

By Email

Mr. Paul O'Connor
Panel Member
Anti-Dumping Review Panel
Department of Industry, Innovation and Science
10 Binara Street
Canberra City ACT 2601

Dear Mr. O'Connor,

Re: Criterion Industries Pty Ltd – Aluminium Extrusions exported to Australia from Malaysia – Investigations Nos 540 (Mill Finish) & 541 (Surface Finish) – Review of Reviewable Decisions – Reviews 135 & 137 -Submission

I refer to the Review Panel's notice of 14 July 2021 advising of its review of the decisions by the Minister for Industry, Science and Technology (**Minister**) to publish dumping notices under subsections 269TG(1) and (2) of *the Customs Act 1901 (the Act)* in respect of aluminium extrusions (mill finish) exported from Malaysia and aluminium extrusions (surface finished) exported from Malaysia (the **Reviewable Decisions**) in connection with the abovementioned investigations and inviting interested parties to make submissions within 30 days of the date of the notice.

Criterion Industries Pty Ltd (**Criterion**), an interested party, makes the following submissions to reiterate and reinforce the grounds of its applications for the Review Panel to review the Reviewable Decisions.

As you would be aware, the substance of Criterion's applications was that:

- (i) the determination of material injury to the Australian industry was based on part of the Australian industry and not the whole of the Australian industry as required by law;
- (ii) the determination of material injury to the Australian industry failed to properly and adequately causally link any exports of the product under investigation at dumped export prices to the claimed material injury and identify the extent by which such causally linked injury was attributable to dumping; and
- (iii) the determination of material injury incurred by one member of the Australian industry, namely, Capral Limited (**Capral**) failed to properly attribute the causes of such injury to other factors including other economic factors, unrelated to import competition from the product under investigation whether or not at dumped export prices.

Criterion makes the following submissions: -

1. Material injury to the Australian industry as a whole

It is perplexing to understand how or why it could have been considered appropriate to base a finding of material injury on the economic performance of one member of the Australian industry or, possibly two, when the law is clear that it must be based on the economic performance of the industry as a whole and not any part thereof. That is, the determination of material injury must be based on all nine members of the Australian industry and not any part thereof.

This is clearly reflected in the definition of 'Australian industry' in s.269T of the Act, in the Federal Court judgement of Lockhart J. in *Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority* [1991] FCA 42 (**Swan Portland**) and in the Anti-Dumping Commission's (**Commission**) own 'Dumping and Subsidy Manual' that adopted the decision in *Swan Portland*.

It is of concern that, apparently, the Commissioner does not consider to be legally bound by the statutory definition of what constitutes the 'Australian industry producing like goods' (i.e., s. 269T(4) of the *Customs Act 1901*) or the decision of the Federal Court in *Swan Portland* and, apparently, would seek to circumvent the application of the law as set out in Reports 540 and 541.

Clearly, Capral is not the 'Australian industry' and it is of concern that the investigation on 'material injury' and 'causation' was largely confined to information supplied by Capral contrary to both domestic and international legal requirements. It also is of concern that the Investigations continued to proceed on this basis, that is, with the participation of one member of the Australian industry, limited participation, if that, of two other members of the Australian industry and no participation by the remaining majority of members of the Australian industry.

Further, in acknowledgment of this deficiency, to then seek to rectify that deficiency in the last stage of the investigation by approaching members of the Australian industry for the requisite information and evidence and succeeding in only obtaining some limited information from two members of the Australian industry of minimal utility. Then failing to subject that information to same stringent standards of verification required of information provided by other interested parties such as exporters raises questions as to the reliability of any such information, as well as its relevance.

To also seek to rely on information provided in support of the application for the imposition of anti-dumping measures, namely, the information required by s.269TC(6) of the Act, which information is provided for an entirely different purpose and is information on production of the product in question, as opposed to sales, prices, revenues and profits, was misconceived and misguided. Proportion of production of like goods does not define the 'Australian industry', which is defined by reference to those entities who produce like goods in Australia and who collectively comprise the 'Australian industry'.

Finally, as Australia's 'investigating authority' in dumping investigations, it is unclear why the Commissioner assisted by the Commission (s.269SMD of the Act) failed to investigate whether the Australian industry as a whole had incurred material injury and, if it had, what caused such injury, including by availing itself of publicly available information such as for example, annual financial statements filed by members of the Australian industry with the Australian Securities and Investments Commission (**ASIC**) as required under the *Corporations Act 2000 (Cth)* or by obtaining relevant information from other interested parties.

That is, on what lawful basis could the Commissioner, assisted by the Commission, limit the 'investigation' into 'material injury' and 'causation' to one or, possibly, three members of the Australian industry and make findings of fact and recommendations to the Minister purportedly of the economic performance of the whole Australian industry based on such a limited 'investigation'?

It also is unclear why in Reports 540 and 541 and in its recommendations to the Minister, the Commissioner did not advise the Minister that the Commissioner's finding of fact on material injury to the Australian was not a finding that the Australian industry as a whole had incurred material injury as required by law. Further, that absent such a finding of fact, supported by evidence, the Minister could not be satisfied of this matter in order to lawfully publish a dumping duty notice under ss.269TG(1) and (2) of the Act in either Investigation.

On this ground alone, the Reviewable Decisions must be set aside.

2. *Analysis of causal links between exports and material injury*

The Reviewable Decisions were based on the purported finding of fact that exports of the products under investigation had caused, because they were at dumped export prices, material injury to the 'Australian industry'.

However, not only did Reports 540 and 541 not identify what constitutes 'injury' or, at least, misconceived what constitutes 'injury', because of this the necessary causal links between exports at dumped prices and injury to the Australian industry were not established. The occurrence of certain events, such as price suppression, price depression and reduced sales volumes, may be merely coincidental and due to other economic factors. Coincidence without more is not evidence of causation.

The appropriate analysis, as indicated in the '*Economic framework for injury and causation analysis*' (April 2017) prepared by Frontier Economics Pty Limited for the Commission ([Economic framework for injury and causation analysis \(industry.gov.au\)](http://industry.gov.au)), is to analyse:

- the extent by which prices of the product under investigation undercut those of the Australian industry and other participants in the relevant market at the point of competition between the product under investigation and the other products in the relevant market, noting that there are different points of competition in the supply chain involving different prices after the product under investigation has entered into the commerce of Australia (i.e., after importation);
- the extent by which the prices of the Australian industry are suppressed and or depressed to meet the price undercutting of 'dumped' export prices, as opposed to 'un-dumped' prices in the market either from the subject countries or other countries and/or price undercutting by members of the Australian industry;
- the extent by which sales volumes of the Australian industry declined because of lost sales to the product under investigation due to price undercutting, as opposed to loss of sales volumes to other imports; and
- the extent to which such price and volume effects impact on sales revenues and, consequently, profits of the Australian industry as a whole, recognizing that members of the Australian industry are not only competing with the product under investigation but also with other imports and with one another.

That this is the required analysis is set out in Articles 3.1 and 3.2 of the WTO Anti-Dumping Agreement.

This analysis was not undertaken in Investigations 540 and 541 and could not have been undertaken due to the lack of participation by the majority of members of the Australian industry in those investigations. Consequently, the information and evidence to undertake such analysis was not available. Hence, to the extent that the Australian industry may have incurred injury, if any, it could not be causally linked to 'dumping' of the product under investigation, that is, be attributed to the product under investigation as opposed to other causes operating in the Australian market. Any claims to that effect were mere speculation unsupported by evidence.

Not only was injury to the Australian industry as a whole not investigated but also to the extent that any members of the Australian industry incurred injury, the causes of such injury were not properly investigated and could not have been properly investigated due to the lack of participation of the majority of members of the Australian industry in the Investigations.

Again, on this ground alone, the Reviewable Decisions must be set aside.

3. *Economic performance of Capral due to other economic factors*

The sole member of the Australian industry to fully cooperate in Investigations 540 and 541 was Capral. It was apparent that during the period 2016 to 2019, its aluminium extrusion business, when profitable, had been less profitable as disclosed in its Annual Reports over this period but, in 2020, its fortunes changed, and its aluminium extrusion business had commenced to become more profitable.

The reasons for such economic performance, as has been submitted both to the Commission and to the Review Panel, was due to factors other than import competition from the products under investigation. Rather, it was due to the performance of the Australian construction industry and, in particular, the residential construction sector, during this period on which Capral's aluminium extrusion business extensively relied, as well as internal management and infrastructure issues as evidenced by its cost reduction initiatives.

As disclosed in its Annual Reports and, in particular, its financial statements in those reports, Capral's economic performance unsurprisingly tracked the economic performance of the Australian residential construction industry with its losses resulting from reduced revenues due to reduced activity in the construction industry and the effect that its fixed costs had on such declining revenues. Understandably, in such circumstances Capral reported losses. However, when activity in the residential construction industry commenced to increase in 2020, Capral's economic performance improved, and it was able to report profit for its aluminium extrusion business.

No evidence of the products under investigation causing material injury to Capral during the injury period because of dumping, nor any evidence that the products under investigation were affecting Capral's economic performance separately from other imports whether subject to measures or not.

As a significant member of the Australian industry, it is evident that Capral's economic performance over the relevant period, as disclosed in publicly available documents, had little, if anything, to do with import competition from the product under investigation but

was due to the usual 'ebb and flow' of business on which Capral's economic performance extensively relied upon, namely, the performance of the Australian residential construction industry.

Further, in assessing the economic performance of Capral, insufficient weight was given in the Investigations to the fact that Capral itself was an importer of like goods from countries not subject to measures, namely, Indonesia and how and to what extent such imports competed in and affected the Australian market.

Accordingly, even if it were permissible for Capral's economic performance, as a substantial member of the Australian industry, to be indicative of the possible economic performance of the remaining members of the Australian industry, which is not permissible, it is not indicative that the product under investigation has caused injury as opposed to injury being caused by other economic factors.

Finally, in relation to the other two members of the Australian industry that provided limited information at the request of the Commission in the final stage of the Investigations, that information, being extracts from audited accounts, was clearly insufficient to make an assessment of their respective economic performance over the relevant period. It did not provide information on their respective cost to make and sell like goods, their pricing, their customer base, their business models, their sales and pricing into the market and consequent success or otherwise over the period, their respective points of competition in the supply chains in the Australian market, the extent to which their pricing and sales volumes were affected by imports other than the product under investigation and by other members of the Australian industry and so on. In other words, there was insufficient verified information and evidence on which a rational conclusion could be made as to their respective economic performance over the relevant period and the reasons therefore.

Again, on this ground alone, the Reviewable Decisions must be set aside.

4. Additional observations

4.1 Market share

Table 16 at Section 7.3.2 of Report 540 (page 84) set out the market share of aluminium extrusions (mill finish) by country of origin. However, there are a number of deficiencies with the Table. For example, it suggests that while exports from Malaysia subject to measures declined, exports not subject to measures increased. However, what it does not show is that overall exports from Malaysia may have declined. Further, it does not index proportional increases by country of origin as a proportion of the total market. Consequently, the indexed increase and decreases are essentially meaningless and possibly misleading because the market share in the base year (2016) is indexed as 100% for each country without indicating what proportion it was of the total market. Consequently, any increase or decrease from the base year is meaningless.

Further, the Table aggregates all other imports, including from New Zealand, into one row, thereby rendering it meaningless. For example, it avoids disclosing the market share held by imports from Indonesia, which is understood to be Capral's source of imports. The Table also does not disclose changes in market share held by members of the Australian industry. For example, it is apparent from Capral's 2019 Annual Report (page 3), amongst others, that it was subject to competition from other members of the Australian industry who were

obtaining market share at Capral's expense, as well as imposing pressure on Capral's prices. This is not reflected in Reports 540 and 541 and requires scrutiny. Failure to include changes in market share of each of the members of the Australian industry presents and incomplete and distorted picture of movements in market share not only between imports and the Australian industry but also between members of the Australian industry.

In addition, the Commission publishes on its website the Trade Remedy Index (TRINDEX): [Trade Remedy Index | Department of Industry, Science, Energy and Resources](#) At Attachment A to this submission are graphs extracted from that Index along with Table 16 referred to above. A comparison of the information in the extracted graphs with Table 16 reveals that exports from Malaysia overall declined and that its prices were not the lowest, which is a different picture than that set out in Table 16. Further, of interest is the increase in volumes of exports from Indonesia at prices generally higher than other exports. Clearly price was not there the principal consideration.

This information was available to the Commission throughout both Investigations as it is information collected and published by the Commission itself according to the website, but the Commission does not appear to have availed itself of it for the purposes of the Investigations.

Also, why market share held by each country, as opposed to by each company, is or could be confidential is unclear. There would appear no reason for this information to be confidential.

4.2 *Capral economic performance*

In the 'Profit Analysis' spreadsheet that was included in Criterion's applications (copy attached), Row 16 shows Capral's finance costs increasing from \$1.08m in 2018 to \$5762m in 2019 to \$6.03m in 2020. Clearly such fixed costs affected Capral's economic performance and resulted in the loss in 2019 and which would likely have been repeated in 2020 but for the increased sales volumes and revenues. In other words, Capral's economic performance was adversely affected and materially so for reasons unrelated to import competition and, specifically, import competition from the products under investigations.

This of itself is of concern but also of concern is the seeming absence of a thorough analysis of Capral's economic performance even on the basis of publicly available information such as its financial statements in its Annual Reports over the injury period. As the 'Profit Analysis' reveals, information necessary to undertake such an analysis was publicly available for the purposes of investigating what injury one member of the Australian industry had incurred, namely, Capral, and what had caused that injury. That analysis, if undertaken, is not apparent from Reports 540 and 541.

Finally, also at Attachment A is a Table prepared from Tables 24 and 30 in Report 541 that shows Capral's production volumes during the injury period as compared with the sales volumes of the Australian industry over the same period. It is evident from that data that Capral lost sales volumes to other members of the Australian industry. This also does not appear to have been taken not account in the analysis of Capral's economic performance, which, together with other deficiencies identified in the applications and above, raises the question of the robustness and reliability of that analysis of Capral's economic performance.

5. **Conclusion**

On the grounds set out in its applications for the Review Panel to review the Reviewable Decisions and reiterated above, Criterion submits that the Reviewable Decisions must be set aside.

I hope the foregoing is of assistance, but please contact me if you have any questions or require clarification on any matter.

Yours faithfully,

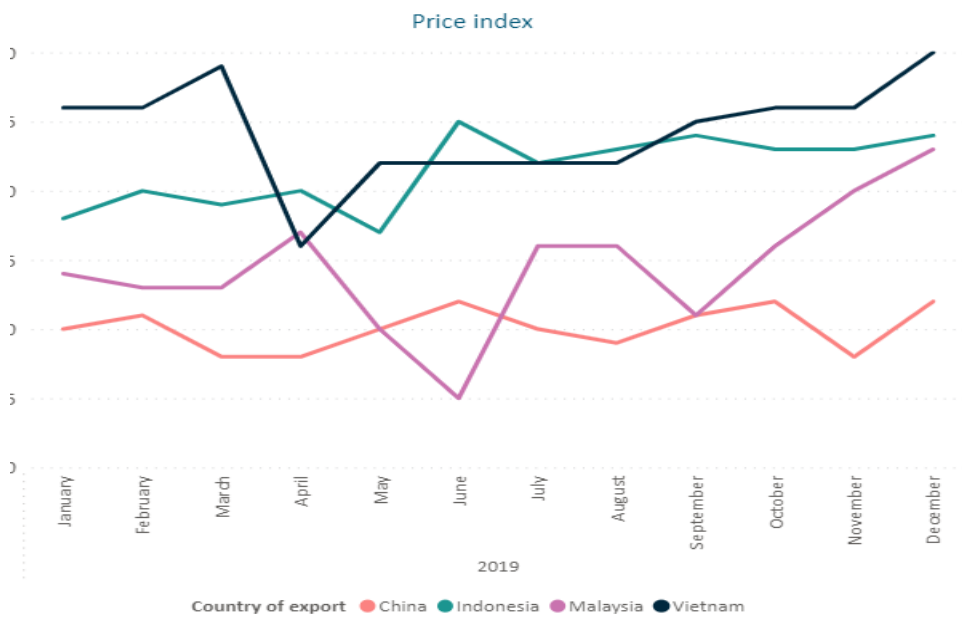
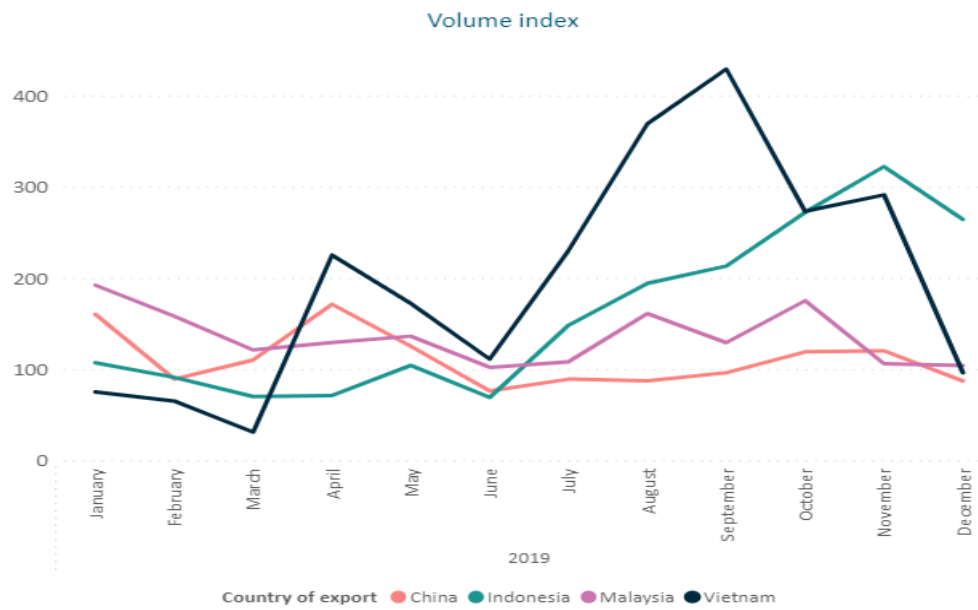
A handwritten signature in black ink, appearing to read 'Andrew Percival', written in a cursive style.

Andrew Percival
Principal

Attachment A
Trade Remedy Index & Extracts from reports 540 and 541

Trade Remedy Index: [Trade Remedy Index | Department of Industry, Science, Energy and Resources](#)

Extracts from Trade Remedy Index:



Report 540 – Table 16

7.3.2 Market share

The Commission has relied upon the approach outlined in the assessment of the Australian market at section 5.5.2 to calculate the market share figures outlined below.

Country of Origin	2016	2017	2018	2019
Australian Industry	100	101	96	93
Imports (all source countries)	100	98	107	114
China	100	121	132	129
Malaysia (subject to measures)	100	51	14	7
Malaysia (not subject to measures)	100	82	127	135
Vietnam	100	33	23	63
All other (including NZ)	100	97	93	109

Report 541

Production volumes vs Sales volumes – Australian Industry

	2016	2017	2018	2019
Capral Production Volumes*	100	93	78	70
		-7%	-22%	-30%
Australian Industry Sales Volumes^	100	98%	87%	88%
		-2%	-13%	-12%

*Ref. REP 541 - Surface Finished Aluminium Extrusions - Malaysia Section 7.6.1
Production Volume: Table 24*

^Ref. REP 541 - Surface Finished Aluminium Extrusions - Malaysia Section 8.5 Volume
Affects: Table 30