and invoice date for domestic and export sales had a material impact on the comparative quarterly weighted average export price and domestic sale and a misalignment between the invoice price and product cost.

The table below demonstrates the impact of this 3-month lag of invoicing vs pricing of export orders. Over the 12 months of the investigation period there was an impact that caused the inflating of export prices on average by $xxx/t.

[23] The investigation period in Investigation No. 557 was 1 July 2019 to 30 June 2020.

[*Removed - Commercially sensitive pricing information on copper price movements by quarter in Table form, and represented in graphic form*].

The differential in the above table is depicted in the following graph.

The Commission considered the timing difference between the order placement date and invoice date for both the domestic and export sales for the exporters the subject of this investigation. The evidence before the Commission led it to conclude that the timing difference for exported copper tube is substantially less than the 3 months as submitted by MM Kembla and, in the Commission's opinion, of itself, is not significant.

MM Kembla submitted in Investigation No. 557[24] –details on copper price volatility during the investigation period. The following table below was included in MM Kembla's 9 November 2021 submission:

[24] MM Kembla submission, 9 November 2021, P. 7-8.

[*Removed – commercially sensitive copper movement prices month on month in Investigation period*]

This table demonstrates the volatility impact on copper pricing that was during the investigation period between US$xxx/t to US$xxxx/t. The intermonth volatility was very significant and further supports why it is not reasonable to compare domestic sales with export sales at the date of invoice even if the timing difference is less than 3 months as suggested by the Commission. To suggest this is not significant or material is incorrect when you consider the economics of manufacturing and selling copper tube when the raw material accounts for more than 90 per cent of the selling price.

The foregoing demonstrates that the Commission should, based on the evidence before it as provided by MM Kembla and readily available from third party industry analysis in relation to domestic and global copper markets, have concluded that:

- the volatility in the copper price during the period of investigation was significant and material;
- the timing of when the copper price is set and has a material impact on normal values and export prices (as evidenced in Zhejiang Haliang's export prices to Australia);

- a comparison of quarterly weighted average normal values and export prices is NOT appropriate; and
- to accurately compare export sales prices with domestic prices the Commission must make due allowance under subsection 269TAC(8) to address differences in copper pricing between the two markets.

A more appropriate basis for fair comparison purposes that was available to the Commissioner and more accurately reflects the commercial terms and industry practices for copper tube sales involves a transaction by transaction comparison of domestic and export prices utilizing order date (as per subsection 269TACB(3)).

The Commission's failure to accurately assess the volatility in the copper price during the investigation period has contributed to an understatement of the exporter's actual costs to make and sell the exported goods. The exclusion of an adjustment to correctly price copper in the exporter's normal value for fair comparison purposes with export prices understates the actual margin of dumping for exports from Korea.

The movement in copper price from the date of order placement to invoice can be substantial and, given the longer lead time (up to three months) for export sales, it is not reasonable to compare domestic sales with export sales at date of invoice due to the volatility in the copper price that evolves over this period.

The Commission stated that "*for each of the subject exporters, the Commission is satisfied that there are no material differences in the determination of price for export and domestic sales. Moreover, the evidence demonstrates that sales quantities may differ between the date of order placement and the date of invoice*". MM Kembla accepts that quantity in the order advice can change by up to xx% this is normal practice but the **price** set at order date based on a copper benchmark used on the order does not change. The Commission failed to demonstrate when and with what regularity the price change it evidenced had occurred. MM Kembla has provided evidence[25] to the Commission of its own imported copper purchases from the same exporters showing the lag between order date and invoice date, and that prices do not change.

MM Kembla has demonstrated in its response to SEF 557 to the Commission that the terms of sale are more accurately reflected on the date of order placement for copper tube that is exported to Australia. At that time the terms of the contract (i.e. the three-month forward price of copper is used) and this can be correctly compared and contrasted with domestic sales that reflect a similar copper input price (and are not subject to the variations in copper pricing that are evident when invoice date is used for fair comparison purposes).

The Minister's decision to use invoice date for fair comparison purposes is not the correct or preferable decision.

11. Grounds in support of the decision

Set out how the grounds raised in Question 10 support the making of the proposed correct or preferable decision.

Where the cost of the raw material input (i.e. copper) accounts for as much as 95 per cent of the cost of the exported goods (or 90% of the invoice price) and there is high volatility surrounding raw material pricing, it is appropriate to select the date for fair comparison purposes where the terms of the sales for domestic and export sales are best aligned. This occurs at date of order or when the copper benchmark for pricing is agreed. In nearly all cases this occurs at order date.

The selection of invoice date as used by the Commission allows for significant movement in prices for the raw material between the order date and invoice date (i.e. up to three months for export sales). The Commission thus compared export sales with domestic sales in which prices had been set at

[25] MM Kembla submission in response to SEF 577, 4 October 2021, Confidential Attachment 2.

different times and the key determinant of price – the cost of copper – was likely to have been quite different.

12. Material difference between the decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

The material difference in using the date of order as the comparison date for domestic and export sales more readily aligns the terms of sales in the different markets and removes the vagaries of subsequent movements in copper prices that inevitably occurs between setting of the copper benchmark, date of order, and invoice date.

MM Kembla has demonstrated that the volatility impact on pricing during the investigation period was between US$xxx/t to US$xxxx/t. This is significant and material when the economics of manufacturing and selling copper tube are considered and correcting this error will result in higher, positive dumping margins for the exporters.

B. Second Ground – not correct or preferable decision involving determination of normal values under sub-section 269TAC(1)

10. Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

It is MM Kembla's informed view that the Minister's decision to accept the Commissioner's recommendations as to the determination of normal values for Nungwon and Daejin is incorrect and not the preferred decision.

The Commission dismissed MM Kembla's representations concerning required adjustments to permit a fair comparison between normal value (determined under subsection 269TAC(1)) and the export prices for Korean exporters. As a consequence the Minister's decision on normal value determination has failed to take account of:

- to need to take account of the cost of scrap copper in the domestic sales that is not evident in export sales of the goods;
- the impact of the applicable International Standards on domestic and export sales respectively, that result in different costs to make copper tube in the domestic and export markets respectively;
- exporter's practice to draw thin in copper tube production for sales on the domestic market, resulting in a lower CTM than applies for exported goods;
- actual capping and cleaning costs for refrigeration copper tube models;
- hedging costs that impact domestic and export selling prices for copper tube.

MM Kembla provided the Commission with detailed explanations and quantifications concerning the required adjustments to normal values for Nungwon and Daejin. The representations demonstrated numerous shortcomings with the acceptance of Korean normal values based upon, lower cost copper tube when contrasted with the goods exported to Australia that meet AS/NZ Standards.

The Commission elected to disregard each matter raised by MM Kembla (and its more than 100 years experience producing seamless copper tube) in preference to responses from the cooperating exporters. MM Kembla did not receive any follow questions in responses to written submissions from the Commission during the conduct of the prolonged, five-times extended investigation.

MM Kembla submits the following items require adjustments to normal values for Korean exporters of copper tube to Australia.

I. Model Control Codes and International Standards

MM Kembla does not dispute that it manufactures goods that are alike to the goods exported to Australia from Korea. MM Kembla concurs with the Commission that the goods manufactured by it possess "characteristics closely resembling" the imported goods.

However, the locally produced goods and the imported goods are not identical. It is therefore essential for fair comparison purposes that the normal values assessed by the Commission for the goods sold in Korea be adjusted to align with the goods that are exported to Australia.

The normal values for Korean exporters as determined by the Commissioner in Term 557 are for generic copper tube that have been manufactured to a lower standard and possess physical characteristics that involve a lower cost of production (and selling price) than the goods exported to Australia.

The Commissioner has failed to adjust normal values to account for the inferior physical characteristics that are evident in the Korean domestic sales of copper tube. These physical differences include product dimensions, product quality, copper content, product cleanliness and chemical composition. Ultimately, the lower standards applicable in Korea result in a lower cost of production for the subject goods that, without adjustment, cannot properly be reasonably compared with the goods exported to Australia (which are required to meet the AS/NZ Standards involving a higher cost of production).

A number of the physical differences are generated by the applicable Standard that applies to the goods. The Australian Standard (for the exported goods) differ greatly to the Korean Standard (for the domestic good).

In its submission dated 9 September 2021 in response to the release of the Nungwon Metal Ind Co., Ltd ("Nungwon") exporter verification report, MM Kembla provided a detailed analysis of the difference between the applicable domestic standards in Korea, and the mandated Australian Standards for the exported goods[26]. The Commissioner has had little regard to MM Kembla's representations in its assessment of normal value for Korean exporters, thereby resulting in the determination of normal values that are under-valued (and hence negative or only small dumping margins have been calculated).

For example, MM Kembla made the following comments in its submission concerning the Nungwon exporter verification report[27]:

> "*The copper tube manufactured by Nungwon and sold domestically are not identical to the goods produced and exported to Australia. Consistent with the Commission's findings in the exporter verification report for Guilin International Wire and Cable Co Ltd in PVC Electrical Cables exported from China, the locally produced goods differ from the exported goods due to the latter being manufactured to Australian Standard AS 1432 and AS/NZ 1571 whereas the locally produced goods are manufactured to a Korean Standard KS D5301 (which is essentially the same as the Japanese Standard JIS H3300). The Korean Standard KS D5301 requires a completely different range of outside diameter and wall thicknesses for its pipe and tube. This range while falling into the definitions of the MCC the majority of OD and wall thicknesses are larger than the closest AS1432 comparable size. Across the entire range (Type L) the average kg/metre of Nungwon's seamless copper pipe and tube is 19% higher than AS1432 type B.*
>
> *The thinner the wall thickness and lower the total weight of the product the conversion cost increases on a $/T basis. In MM Kembla's experience every x% increase in weight equates to $xx/T reduction in variable conversion cost. The xx% difference equates to $xxx/t difference across the range due to the difference in the KS D5301 standard and AS1432. This equates to ~xx% difference at the current LME copper cost. This is a material difference and should be a positive adjustment to the Nungwon normal value (so that the dumping margin truly reflects like difference in copper content between the domestic and export sales)."*

MM Kembla further detailed to the Commission that the differences in the applicable standards for seamless copper tube manufactured in Korea translated to differences in the costs of production of the goods sold domestically in both countries. These differences include:

- physical differences in applicable standards;
- safe working pressures;
- manufacturing wall thickness tolerances;
- manufacturing outside diameter ("OD") tolerance.

MM Kembla detailed the impact of the identified differences on the cost of the goods manufactured as follows[28]:

> ***(i) Made to different standards***
>
> *The local standard has different Outside Diameter and Wall Thickness dimensions compared to the goods sold in Australia. The domestic standard appears to be a Korean standard KSD*

[26] Refer EPR Document No. 034.
[27] Refer EPR Document No. 034, P.2.
[28] Refer RPR Document No. 034, P.3.

5301 which is comparable to JIS H3300 (Japanese Standard) and ASTM B88 (American Standard).

Refer product sizing table (Non-Confidential Attachment 1) that show the differences in Outside Diameter ("OD") and Wall thickness ("WT") between Australian goods produced to AS 1432 standard. There is very little alignment in sizing of OD above 19.05mm and no direct comparisons on WT.

(ii) Made to different working pressures

As a result of the differing standards and product dimensions in (i), the safe working pressures are different across sizes due to the calculation between OD and WT dimensions.

Point 1 illustrates the product sold in the domestic market is not considered identical (and hence costs are not the same) to the product exported to Australia.

Subsequently the tube chosen will have varying safe working pressures and may/may not be suitable for the same application in local/export markets. These should not be considered comparable for normal value purposes as safe working pressures are a critical determining factor in the selection of product for an application.

(iii) Made to different manufacturing wall thickness tolerance

The local product standard not only has varying dimensions but also varying allowable min and max. tolerances of the tube wall thickness.

Min and max tolerances in the local standard can range between 9% and 18.5%. In the standard exported to Australia, tolerances range between 13.7% and 15.4%.

(iv) Made to different manufacturing mean outside diameter tolerance

The local product standard not only has varying dimensions but also varying allowable min and max. tolerances of the tube mean outside diameter.

Minimum mean OD tolerances for the local standard range between 0.1 - 0.3%, in the Australian standard they range between 0.3 – 0.6%.

Maximum mean OD tolerances for the local standard range between 0.1 - 0.3%, in the Australian standard, there is no allowable tolerance from the specified OD.

The Commissioner failed to consider the significance of the differing International Standards that apply to domestically sold copper tube in Korea with the exported goods (to Australian Standards). Additionally, the Commissioner failed to comply with his positive obligation to calculate and apply adjustments to determine normal values to ensure fair comparison between normal values and export prices.

The Commissioner failed to consider the significance of the differing International Standards that apply to domestically sold copper tube in Korea with the exported goods (to Australian Standards).

As demonstrated, the resulting normal values for copper tube sold Korea are manifestly under-stated due to the failure to adjust normal values for the identified physical differences evident between goods sold domestically and the exported goods.

II. Draw thin

MM Kembla highlighted with the Commission (in exporter briefings) the practice of "drawing thin" whereby a manufacturer can reduce the wall thickness ("WT") and outside diameter ("OD") of copper tube. The result is that a piece of copper tube that is sold to a less-stringent Korean Standard on the domestic market in Korea incorporates less copper than a similar length of tube exported to Australia that complies with the relevant AS/NZ Standard. Hence the cost of production of Korean domestic copper tube is substantially lower than the cost of production of the exported goods.

MM Kembla understands that the Korean exporter Daejin manufactures seamless copper tube adopting a “draw thin” practice. That is, the exporter manufactures the goods to meet the respective Standard (whether to Korean Standard or to AS/NZ Standard) and achieves the minimum threshold permitted under the Standard.

The practice involves producing copper tube with thinner wall thickness and lower copper content to reduce costs.

This issue was also raised with the Commission in the Chinese exporter briefing for Zhejiang Hailiang.

As the Korean Standards differ with the Australian Standards, customers of Daejin in Korea are supplied with narrower tube with a thinner wall thickness than is exported to Australia.

MM Kembla indicated that the increased draw thin percentage was “*in the order of an additional 5 per cent saving in copper cost*”. MM Kembla quantified the saving based upon an average cost of copper of US$xxxx per metric tonne across the investigation period, this is a US$xxx per tonne saving (or $Axxx per metric tonne).

The Commissioner incorrectly accepted Daejin’s CTMS for all goods (i.e. domestic and exports) which includes the benefit of drawing thin which is not included in the goods exported to Australia (that must comply with the Australian Standards and do not allow for lenient tolerances that are evident on the Korean domestic market).

The Commissioner’s decision does not allow for permit a fair comparison between the domestic copper tube (that is drawn thin) versus the exported goods (with a thickness that complies with Australian Standards) is not the correct or preferable decision.

III. Capping and Cleaning

Termination Report 557 does not discuss the costs of capping and cleaning associated with refrigeration tube. MM Kembla provided the Commission with a submission[29] demonstrating that the cost of cleaning and capping was not insignificant or immaterial, and that it should be included as an upward adjustment cost associated with the export of the refrigeration copper tube exported to Australia (that are required to be cleaned and capped).

MM Kembla notes the Commission’s comments at Paragraph 6.2.2 of Term 557 including:

> “*In response to adjustments to conversion costs, the commission notes that each exporter has provided, and the commission has verified, the costs for each specific model. The commission has examined the specific models included in each MCC category and is satisfied that these contain both domestic and export models. The Commission has analysed the WA cost for each MCC used in the dumping margin calculations and compared these with the cost to produce each specific model within that MCC category. On each occasion, the commission has found that the highest cost within the MCC is for a domestic model and the WA cost closely aligns with the costs for each specific exported model. On this basis, the commission is satisfied that through calculating the cost to make (CTM) using the MCCs gives consideration to both domestic and export models and therefore, no adjustment to the normal value is required*.”

The Commission considered capping and cleaning costs to be immaterial. MM Kembla submits that the Commission has not sighted the full capping and cleaning costs for Nungwon and Daejin as represented in its submission of 11 May 2021 and that the Commissioner has incorrectly concluded that all capping and cleaning costs have been verified. MM Kembla further quantified the capping and cleaning costs in its SEF 557 response submission[30] to demonstrate the costs were not immaterial.

MM Kembla considers the Commissioner has ignored MM Kembla’s representations concerning capping and cleaning costs. These costs cannot be considered insignificant or immaterial and

[29] MM Kembla submission dated 11 May 2021.
[30] MM Kembla submission in response to SEF 557, 4 October 2021, P. 25-26.

certainly do have an impact on the price of the goods sold in Australia. . For example, there is a variation of approximately $xxx/t in cost of manufacture and xx% ($xxxt) in price between refrigeration tube AS1572 (cleaned and capped product) and plumbing AS1342 (Uncapped and lower level of cleaning required) . The Commissioner's decision that the capping and cleaning costs have been adequately incorporated into the CTM for the relevant model of MCC is incorrect and not the preferable decision.

IV. Copper volatility

The Commissioner did not make any adjustment to normal value to account for the volatility in the raw material copper price. Such an adjustment is required in the absence of fair comparison between domestic and export sales at order placement date.

The Commission stated that it[31]

> "*assessed the volatility of the copper prices on a quarterly basis on the LME and notes that these are in the range of approximately 5% and increases of approximately 2%. The Commission has also assessed the difference in the cathode copper price on the LME on a monthly basis and has found that the differences are both increases and falls of under 2% in the majority of months during the investigation period. The commission does not consider these changes in copper prices to be significant and therefore, a comparison of quarterly weighted average (WA) normal values and export prices is appropriate*."

The Commission then stated that to make an adjustment for copper volatility, it would require "*evidence to suggest that copper price volatility affects price comparability between domestic and export markets*."

In its 9 November 2021 submission to the Commission, MM Kembla demonstrated the volatility on copper pricing to be between US$xxx/t to US$xxxx/t. MM Kembla included (at Confidential Attachment 3 to the 9 November 2021 submission) the inter-monthly movements, monthly average movements, inter-month Low-High movements for copper across the investigation period which averaged xxx%, xxx% and xxx%. When examined on a quarterly basis the quarterly average movement in the LME copper price was xxx% and the inter-quarter Low-High movement was xxxx %.

The volatility in the LME copper price during the 2019-20 investigation period far exceeded the Commission's claimed "falls of under 2%".

MM Kembla demonstrated that copper pricing was volatile during the 2019-20 investigation period in Investigation 557. The Commission failed to take account of MM Kembla's representations and therefore the decision to not adjust normal values for copper volatility is not the correct or preferable decision.

V. Hedging costs

In its response to SEF 557 MM Kembla detailed the use of copper hedging by copper tube manufacturers. MM Kembla explained[32]:

> *Export sales of fixed price copper tube expose the tube manufacturer to the risk that the copper price will increase between the time at the which the sales order price is fixed and the invoice date.*
>
> *The international copper tube markets use a benchmark of three months lead time between fixing the price on an export order to invoicing that order. Tube manufacturers will hedge this risk by buying forward derivative contracts on the LME that match the expected physical delivery date or adjusting the hedge book. Gains and losses on the hedge contract or hedge book adjustment will offset the exposure created by taking the fixed price sales order.*

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31 SEF 557, Paragraphs 6.2.2, P. 33.
32 MM Kembla submission in response to SEF 557, 4 October 2021, P 4-5.

If the copper price falls, then the losses on the hedge contract or hedge book will offset the gains generated by the fixed price sales transaction. These hedge or hedge book gains and losses can be directly associated with the underlying fixed price sales order.

When fixed price export sales orders are being negotiated between the manufacturer and the export customer this will normally be done on a shipping container by container basis. The export customer will contact the tube producer and request a quote on the copper price basis. The manufacturer will closely monitor live LME copper prices, using platforms like Bloomberg. The manufacturer will use the live 3-month LME copper price, at that instant, as the pricing basis to make an offer to the export customer. When the export customer accepts the pricing offer, the tube manufacturer will immediately hedge the copper exposure by buying forward 3-month LME contracts, or by making the necessary adjustments to the hedge book. The agreed fabrication premiums above LME for each tube product are then added to the agreed fixed copper price to form the total fixed price for the respective different tube sizes. Discounts and rebates may then adjust the net pricing.

The selling price is fixed until the sale is invoiced, regardless of subsequent copper price fluctuations on the LME. The copper hedge contract or hedge book adjustment remains in place until it is settled at maturity.

Export sales are predominantly made at fixed price across the international tube market.

MM Kembla understands that Nungwon hedges its copper costs. The Commission has not undertaken an analysis of the Korean exporters' policies concerning the basis for pricing copper on export sales versus domestic sales. The correct methodology would be to identify the copper costs and compare the sales at date or order, thereby removing the need to adjust normal values for the copper volatility.

Where the date of order is not accepted, it is necessary for adjustments to be made to normal value to account for the different copper costs used in a domestic sale versus an export sale (as comparison is at invoice date thereby involving two different time periods for copper cost).

MM Kembla provided the Commission with examples of the impact of hedging on copper tube contracts. The Commission's stance to ignore the costs of hedging as material and to consider the hedging practices as not relevant to pricing determinations is misguided and incorrect.

The Commission's decision to not account for hedging gains/losses on export sales via the application of reasonable and proportionate adjustments to normal value is incorrect and not the preferable decision.

VI. Conclusion - Normal value adjustments

The Commissioner's decision to determine normal values based upon domestic selling prices in the ordinary course of trade on the domestic market in Korea is not the correct or preferable decision. Even if those prices can be used as a basis for normal value, the Commissioner failed to take full account of MM Kembla's representations concerning adjustments required that impact selling prices that would have resulted in normal values determined at much higher levels (that are consistent with the quality and specifications of copper tube exported to Australia).

11. Grounds in support of the decision

Set out how the grounds raised in Question 10 support the making of the proposed correct or preferable decision.

The grounds addressed in question 10 support the making of the proposed correct or preferable decision by adjusting normal values to take account of the factors identified in Question 10 to ensure the correctly adjusted normal value(s) may be fairly compared with the actual export prices for the goods exported to Australia.

12. Material difference between the decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

The proposed decision is materially different to the reviewable decision, as the proposed decision involves the determination of revised normal values that when compared with export prices for the goods, would demonstrate the existence of dumping margins above negligible levels and support the publication of notices under Sections 269TG(1) and (2) of the Act.

C. Third Ground – not the correct or preferable decision involving the determination of material injury

10. Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

The Commissioner decision that dumping (and subsidization) had not caused material injury to the Australian industry is not the correct or preferable decision.

The Minister's decision is premised on the Commissioner's finding that exports of seamless copper tube from Korea (and China) were not exported to Australia at dumped prices. MM Kembla submits that had the Minister correctly determined normal values for Korean (and Chinese) exporters (as per the cited Grounds of appeal for Chinese and Korean exporters) the Commissioner could not have reached the conclusion that he did in relation to material injury.

The Commission correctly assessed that the selling prices of imported seamless copper tube undercut the Australian industry's selling prices by between 7 and 55 per cent. The Commission also concluded that MM Kembla had suffered injury in the form of price depression, price suppression, reduced profit and profitability in the investigation period.

Once it is accepted (as it should be for reasons outlined above) that the price undercutting was achieved to a significant extent by dumping (and subsidization) of exports of seamless copper tube to Australia, the conclusion is inescapable that the injury found by the Commission was attributable at least in part to dumping.

The decision that the Australian industry has not suffered material injury from the dumped (and subsidization) is not the correct or preferable decision.

11. Grounds in support of the decision

Set out how the grounds raised in Question 10 support the making of the proposed correct or preferable decision.

Correctly understood, the price undercutting of between 7 and 55 per cent confirmed by the Commissioner during the 2019-20 investigation period was at least in part attributable to dumping at significant margins. That dumping is thus a cause of the injury identified by the Commission, which is material.

12. Material difference between the decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

Because the Commission's analysis of material injury was premised on an absence of dumping (but found, correctly, that injury had occurred), the result of the analysis will necessarily be different – leading to a conclusion that material injury has been caused by dumping – if some or all of MM Kembla's arguments above in relation to the ascertainment of normal value and export price are accepted. This would lead to a decision not to terminate the investigation.

D. Request

The decision of the Commissioner to terminate Investigation 557 is a reviewable decision under s.269ZZN. MM Kembla is an interested party to Investigation 557 and was the applicant for anti-dumping measures on seamless copper tube exported to Australia from China and Korea.

MM Kembla firmly considers that it has detailed the relevant considerations in its grounds for appeal that demonstrate the Commissioner's decision concerning the determination of normal values for Chinese exporters is not the correct or preferable decision. The correct and preferable decision is detailed in 11 above.

The ADRP is requested to conduct a review of the Commissioner's termination decision and revert the matter back to the Commissioner for re-investigation to then arrive at a Statement of Essential Facts involving the determination of normal values on relevant information for the determination of correctly adjusted normal values for seamless copper tube produced in China (by cooperative and uncooperative exporters).