Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

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 Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application to the ADRP for review of a Ministerial decision.

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 public notice of the reviewable decision is first published.

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 9, 10, 11 and/or 12 of this application form (s 269ZZG(1)). See the ADRP website for more information.

Withdrawal
You may withdraw your application at any time, by completing the withdrawal form 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*.
[2] As defined in section 269ZX *Customs Act 1901*.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: **Criterion Industries Pty Limited (ABN 91 164 120 727) ('Criterion')**
Address: **23 Scanlon Drive, Epping VIC 3062**
Type of entity (trade union, corporation, government etc.): **Corporation**

2. Contact person for applicant

Full name: **Mr Mark Chirnside**
Position: **Procurement Manager**
Email address: mrc@criterionindustries.com.au
Telephone number: **(03) 9355 0700**

3. Set out the basis on which the applicant considers it is an interested party:

Having regard to the definition of 'interested party' in s.269T(1) of the *Customs Act 1901*, Criterion is:

- **an entity that directly concerned with the importation into Australia of the goods the subject of this application; and**
- **an entity that uses the goods the subject of this application in the production or manufacture of other goods in Australia for supply to the Australian market,**

and, therefore, is an interested party.

Specifically, Criterion sources its requirements of aluminium extrusions, including the goods the subject of this application, from overseas and domestic suppliers, including from Australian manufacturers. It uses such extrusions in its businesses to produce a range of products for installation in commercial offices and buildings. The range of such products are set out on Criterion's website, including in its brochures that are available on its website:

Criterion Industries: Office Fitout Supplier

Brochures - Criterion Industries

Case Studies - Criterion Industries

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 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

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**.

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

The goods the subject of the reviewable decision are:

"Aluminium extrusions produced via an extrusion process, of alloys having metallic elements falling within the alloy designations published by The Aluminium Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill) (excluding all other surface finishes), whether or not worked, having a wall thickness or diameter greater than 0.5 mm., with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421 mm exported from t*he Republic of* Malaysia t*o Australia* by:

- • Milleon Extruder Sdn Bhd (**Milleon**);
- LB Aluminium Sdn Bhd (**LB Aluminium**);
- Kamco Aluminium Sdn Bhd (**Kamco**);
- Superb Aluminium Industries Sdn Bhd (**Superb**); and
- Genesis Aluminium Industries Sdn Bhd (**Genesis**)":

the "GUC",

[Note: Criterion considers that the full description of the goods the subject of this application (GUC) consists of the description of the physical good(s) plus the country of export plus the exporter(s). Hence the description above]

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

Imports of the GUC are generally, but not exclusively, classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

Tariff classification (Schedule 3 of the *Customs Tariff Act 1995*)			
Tariff Code	**Statistical Code**	**Unit**	**Description**
7604.10.00	06	Kg	Non alloyed aluminium bars, rods and profiles
7604.21.00	07	Kg	Aluminium alloy hollow angles and other shapes
7604.21.00	08	Kg	Aluminium alloy hollow profiles
7604.29.00	09	Kg	Aluminium alloy non hollow angles and other shapes
7604.29.00	10	Kg	Aluminium alloy non hollow profiles
7608.10.00	09	Kg	Aluminium tubes and pipes, not alloyed
7608.20.00	10	Kg	Aluminium tubes and pipes, alloyed
7610.10.00	12	Kg	Aluminium doors, windows and their frames and thresholds for doors
7610.90.00	13	Kg	Other aluminium structures and parts thereof

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number: **ADN 2021/033 (copy attached)**
Date ADN was published: **2 June 2021 (see:** 540_-_066_-_notice_adn_-_adn_2021-033_-_findings_in_relation_to_a_dumping_investigation.pdf (industry.gov.au)

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

PART C: GROUNDS FOR THE 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: ☐

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

The grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision are set out in Attachment A (at pages 10 to 35 of this application).

10. 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 9:

The correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9 is/are that the Minister decide not to publish a dumping duty notice under ss.269TG(1) and (2) of the *Customs Act 1901* in respect of the GUC. That is, the decision to publish a dumping duty notice under ss.269TG(1) and (2) of the *Customs Act 1901* in respect of the GUC be revoked.

11. Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

The grounds set out in Attachment A in response to question 9 support the making of the proposed correct or preferable decision because those grounds demonstrate that the Minister could not be or should not have been satisfied as to those matters the Minister is required to be satisfied of under ss. 269TG(1) and (2) of the *Customs Act* 1901 in order to publish a dumping duty notice in respect of the GUC.

Specifically, those grounds are that Minister could and/or should not have been satisfied that the whole of the Australian industry producing like goods to the GUC and not any part thereof was incurring material injury during the injury period and, consequently, the issue of whether injury was being caused to that industry by the injurious effects of exports of the GUC at 'dumped' export prices did not and could arise.

12. Set out the reasons why the proposed decision provided in response to question 10 is materially different from the reviewable decision:

Do not answer question 11 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

The proposed or preferable decision is materially different from the reviewable decision because:

- **the reviewable decision was to publish a dumping duty notice in respect of the GUC, which has the effect of imposing antidumping measures on those goods, that is, of imposing a tax in the form of a special duty of customs (i.e. dumping duty) at the rates specified in the notice; and**
- **the proposed correct or preferable decision is that no dumping duty notice could or should have been published by the Minister in respect of the GUC and this would have resulted in no antidumping measures, that is, a tax in the form of a special duty of customs (i.e. dumping duty), being imposed on the GUC.**

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

ADN No 2021/033
Report No 540
Statement of Essential Facts 540

In addition, this is a link to Report 540 on the Comission's electronic public file: 540 Attachment A - Anti-Dumping Commission Report 540 (industry.gov.au)

***Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority* [1991] FCA 42**

Capral Profit Analysis - Spreadsheet

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* it gives public notice of its intention 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: Mark Chirnside

Position: Director

Organisation: Criterion Industries

Date: 2 / July / 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: **Andrew Percival**
Organisation: **Percival Legal**
Address: **1 Rickard Avenue, Mosman, NSW, 2088**
Email address: andrew.percival@percivallegal.com.au
Telephone number: **0425 221 036**

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.

Please ensure that all communications in respect of this application are directed to Mr Percival.

Signature:
(Applicant's authorised officer)

Name: Andrew Percival

Position: Principal

Organisation: Percival Legal

Date: 2 July 2021

Attachment A
Application for a Review of a Ministerial Decision

Exports of Certain Aluminium Extrusions from Malaysia – Investigation No 540

For the purposes of Question 9 of the attached Application Form for a Review of the Decision by the Minister to publish a dumping duty notice in respect of the goods the subject of this application (i.e., the **GUC**), the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision are set out below.

In substance, those grounds consist of the following, namely, that:

1. there is and was no evidence or sufficient evidence before the Anti-Dumping Commissioner (**Commissioner**) and, consequently, the Minister for Industry, Science and Technology (**Minister**) that the Australian industry as a whole, as opposed to part thereof, had incurred material injury during the injury period; and
2. in the absence of evidence or sufficient evidence that the Australian industry had incurred material injury, the issue of whether exports of the GUC at 'dumped' export prices had caused material injury to that industry did not and could not arise; and
3. even had there been sufficient evidence that the Australian industry as a whole had incurred material injury, there was insufficient evidence that exports of the GUC through the injurious effects of 'dumping' had caused material injury to the Australian industry as a whole during the injury period.

Consequently, there was no basis for the Commissioner to recommend to the Minister to decide to publish a dumping duty notice in respect of the GUC and for the Minister to publish a dumping duty notice in respect of the goods the subject of this application. That is, in such circumstances the Commissioner could not recommend to the Minister and the Minister could not have been satisifed of the matters the Minister is required to be satisifed of in order to publish a dumping duty notice under ss. 269TG(1) and (2) of the *Customs Act 1901*, namely, that the Australian industry, and not part thereof, had incurred 'material injury' during the injury period.

The specific grounds and the reasons for such grounds are set out below.

1. Ground 1 – Deficiency in the investigation

1.1 Criterion contends that the investigation conducted in Investigation 540 by the Anti-Dumping Commission (**Commission**) and Commissioner[3], as Australia's 'investigating authority' in dumping investigations undertaken under Australia's antidumping regime in Part XVB of the *Customs Act 1901*, was deficient in a number of material respects. These deficiencies are set out below. The effect of these deficiencies is to undermine and vitiate so-called findings of fact reported by the Commissioner in his report to the Minister and the recommendations contained

[3] Please note that elsewhere in this application, references to the 'Commission' are references to the Commission and the Commissioner collectively (i.e. jointly and severally as appropriate) except where and to the extent the context otherwise requires or where and to the extent expressly indicated otherwise.

therein (**Report 540**) and, in particular, the purported finding of fact that the Australian industry had incurred material injury.

1.2 As the Anti-Dumping Review Panel (**Review Panel**) would be aware, the Commission and Commissioner's role under Part XVB of the *Customs Act 1901*, as Australia's investigating authority in dumping investigations, is to conduct an investigation into the product under investigation following acceptance of an application for the imposition of antidumping measures in respect of that product. The purpose of such an investigation is to make findings of fact supported by evidence and to report those findings of fact and evidence to the Minister including making recommendations to the Minister based on those findings on whether the Minister should be satisfied of the matters that the Minister must be satisfied of in order to publish a dumping duty notice under ss. 269TG(1) and/or (2) of the *Customs Act 1901* and whether the Minister should publish a dumping duty notice in respect of exports of the product under investigation.

1.3 The deficiencies in the Investigation 540 consisted of the following, in summary:

(i) the application for the imposition of dumping measures, while apparently supported by the requisite proportion of the Australian industry as required by s.269TB(6) of the *Customs Act 1901*, contained no information or evidence, or insufficient information and evidence, of the economic performance of the majority of members of the Australian industry other than Capral Limited (**Capral**), namely, eight of the nine members of the Australian industry, during the injury period, nor information or evidence of whether those eight members' economic performance had been adversely affected by the allegedly dumped exports from Malaysia as required by the application form, but the application was nonetheless accepted by the Commissioner and a dumping investigation initiated[4];

(ii) during the dumping investigation from its initiation up until after the publication of the Statement of Essential Facts on 9 Decmber 2020 (see: 540 EPR 039 SEF 540 (PUBLIC RECORD) (industry.gov.au), eight of the nine members of the Australian industry still had not participated in the dumping investigation by providing any information or evidence relevant to the investigation, including information and evidence as to their respective economic performance during the injury period or the extent to which they may have been adversely affected by exports of the GUC to Australia, if at all. The Commission apparently did not seek any such information or evidence from those eight members of the Australian industry during this period of the dumping

[4] See Consideration Report No 540 & 541, Section 4 including Section 4.4 (at p. 19) where the Commissioner confirmed that the only evidence provided in the application by members of the Australian industry on the Australian industry's economic performance was that provided by Capral and, consequently, the assessment of injury I the Conisderation Report was of injury Capral claimed to have incurred, as opposed to injury incurred by the Australian industry as a whole.

investigation, at least not according to the Commission's electronic public file for the investigation[5];

(iii) also, during the conduct of Investigation 540 from its initiation up until after the publication of the Statement of Essential Facts, the Commission did not seek, according to the Commission's electronic public file and information in the Statement of Essential Facts published on 9 December 2020, to obtain any information and evidence regarding the economic performance of the eight members of the Australian industry or the extent to which they had been adversely affected by the product under investigation, if at all, from sources other than those eight members such as, for example, obtaining copies of any of the financial statements of those members of the Australian industry filed with the Australian Companies and Securities Commission (**ASIC**) each financial year in accordance with the statutory requirements under the *Corporations Act 2001 (Cth)* and publicly available from ASIC or from other stakeholders and participants in the Australian aluminium extrusion market (i.e., from other interested parties);[6]

(iv) subsequent to the publication of the Statement of Essential Facts on 9 December 2020 and the receipt of submissions from interested parties in response to the Statement of Essential Facts concerning the lack of information and evidence before the Commission regarding whether the Australian industry as a whole had incurred material injury caused through the effects of 'dumped' exports of the GUC and in acknoweldgement and confirmation of the deficiency in the investigation in this regard, the Commission sought information and evidence from the eight members of the Australian industry relevant to these issues or, at least, from some of them. However, the Commission apparently only received a limited amount of such information and evidence from only a few members of the Australian industry, as detailed in Section 7..2.3 of Report 540. As indicated, this was undertaken in an attempt to reddress the deficencies of the investigation in this regard in the closing stage of the investigation; and

(v) the information and evidence so obtained by the Commission from those few members of the Australian industry, as detailed in Report 540, was of limited scope and probative value and, therefore, of limited relevance to the investigation and, in particular, to whether the Australian industry as a whole

[5] Had these eight members been 'exporters', such non-particpation would invariably have resulted in their being determined to be 'uncooperative exporters' but no similar determination was made in relation to such members of the Australian industry despite thier non-particpation obviously adversely affecting the conduct of the investigation.

[6] Criterion obtained copiesof such Financial Statments for all of those members of the Australian industry required to file their annual finacial statments with ASIC and understands that copies of the most recent financial statments of a number of such members of the Australian industry were provided by an interested party to the Minister and Comissioner after the Commissioner had reported to the Minister but before the Minister had made his decision as documents relevant to the Minister's decieion and that the Minister was entitled to take into account.

had incurred material injury during the injury period for the reasons set out in subsequent sections to this application.

1.4 As a result of these deficiencies in the conduct of the dumping investigation, at the time the Commissioner reported to the Minister his findings of fact supported by evidence and his recommendations based on those findings of fact, the Commissioner effectively only had before him information and evidence on the economic performance of one member of the Australian industry, namely, Capral , and the extent by which it had been adversely affected, if at all, during the injury period by allegedly dumped exports of the GUC, which is addressed in a subsequent section of this application.

1.5 The consequence of this was that the Commissioner had no evidence that the Australian industry as a whole had incurred material injury at the time the Commissioner reported to the Minister, let alone material injury caused through the effects of alleged dumping of exports of the GUC. Consequently, the Commissioner could not have made a finding of fact supported by evidence that the Australian industry as a whole had incurred material injury during the injury period and make recommendations to the Minister that the Minister be satisifed that the Australian industry had incurred material injury during the injury period.

1.6 Report 540 to the Minister did not set out the fact that information and evidence regarding the economic performance of the Australian industry as a whole had not been obtained from or provided by members of the Australian industry other than Capral during the conduct of the investigation. That is, that a majority of members of the Australian industry (i.e., at least two-thirds) had not particpated in and provided relevnt information and evidence at any time throughout Investigation 540. That this deficiency could only be rectified by the Australian industry itself but it did not do so even when some were provided with the opportunity to do so. Nor was mention made that the limited information and evidence subsequently obtained from two members of the Australian industry was not placed on the public file, including, if required, as non-confidential summaries, to enable interested parties to defend their interests.

1.7 Due to these deficiencies in the conduct of the investigation, it was not open to the Commissioner to make a finding of fact, nor for the Minister to be satisifed, that the Australian industry as a whole had incurred material injury during the injury period, let alone that any injury was caused through the effects of dumped exports of the product under investigation. There was no evidence or insufficent evidence before the Commissioner at the time the Commissioner reported to the Minister and, consequently, before the Minister when making the decision(s) the subect of this application that the Australian industry as a whole, as opposed to any part thereof, had incurred material injury during the injury period.

1.8 Consequently, the Commissioner could not have recommended and the Minister could not have been satisfied of the matters the Minister is required to be satisfied of under sections 260TG(1) and (2) of the *Customs Act 1901* in order to publish a dumping duty notice in respect of the GUC. That is, the Commissioner could not have recommended and the Minister could not have been satisifed that the

Australian indsutry as a whole had incurred material injury during the injury period. Consequently, the issue of whether exports of the GUC to Australia at 'dumped' export price had caused injury to the Australian industry as a whole could not arise.

2. Ground 2 – Finding of fact that the Australian industry had incurred 'injury'

What constitutes 'injury'?

2.1 It is contended that, on the available information before the Commissioner and, consequently, the Minister, that information and evidence was to the effect that there was no evidence that the Australian industry had inccurred material injury.

2.2 In Report 540 the Comissioner does not state what in his view consitutes 'injury', let alone 'material injury', to a domestic indsutry producing like goods. Instead, at Section 7.1 of Report 540 the Commissioner set out a list of 'injuries' he had determined that the 'Australian industry as a whole' had incurred during the injury period. However, the majority of so-called 'injury' items listed do not themselves constitute 'injury'. Rather, they are, if they exist, the causal links between the cause of injury (i.e., exports at dumped export prices) and the 'injury' (i.e., reduced revenues and consequently profits) or are symptoms of injury or are the consequent effects from 'injury'. (i.e., reduced return on investment, employment, etc.).

2.3 For an entity conducting a commercial business whose objective is to generate revenues creating profits for the owners of the business, then 'injury' to that entity is a reduction or loss of revenue and, consequently, reduced profit(s). Other factors such as price undercutting, price depression, price suppresion and reduced sales volumes are factors providing the causal links between the alleged cause of injury (dumped export prices) and the injury itself (reduced revenues and profit(s)) as further explaind in secion 5.4 of this application. Consequently, whether an entity has incurred such 'injury' is a question of fact to be supported by evidence and is to be distinguished from the 'causes' of any such injury.

What constitutes 'injury' to the Australian industry?

2.4 As was put to the Commission by submissions from interested parties, a finding of 'injury' must be in relation to the Australian industry as a whole and not to any one part of it or any one member of it. This was the judgement of the Federal Court in *Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority* [1991] FCA 42 (copy **attached**), where, at page 19, Lockhart J. stated that:

> "*In my opinion, the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry,* ***whether the part be determined by geographic, market or other criteria****. The difficulty seems to me to lie, not in defining the expression, but in determining on the facts of a given case whether a* ***particular industry answers the statutory description of an Australian industry****. The latter is not a question of construction; it is a question of identification by the relevant fact finding body, in this case, the Authority.*" (emphasis added)

2.5 This is reflected in the Commission's Dumping and Subsidy Manual, a copy of which is available on the Commission's website (Dumping and Subsidy Manual | Department of Industry, Science, Energy and Resources):

> "*The Federal Court has held that the Australian industry is the sum total of the industry in Australia (not any part, whether that part be defined by geography, market or any other criteria) and the material injury determination must be assessed against the Australian industry as a whole. This assessment is required regardless of the size of the applicant.*" (at p.17) (underllining added) (Footnote omitted, which referred to the above Federal Court cases)

2.6 It also is reflected in the definition of 'Australian industry' for the purposes of Part XVB of the *Customs Act 1901* in s.269T(4) of the *Customs Act 1901*, being the statutory defintion referred to in the above Federal Court case. That is:

> "*(4) For the purposes of this Part, if, in relation to goods of a particular kind, there is a person or there are persons who produce like goods in Australia:*
>
> *(a) there is an Australian industry in respect of those like goods; and*
>
> *(b) …, the industry consists of that person or those persons."*

2.7 Accordingly, the Australian industry here consists of the nine Australian entities producing like goods to the GUC as identified in Capral's application for the imposition of antidumping measures and in the Commissioner's Consideration Report and in Report 540. It does not follow that each such entity must necessarily have incurred 'injury' for the industry as a whole to have incurred injury but it must be a majority of members of the industry. It also will depend upon the nature and extent of the injury as to whether the Australian industry as a whole has incurred material injury. This is a question of fact to be supported by evidence and not a matter for speculation. Further, it also is a different question to what may have been the cause(s) of any such injury. Neverthless, the 'injury' incurred must be 'injury' to the whole of the industry and not to any one part, whether that part be defined by geography, market or any other criteria.

2.8 In this context, whether the Australian industry has incurred 'injury' is a question of fact as to whether members of the Australian industry have each incurred 'injury' that is, reduced revenues and profits during the injury period and, if so, what proportion of such members have incurred 'injury' and to what extent. That is, what is the nature and extent of 'injury' that each member of the industry has incurred during the injury period and, therefore, the Australian industry as a whole. This is a question of fact supported by evidence. It is not a question of extrapolating injury apperently incurred by one member or several members of the industry to the remainder. That is mere specualtion that the remaining members may have incurred injury and that any such injury would be the same injury as incurred by those members of the industry who had incurred injury caused by the same factors and to the same extent. Those remaining members of the industry may or may not have incurred injury. The fact that some have incurred injury does not mean that the others must necessarily also have incurred injury or the same injury or to the same extent or form the same

causes. That, as indicated, would be mere speculation, which is impermissible. Whether any 'injury' incurred by members of an industry is 'injury' to the industry as a whole ultimately depends upon the nature of the injury incurred by members of the industry and the extent of that injury to the industry as a whole, which is a question of fact to be supported by evidence.

2.8 By way of example, if three out of ten exporters provided information and evidence that demonstrated that their exports were not at 'dumped' prices and the remainder provided no information or evidence, does it mean that the remaining six members were also not exporting at 'dumped' prices? Based on the evidence and on the balance of probablities, and extrapolating the position of three to the remaining seven is that a rational conclusion? The logical and evidentiary absurdity is obvious. There is simply no evidence as to the exports of the reminder and, consequently, no conclusions can be drawn on whether such exports were or were not at dumped prices. There is simply no evidence regarding the position of the exports of the seven remaining exporters and, in the absence of such evidence, no conclusion can be drawn as to whether their exports have ben at dumed prices. The position regarding assessing injury to an industry as a whole is not dissimilar. There is simply no evidence or insufficent evidence at least as to whether eight or, at least, six of the nine members of the Australian industry have incurred any injury during the injury period. It simply is not possible to rationally conclude that either they or the Australian industry as a whole has incurred injury, as further discussed below

What is the evidence of injury?

2.9 The issue, therefore, was there evidence before the Commissioner supporting a finding of fact that 'injury' had been incurred by members of the Australian industry and, if so, what was the nature and extent of that 'injury' and did it consitute injury to the whole of the industry and not just part of the industry?

2.10 At the time of publication of the Statement of Essential Facts the only evidence of 'injury' before the Commission and Commissioner was in relation to Capral as only it had particpated in Investigation 540 and provided relevant information and evidence. Whether the 'injury' it had incurred was caused by exports of the GUC is addressed in section 5 later below but that is not relevant to a finding of fact as to whether Capral had incurred 'injury'. No evidence was before the Commission and Commissioner at the time of publication of the Statement of Essential Facts as to the economic performance of the remaining members of the Australian industry during the injury period. Consequently, there was no evidence or insufficient evidence before the Commission at that time as to whether eight of the nine members of the Australian industry had incurred 'injury' during the injury or the nature and extent of any 'injury'. The findings in the Statement of Essential Facts on 'injury', therefore, must be disregarded for this reason.

2.11 As noted earlier above, after publication of the Statement of Essential Facts and following receipt of submissions from interested parties, including Criterion, on this issue in response to the Statement of Essential Facts, the Commission sought information and evidence from the eight members of the Australian industry relevant to the issue of whether the Australian industry had incurred injury. A limited amount

of such information and evidence was obtained from only two of the eight members of the Australian industry, as detailed in Section 7..2.3 of Report 540, namely from G. James Australia Pty Ltd (**G James**) and Independent Extrusions Pty Ltd (**INEX**)[7]. The remaining six members of the Australian industry declined to provide any information or evidence or did not do so or were not invited to do so.

2.12 The information and evidence so obtained by the Commission apparently consisted of sales revenue and volume information for G James and INEX for each year of the injury analysis period and 'information from their audited accounts' (as opposed to copies of the audited accounts themselves), which extracted information apparently permitted the figures provided to the Commission to be verified.[8] It is unclear from Report 540 whether such information consisted of sales and volume information of like goods produced and sold during the injury period by G James and INEX or all aluminium extrusions or all products and, hence, how such information was verified to information extracted from audited accounts that typically will refer to sales volumes and values of all products. No report(s) were placed on the public file recording how such verification was undertaken or the outcome. The relevance and probative value of such information, if any, to a finding of 'injury' to their respective businesses producing like goods to the GUC is unclear, particularly as no non-confidential summaries of such information were placed on the public file. In the circumstances, the issue is whether all of that information should have been disregarded, especially as no non-confidential summaries of it or a record of its verification were placed on the public file as required.

2.13 The information and evidence that the Commissioner stated that he relied upon for his injury analysis consisted of the following, as detailed in section 7.2.3 of Report 540:

- verified economic data from Capral, which is relevant and probative as to whether Capral incurred 'injury' during the injury period and the nature and extent of that 'injury';

- sales volumes and revenues received from G.James and INEX that was apparently verified from extracts from audited accounts, but whose probative value is unclear and which probaly should have been disregarded in any event for the reasons set out above;

- sales volumes outlined in letters of support received with Capral's application[9], which was not verified, apparently unsupported by any evidence and is of limited, if

[7] It is unclear to which G James entity in the G James goup of companies that the Commissioner is referring to when referring to G James, as G James Australia Pty Limited is the holding company of the group with G James Extrusions Co. Pty Limited being th entity producing aluminium products within the group and this would be reflected in the audited accounts of each.

[8] See above footnote in this regard. Also, neither this information nor non-confidential summaries thereof were placed on the public file so as to enable interested parties to defend their interests as required by s. 269ZJ of the Customs Act 1901 and the WTO Anti-Dumping Agreement. Consequently, it raises the question of whether such information should proeprly have been disregarded.

[9] The reference to such data being 'sales volumes' is unclear as s.269TB(6) of the *Customs Act 1901* requires information concerning 'production', not 'sales', in assessing support for an application for the imposition of anti-dumping measures.

any, probative value to the issue of 'injury' (i.e., sales revenues and profits) and, presumably, was limited to nly those members of the Australian industry who provided such letters of support;

- Capral's estimates of the sales volumes achieved by those members which did not support the application, which, as an estimate, is speculative and, therefore, of no probative value for this purpose;

- data sourced from the ABF import database by the Commission, which is irrelevant because it relates to imports not to the production and sale of like goods to the GUC in Australia and does not relate to the economic performance of the relevant businesses of members of the Australian industry; and

- verified data from importers and exporters cooperating in Investigation 540, Review of Measures 544 and Continuation Inquiry 543 which is irrelevant because it does not consist of information and evidence from members of the Australian industry concerning the economic performance of their respective bussinesses, as well as including aluminium extrusions not comprised in the GUC.

2.14 With the exception of economic data provided by Capral, non-confidential summaries of any of the abovementioned data was placed on the public file and none after publication of the Statement of Essential Facts to enable interested parties to defend their interests as required by section 269ZJ of the *Customs Act 1901* and Article 6.1 of the WTO Anti-Dumping Agreement. As noted above, in such circumstances the information should have been disregarded by the Commissioner. Further, it is apparent that the only data before the Commissioner and, therefore, the Minister relevant to 'injury' being incurred by members of the Australian industry was the economic data from Capral and, possibly, the limited sales volumes and revenues of G James and INEX.

2.15 Further, in relation to the sales volumes and revenues of G James and INEX and in addition to the concerns expressed earlier above, precisely what that data consisted of was not identified in Report 540 (i.e., solely to like goods to the GUC or did it include other products, etc) and it was evident that it was not verified downwards to source documents, as is the Commission's usual practice in verifying infomration, especially for importers and exporters. No explanation was provided for such differential and preferential treatment in preference of members of the Australian industry in verifiying the information. The relevance and probative value of such sales and revenue data to the economic performance to those members of the Australian industry also is unclear because it does not address, amongst other matters relevant to their economic performance:

(a) the business models of each of the companies in respect of their production and supply of like goods to the GUC into the Australian market;

(b) the costs of production incurred by those companies, both fixed and vaiable, and to what extent, if any, they impacted on the economic pefomance of those companies and why or if they were necessarily incurred and to the extent so incurred;

(c) sales volumes and revenues throughout the injury period, including to which customers at which points in the supply chain they supplied their respective products and at what prices, given the different levels of trade of the aluminium extrusions here in question;

(d) their respective customer base in Australia, including nature of such customers, terms and conditions of supply, volumes required, price negotiations, etc.;

(e) the extent to which their customer base, sales volumes and prices had been eroded, if at all, by competition from imports from which countries and/or by other members of the Australian industry, including the extent to which their prices had been undercut by the product under investigation and those not under investigation and the effects, if any, that it had on prices and sales volumes;

(f) the effect that government policies and programmes had on their respective economic performance including government programmes promoting downstream industries such as the residential and industrial construction industries in Australia; and

(g) other similar factors reflecting and affecting their respective economic performance.

2.16 These and releated matters that would affect the economic performance of an entity in a competitive market such as the Australian aluminium market do not appear to have been investigated or, at least, those is no information or evidence on the public file or in Report 540 or referred to that they were. Hence, the query regarding the relevance of the sales and revenue obtained by the Commission from these two members of the Australian industry in isolation as to the economic performance of their respective business of producing and selling like goods to the GUC in a competitive market subject to competitive market conditions, let alone how their economic performance compared with other members of the Australian industry and the reasons for similarities and diffierences.

2.17 In summary, the evidence before the Commissioner consisted of:

(a) one member of the Australian industry, Capral, having incurred injury during the injury period;

(b) two members of the Australian industry, namely, G James and INEX, may have incurred injury during the injury period but it was unclear precisely what injury or the nature or extent of any such injury from the information and evidence each apparently had provided on their economic performance and, consequently, the probative value of such informatioon and evidence; and

(c) no evidence or insufficent evidence that any on the remaining six members of the Australian industry had incurred any injury during the injury period, and

consequently, there was no evidence or insufficent evidence that the Australian industry as a whole had incurred injury during the injury period.

2.18 Also, it is clear that had the Commission inquired earlier in the investigation into the economic performance of members of the Australian industry, the Commission would have been unlikely to have obtained sufficient information and evidence to make a finding of that the Australian industry as a whole had incurred 'injury' during the injury period and not just part of it. For this reason there would seem little benefit, if any, for the Review Panel. Pursuant to s.269ZZL of the *Customs Act 1901*, to require the Commissioner to investigate whether the Australian industry as a whole had incurred material injury.

2.19 The Commissioner sought to overcome these deficiencies by extrapolating the economic performance of, essentially, Capral to the economic performance of the Australian industry as a whole. This was contrary to the definition of 'Australian industry', Federal Court jurisprudence and the policy and practice of the Commission's Dumping and Subsidy Manual that required a finding of injury to be in relation to industry as a whole and not any part of the industry, as discussed earlier above. Further and importantly, not only is there no evidentiary basis for any such extrapolation but also it ignores the evidence before the Commissioner at the time when reporting to the Minister, again as indicated above. That is, the Commissioner had no evidence and/or insufficient evidence as to the economic performance of the majority of members of the Australian industry (i.e., eight or, at least, six out of nine members) and the majority of those members had elected not to participate in the investigation and provide information and evidence relevant of their respective economic performance during the injury period. The absence of such evidence before the Commissioner was only something that the Australian industry could rectify if it elected to do so and it chose not to do so, even when provided with the opportunity to do so.

2.20 It is self-evident, therefore, that the data before the Commissioner when reporting to the Minister did not relate to the economic performance of the Australian industry as a whole. From a statisitical modelling perspective or any other perspective, a sample of one or three members is not representative of the larger group of nine members and, clearly, their respective economic performance was not investigated by the Commission as Australia's investigating authority in dumping investigations due to the latter member's decision, including G James and INEX, not to cooperate and particpate in the investigation.and provide relevant information and evidence in a timely manner during the investigation.

2.21 Consequently, the only rational conclusion in the circumstances and the only available finding of fact based on the evdence was that the Commissioner lacked sufficient evidence to make any finding of fact as to whether or not the Australian industry as a whole had incurred 'injury'. The Commissioner should have so reported to the Minister, together with an explantation as to the reason for the lack of suficient information and evidence on this issue.

Assessment of the evidence

2.22 Despite the foregoing deficiencies, the Commissioner stated that:

> "*After assessing the economic condition of G.James and INEX, the Commission found that both companies exhibited economic performance trends comparable to Capral's. The Commission considers that the findings in relation to G.James and INEX indicate that Capral's economic condition is not dissimilar to the condition of other Australian industry producers who also represent a significant proportion of the Australian industry.*" (Section 7.2.3 of Report 540, p. 83)

2.23 Whether this is correct or not is irrelevant to whether G James and INEX incurred 'injury' during the injury period. That is, did either or both companies incur reduced revenues and, consequently, reduced profits in their respective businesses of producing and selling in Australia like goods to the GUC during the injury period and, if so, to what extent? A simple question of fact, which, presumably, would be disclosed in their respecitve financial and management records and accounts.[10] ''Comparable economic performance' is not a finding of fact that an entity has actually incurred 'injury'. Further, the Commissioner's logic in the above extract is circular and, consequently, self-defeating.

2.24 In addition, the Commissioner stated that:

> "*Furthermore, the Australian industry members;*
>
> - *are subject to similar factors of competition, e.g. prices, material costs etc.;*
> - *generally deploy the same or similar methods of production;*
> - *sell into the same or similar market segments; and*
> - *are required to compete either directly or indirectly against overseas producers of the goods from Malaysia and other countries.*" (Section 7.2.3 of Report 540, p.83)

*2.*25 While, again, this may or may not be correct but it is unclear how or why these matters are relevant to whether each member of the Australian industry relevantly incurred 'injury', that is, 'injury' to their respective businesses of producing and selling in Australia like goods to the GUC during the injury period? What is the relevance of these matters to whether members of the Australian industry actually incurred 'injury' during the injury period and, if so, which members and the nature and extent of that injury? A question of fact. The matters referred to above are seemingly relevant to 'caustion', not to 'injury'.

[1010] Financial Statements obtained by Criterion from ASIC in respective of G James disclose a different picture, namely, that its aluminum extrusion business was profitable with the exception of FY2019 but the loss in that financial year could not be attributed to imports, let alone fom Malaysia. Criterion understands that such fincial statments obtained from ASIC for G James and other members of the Australian industry were provided to the Minister with copies to the Commissioner after the Commissioner had reported to the Minister as matters the Minister could consider relevant and take into account in making his descision: s.269ZDB of the Customs Act 1901 refers.

2.26 In addition, there was no evidence or insufficent evidence before the Commissioner supporting any of the matters referred to in the above statement extracted from Section 7.2.3 of Report 540. This is reflected in the language used, namely, 'similar factors', 'generally deploy' and 'similar market segements', which indicate that the Commissioner is speculating on these matters in the absence of evidence. Further, no reason was given why these companies "are required" to compete against imports, as well as, presumably, against each other member of the Australian industry. Does this not require an investigation into the Australian aluminium market itself, namely, of sales of the GUC and like goods in that market, the prevailing competitive market conditions, other factors affecting that market, etc., and obtaining relevant and reliable information and evidence from stakeholders in that market? Such investigation does not appear to have been undertaken on examination of the Commission's public file or Report 540. All that appears to have occurred is an 'audit' of the limited information and evidence before the Commission, as opposed to 'investigting' issues relevant to the investigation. However, in any event these are matters relevant to the issue of 'causation' and not to whether 'injury' has been incurred and, if so, the nature and extent of that 'injury'.

2.27 Finally, in its assessment of injury to the Australian industry, the Commissioner stated that:

> "*It is a **necessary implication of section 269TB(6)** that the evidence required to show injury to the Australian industry need not require evidence that all Australian industry members have suffered injury.*
>
> *Notwithstanding, the Commission accepts that, in order for the Minister to be satisfied that material injury has been caused to an Australian industry, the **evidence required needs to be sufficient on the balance of probability**.*" (emphasis added) (Section 7.2.3 of Report 540, p. 82)

2.28 This misconceives the issue. First, the basis of the statement that "*It is a necessary implication of section 269TB(6) that the evidence required to show injury to the Australian industry need not require evidence that all Australian industry members have suffered injury"* is not explained nor why it is a necesary implication or a necessary implication in the present circumstances and, if such evidence is not required, what is required?

2.29 More fundamentally, the relevance, if any, of s.269TB(6) of the *Customs Act 1901* to the question of whether the Australian industry has incurred material injury is unclear. That section stipulates the support that an application for imposition of antidumping measures must have from the Australian industry. That support is to be determined by the relevant proportion of 'production' of like goods by industry members supporting the application. The section proceeds on the basis that there is an 'Australian industry' as defined in s.269T(4) of the *Customs Act 1901* and then requires an assessment of to what extent that industry supports the application measured by 'production' of like goods of those members supporting the application. It does not define the Australian industry as being, for example, those members who "*account for not less than 25% of the total production or manufacture of like goods in Australia"*. This would be contrary to the statutory definition of 'Australian industry' in

s.269T(4) of the *Customs Act 1901* and the abovementioned Federal Court jurisprudence. Section 269TB(6) of the *Customs Act 1901* has no relevance to who comprises the Australian industry or whether that industry has incurred material 'injury'.

2.30 Second, it is not a question of whether, on the 'balance of probabilities' or otherwise, injury has been 'caused' to the Australian industry. That question only arises if it is determined as a question of fact whether members of the Australian industry have actually incurred 'injury' during the injury period and, if so, which members and the nature and extent of that injury. Based on those findings of fact, the issue then is whether the Australian industry as a whole and not a part of that industry had incurred 'injury' during the injury period. The focus here is whether as a question of fact the Australian industry as a whole incurred injury on this basis, not what 'caused' that injury if any. The latter question arises only if the former question is answereed in the affirmative.

2.31 There was no such findings of fact supported by evidence in Report 540, nor could there have been. This is because there was no evidence of the economic performance of eight or, at least, six of the nine members of the Australian industry. Further, the information on two of the members', G James and INEX, economic perforamce was of limited and questionable relevance and, therefore, of probative value. The only information and evidence that demonstrated that 'injury' had been incurred during the injury period was the information and evidence provided by Capral, which was reflected as fact in its Annual Reports, with the exception of its 2020 Annual Report that disclosed that Capral had returned to profit (a copy of which is on the Commission's electronic public file).

2.32 Rather the evidence before the Commissioner at the time of reporting to the Minister was precisely that, namely:

(i) there was no evidence of the economic performance of eight or, at least, six of the nine members of the Australian industry and, therefore, no evidence whether any of them had incurred any 'injury' during the injury period;

(ii) information on the economic performance of two of the members of the Australian industry, G James and INEX, was of limited and questionable relevance and probative value and, therefore, unclear whether either of them had incurred any 'injury' during the injury period relevant to the investigation and, if they had, the nature and extent of that injury; and

(iii) information and evidence from Capral that demonstrated as a question of fact that it had incurred injury during the injury period and the nature and extent of that injury.

Further considerations regarding 'injury'

2.33 As the Review Panel would be aware, the Commission is to undertake dumping investigations to make findings of fact supported by evidence. The fact at issue, as discussed above, is whether the Australian industry as a whole incurred 'injury', with 'injury' consisting of reduced revenues and profits. This typically would be derived

from the accounts and financial records of the members of the Australian industry. Apart from Capral, no annual accounts or financial statements of members of the Australian industry were provided to or otherwise obtained by the Commission prior to publication of the Statement of Essential Facts.

2.34 This was so despite the fact that financial statements of the majority of members of the Australian industry for the injury period were and are publicly available from the Australian Securities and Investments Commission (**ASIC**). It is a requirement of the *Corporations Act 2001* for companies, unless exempted, to file financial statements each financial year with ASIC. Such financial statements are then publicly available to anyone who wishes to obtain a copy of them, including online. Why the Commission, as an investigating authority, did not avail itself of such publicly available finaical statements during the investigation is unclear given that they would be clearly relevant and already in the possession of a Federal Government agency, that is, ASIC.[11]

2.35 Further, it is noted that the Commissioner claimed that the financial statements provided to it by G.James and INEX in order to verify the sales volumes and revenues received from those companieswere confidential. Why this would be the case is unclear when, if filed with ASIC, they are publicly available. This would seem contrary to section 269ZJ of the *Customs Act 1901*. In any event, either those documents or non-confidential summaries, together with the Commission's verification reports, ought to have been placed on the Commission's electronic public file for the benefit of interested parties.

2.36 Having regard to the Commissioner's statement extracted above, the Minister stated in the dumping duty notice published on 2 June 2021 that:

> "*I, CHRISTIAN PROTER, the Minister for Industry, Science and Technology (the Minster) have considered, and accepted, the recommendations of the Commissioner, the reasons for the recommendations,* ***the material findings of fact*** *on which the recommendations are based and the evidence relied on to support those findings in REP 540.*" (emphasis added)

2.37 Clearly, there was no 'finding of fact supported by evidence' by the Commissioner that the Australian industry as a whole had incurred material injury in Report 540. Rather, at best, there was a finding that on the 'balance of probabilities' the Australian industry or a limited number of members of the Australian industry, if any, may have incurred injury based on limited information and evidence of questionable probabtive value. Essentially, this ignores the evidence (i.e., there was no evidence or insufficent evidence that the Australian industry as a whole had incurred injury) but, on the basis of information of the economic performance of one or several members of the Australian industry, speculates that the other members of the

[11] Criterion understands that copies of such financial statements of members of the Australian industry were provided to the Minister and theCommissioner after the Commissioner reported to the Minister and before the Minister made his decisions in this investigation as relevant to the making of the decision to publish dumping duty notices.

industry's economic performance must have been the same. No explanation as to why this would or should be the case, especially in a competitive, open market.

2.38 Interestingly, at Section 12 of Report 540 the Commissioner does not recommend, amongst all the other recommendations, that the Minister be satisfied that the Australian industry as a whole had incurred material injury, this being a matter that the Minister is required to be satisfied of in order to publish a dumping duty notice under sections 269TG(1) and (2) of the *Customs Act 1901*. Accordingly, what material finding of fact supported by what evidence did the Minister actually rely upon in this regard is unclear as there was no such finding of fact supported by evidence in Report 540, at least not a recommendation to that effect in Section 12 of Report 540.

2.39 The substantive issue, however, is whether the information and evidence before the Commission was sufficient to enable the Commission to make a finding of fact supported by evidence that the Australian industry as a whole had incurred injury. In this regard, the following Table sumarises the provision of information and evidence by the Australian industry:

Company	***Provision of information/evidence prior to SEF***	***Provision of information/evidence after SEF***	***Cooperative/uncooperative during all of the investigation***
Almax Aluminium Pty Ltd	No	No	No
Aluminium Profiles Australia Pty Ltd	No	No	No
Aluminium Shapemakers Pty Ltd	No	No	No
Capral Limited	Yes	Yes	Yes
Extrusions Australia Pty Ltd	No	No	No
G James Extrusion Co Pty Ltd	No	Yes, but limited	No
Independent Extrusions Pty Ltd	No	Yes, but limited	No
Olympic Aluminium Co Pty Ltd	No	No	No
Ullrich Aluminium Pty Ltd	No	No	No

2.40 It is evident from the information and evidence provided by members of the Australian industry before and after publication of the Statement of Essential Facts

that there was insufficient evidence on which the Commissioner could make a finding of fact that the Australian industry as a whole had incurred injury.

2.41 Further, it is apparent from the above Table that the majority were uncooperative in the conduct of the investigation by failing to participate and provide information supported by evidence of their respective economic performance:

> "*6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.*" (WTO Anti-Dumping Agreement)

Clearly the majority of members have not provided access to necessary information as to their respective economic performance within a reasonable period, including declining to do so on request by the Commission following the publication of the Statement of Essential Facts and receipt of submissions on injury. Clearly the majority of members of the Australian industry were uncooperative throughout the investigation and, hence the deficiency in infomration and evidence of the economic performance of the industry during the injury period, which culd only be remedied by the industry itself. In such circumstances, the evidence and fact is that there was no evidence before the Commissioner that the Australian industry as a whole had incurred injury.

2.42 It is noted that in these circumstances, the Commissioner has not treated members of the Australian industry as being 'uncooperative', but has determined that exporters to be 'uncooperative' for far less, including its determination of 'uncooperative exporters' in this investigation and not provided the affected entities from contesting that determination as required by Article 6 and Annex II of the WTO Anti-Dumping Agreement. No explanation was given for such differential and favourable treatment to the memners of the Australian industry in Report 540.

2.43 In any event, having regard to provisions in the *Customs Act 1901*, the WTO Anti-Dumping Agreement, Federal Court jurisprudence and the Commission's Dumping and Subsidy Manual, there was no or isufficent evidence before the Commissioner at the time the Commissioner reported to the Minister that the Australian industry as a whole had incurred material injury.

Conclusion

2.44 Based on the evidence before the Commission at the time of reporting to the Minister there was insufficient evidence to make a finding of fact that the Australian industry as a whole, as opposed to part of that industry (e.g., Capral and possibly, but unlikely, G James and INEX) had incurred injury, including the nature and extent of any such injury.

2.45 For this reason Investigation 540 should have been terminated at that time. Further, the Commissioner could not have made a finding of fact in these circumstances supported by evidence that the Australian industry as a whole had incurred material injury. Consequently, The Commissioner could not have recommended to the

Minister that the Minister be satisfied of the matters that he was required to satisfied of, namely, that the Australian industry as a whole and not a part of that industry had incurred 'material injury' for the purposes of deciding to publish a dumping duty notice pursuant to sections 269TG(1(and (2) of the *Custosm Act 1901*.

2.45 The Minister, therefore, could not have been satisifed of the matters the Minister is required to be satisifed of under ss.269TG(1) and (2) of the *Customs Act 1901* in order to publish a dumping duty notice in respect of the GUC.

3. Ground 3 – Further findings on injury in Report 540

3.1 Section 7 of Report 540 sets out the Commissioner's findings of fact regarding injury incurred by the Australian industry during the injury period. Section 7.1 of Report 540 sets out a list of 'injuries' that the Commissioner asserts the Australian industry incurred. However, as noted earlier above the Commissioner does not identify what constitutes 'injury' to a domestic industry for the purposes of a dumping investigation. Consequently, it is unclear why certain items were included in the list when, arguably, they, of themselves, do not constitute 'injury', such as price depression or price suppression.

3.2 For example, price undercutting is an action taken by one entity in relation to the prices of another entity and, while such price undercutting may affect the entity the subject of price undercutting, price undercutting is the 'cause' of the effect on the other party, if any, and not the effect (i.e., injury) itself. This is addressed further at section 5.4 later below.

3.3 In any event, Section 7.3 of the Report sets out a number of findings and the finding regarding 'volume effects' were indexed as follows:

Period	**2016**	**2017**	**2018**	**2019**
Sales volume	100	101	102	98
Australian market size	100	100	106	105
Australian industry market share	100	101	96	93
Imports market share (all)	100	98	107	114
Malaysia market share (POI)	100	82	127	135

3.4 Based on these figures the Commissioner concluded that the Australian industry experienced a general decline in sales volume and reduced market share in an expanding market. However, these figures do not support that finding. That is, they do not explain why the Australian industry's sales volumes increased progressively until 2019 and then declined in a market that was progressively expanding, nor why its market share declined in 2018 but its sales volume increased.

Further there is no correlation between the market share of the product under investigation and the Australian industry's sales volumes and market share over the same period.

Obviously, further, more detailed analysis is required but that would be difficult because the Commission does not have sales volume data from the majority of members of the Australian industry and who are unlikley to provide it as past experience has demonstrated.

3.5 Nevertheless, based on information contained in Capral's Annual Reports and Table 14 in Section 7.3.1 of Report 540, the following Table has been prepared:

Table: Sales Volumes

Capral	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**
Sales Volume	**0.578**	**0.634**	**0.632**	**0.605**	**0.567**	**0.61**
Change %			**0%**	**-4.5%**	**-10.5%**	
Australian Industry from Table 14						
Change Volume		**100**	**101**	**102**	**98**	
Change %			**1%**	**2%**	**-2%**	

This Table demonstrates that Capral is losing sales volumes to other members of the Australian industry, at least in part. Consequently, it raises the question of to what extent, if any, did Capral lose sales volumes to exports of the GUC, as opposed to others, in a contracting market due to a decline in the Australian construction market during the injury period. This does not appear to have been investigated and may not have been able to be investigated due to the majority of members of the Australian industry providing relevant infomraion and evidence during the investigation.

3.5 Section 7.4 of Report 540 sets out findings on price depression as follows:

Period	**2016**	**2017**	**2018**	**2019**
Unit selling price	100	107	114	110

In other words, the Australian industry, based on the limited data referred to in section 2 of this application, unit selling prices purprtedly of the Australian industry increased over the period notwithstanding an apparent decline in market share in the

latter part of the injury period and a progressive increase in sales volume during the injury period apart from in 2019. In other words, there is no consistency between the indexed figures and no expanantion provided for such inconistency. This, presumably, precludes drawing conclusions from the indexed figures other than price depression does not appear to have occured during the injury period.

3.6 The Commissioner nevertheless claims that a counterfactual analysis suggests that price increases could have been higher in the absence of dumped exports of the product under investigation. No evidence is provided to support that claim or to what exent they could have been higher. The statement is speculative and seemingly an ambit claim unsuported by evidence, which does not take into account other competitive forces that may be operating in that market that a counterfactual analysis would not take into account,. Nor does it take into account the fact that the product under investigation and like goods are commodity products and increasing prices of commodity products in any market is notoriously difficult simply because it is a commodity product as is commonly attested. No market analysis, including obtaining information from market particpants, was mentioned in Report 540 or is contained on the public file that would support such a claim. Consequently, it is speculative and must be dismissed as such.

3.7 Section 7.4.2 of Report 540 sets out the findings on price suppression as follows:

Period	**2016**	**2017**	**2018**	**2019**
CTMS	100	107	116	116
Selling Price	100	107	115	112

3.8 This was based on data provided by Capral only and, consequently, it was found that "*Capral was prevented from raising its prices to recover increasing costs, such as the cost of metal*" and this, together with G James and INEX's data, demonstrated price suppression.

3.9 However, clearly Capral was able to increase its prices to recover its cost to make and sell. This was reflected in the Commissions findings such as in, for example, the Statement of Essential Facts and, importantly, in Capral's Annual Reports and Investor Presentations, including its acknowledgement that its contracts with customers ofter included a price adjsutment mechanisms to address changes in LME prices.

3.10 However, the issue is whether Capral was actually unable to increase its prices, whether to recover increased cost to make and sell or otherwise. That is, do Capral's Annual Reports disclose whether in fact Capral increased its prices and, if so, to what extent. This addressed later below.

3.10 in relation to G James and INEX, their's prices could and would be affected by a range of factors prevailing in the relevant Australian market, as would any other particpant's prices in an open competitive market. Precisely what those factors were and how and to what extent they affected G James and INEX's prices is not known because no data on these matters was provided by those entities during the course

of the investigation. Hence, no conclusion can be made on this issue in relation to these companies.

3.11 Consequently, the findings on price suppression and depression are unsustainable.

3.12 Section 7.5 of Report 540 sets out findings on profit and profitability. Reduced revenues and profit are the only measures of 'injury' to an industry and to members of that industry – that is why they are business, namely, to generate revenue and make profits for their owners (i.e., shareholders).

The findings on profit were as follows:

Period	**2016**	**2017**	**2018**	**2019**
Unit profit margin	100	82	0	-83

3.13 Again, this information was based on data provided by Capral. No explanation was provided as to why Capral's profit declined over the injury period or how it correlated with its price increases and sales volumes. Clearly, if prices are increasing and sales volumes are increasing, why is profit declining throughout the injury period unless something else is occurring, such as internal resturcturing and other similar costs. No explanation is provided.

3.15 Further, it is unclear why the findings on profit were presented as indexed figures. Capral's profits over the injury period are disclosed in its Annual Reports and, presumably, the financial statements filed with ASIC along with those filed by other members of the industry. That information is publicly available and, given that the proportion of their respective aluminiun extrusion business is a significant proportion to their total businesses, such information would or could be expected to reasonably reflect the economic performance of their aluminium extrusion businesses. Presumably the reason for not referring to such information is because the Commission was not in possession of such information with the exception of that relating to Capral.

3.16 In any event, it is unclear what relevance such indexed figures have to injury incurred by the Australian industry as a whole. Capral is one of nine members of that industry – a significant member but still only one. Whether or not it is profitable is not evidence of whether other members of the Australian industry have or have not been profitable during the injury period and, if not, why and to what extent and when. As set out earlier above, there was no evidence of any 'injury' incurred by the majority of members of the Australian industry during the injury period.

Conclusion

3.16 There was no evidence or insufficient evidence to support findings of fact that the Australian industry as a whole had been subject to price undercutting by the product under investigation or that the prices of the Australian industry had been subject to price suppression or price depression during the injury period or that the Australian industry had experienced a decline in sales volumes, revenues and profits during the injury period. In other words, there was insufficient evidence before the

Commissioner that the Australian industry as a whole had incurred injury during the injury.

4. Ground 4 – Information and evidence on the economic performance of Capral

4.1 In relation to Capral's economic performance on which the Commissioner' findings of injury incurred by the Australian industry seemingly depend, it is to be noted that a number of submissions were made in Investigation 540 regarding Capral's economic performance, copies of which are on the Commission's electronic public file: see Documents Nos. 50, 53, 56, 58, 60 and 62, amongst others, and Capral's responses. These submissions and their attachments form part of and are incorporated into this application.

4.2 Having regard to those submissions and, in particular, to Capral's balance sheet as disclosed in its Annual Reports, including in its 2020 Annual Report, the following observations are made regarding a company's economic performance and that of Capral:

(i) a company's economic performance may be calculated as follows:

(a) the revenues of a company are how much money it has earned on sales of goods and/or services over a finite period, usually twelve months, and disclosed in its annual accounts;
(b) the company's profits are then determined by deducting from that revenue the cost of goods sold over the same period; and
(c) this provides the gross profit of the company with the gross margin being the gross profit as a percentage of revenue,

all of which are factual matters disclosed in the company's financial records;

(ii) having regard to these simple economic indicators of a company's financial performance, the question is what are the company's potential sources of growth?;

(iii) essentially, there are four sources of growth, namely, sales growth through:

(a) selling more of the company's products or services;
(b) raising prices;
(c) selling new goods and/or services; and/or
(d) buying another company or business;

(iv) it must be noted that these are 'sources of growth' and not improving economic performance through reducing costs;

(v) having regard to these potential 'sources of growth', what was the position of Capral and the Australian aluminium extrusion market during the period 2016 to 2019?;

(vi) it seems to have consisted of the following according to Capral's Annual Reports and Investor Presentations over the injury period and for the financial year 2020:

(a) the Australian industry held approximately 60% of the Australian aluminium extrusion market and Capral held approximately 29% of that market in 2016, declining to 26% by 2019;
(b) 85% of Capral's business was in the supply of aluminium extrusions, which includes the products the subject of Investigation 540;
(c) its major exposure of its aluminium extrusion business was in the construction industry and, in particular, residential constructions in Australia;
(d) the construction industry was contracting over this period, including, in particular, residential constructions;
(e) in addition, in relation to high-rise residential construction fully manufactured windows were being imported in bulk instead of being assembled/manufactured in Australia – a trend that had already occurred in commercial office buildings;
(f) customers of suppliers of aluminium extrusions would also be affected by the contraction in the construction industry and changes in the residential market; and
(g) the Australian aluminium extrusion market was supplied by both imports and by locally produced product, with there apparently being excess production capacity in the local industry, at least according to Capral in its Annual Reports and Investor Presentations;

(vii) over this same period, Capral's profits had progressively declined. This progressive decline in profits, according to the Balance Sheets in its Annual Reports over this period, was due primarily to a decline in sales volumes and, consequently, sales revenues. It does not seem to have been due to incresing costs that were not recoverable because, as disclosed in its Annual Reports and as found by the Commission, Capral increased its prices in line with increased costs, at least until 2019;

(viii) what were the options available to Capral to arrest and reverse this decline in profits by growing sales revenues?;

(ix) increasing prices would not seem to have been an option. Aluminium extrusion products are a commodity product and it is notoriously difficult to increase prices for commodity products at any time let alone during a period of contracting demand. As noted, this would be especially difficult in a contracting market supplied by competitors from both imports and locally produced products;

(x) as increasing prices was seemingly not an option, the only option would appear to have been to increase sales revenues through increasing sales volumes;

(xi) given that Capral held a market share of approximately 26%, it would seem possible for it increase its market share. A number of possibilities would seem available to Capral, as well as others in the market, to increase sales volumes at the expense of competitiors. They are:

(a) first, successfully apply for the imposition of antidumping measures and, thereby, increase the prices of imports and, hopefully, of prices within the Australian aluminium extrusion market and/or enable Capral and other members of the Australian industry to take market share from imports. However, antidumping measures were in place for exports of aluminium

extrusions from a number of countries, but this does seem to have translated into either increased sales volumes or increased prices for Capral or other members of the Australian industry; and/or

(b) second, reduce prices to increase sales volumes. This appears to have been the strategy adopted in 2019 when, as noted by the Commission in the Statements of Essential Facts, Capral began to reduce its prices for aluminium extrusions. Presumably this, together with its imports from Indonesia, was undertaken to increase sales volumes and, therefore, sales revenues; and/or

(c) third, import aluminium extrusions from a country that was not subject to antidumping measures that could undercut prices in the Australian market. It apparently is common knowledge in the Australian market that Capral has been importing product from a country or countries not subject to antidumping measures for this purpose. No doubt the Commission has confirmed this by recourse to Australian Border Force's import database in Investigation 540. Presumably, such imports were undertaken by Capral in the expectation that competitively priced imports from Indonesia, which are not subject to measures, would not materially affect prices in the Australian aluminium extrusion market but increase its sales volumes, which the consequent effect on its balance sheet and profit and loss statement; and

(xii) it, therefore, would appear that Capral's economic performance over the 2016 to 2020 period reflected a company whose sales revenues was primarily dependent upon a single product, a commodity product (i.e. aluminium extrusions), whose sales volumes and prices were, in turn, dependent upon another market (i.e. the construction industry, in particular the residential construction industry), which market was contracting over this period but which subsequently expanded in 2020. Hence the decline in sales revenues until FY2020 and, consequent, losses until FY2020 when it returned to profit.

4.3 It is apparent, therefore, that this is what was the cause of Capral's economic performance over this period, namely, the normal 'ebb and flow of business' – that is, declining sales volumes in a contracting market with the consequent reduced sales revenues, reduced ability to cover costs to make and sell, in particular fixed costs, and, ultimately, reduced profits (i.e., losses) over the period. It was not the alleged injurious effects of dumped exports and could not have been. Antidumping measures were in place throughout this period in respect of exports of aluminium extrusions from China, Vietnam, Thailand and Malaysia, although some exports from Malaysia were exempt from such measures and there was no evidence that such measures were not effective.

4.4 It was a market unaffected by dumping because of the existence of those measures or, at least, there was no evidence of the Australian aluminium extrusion market being affected by exports of aluminium extrusions at 'dumped' export prices nor, if it was, to what extent. There has been no investigation by the Commission into whether the antidumping measures in force not having achieved their intended purpose of offsetting the injurious effects on a domestic industry through the effects of dumped exports, including in Review 544 that involved a review of the antidumping measures applying to aluminum extrusions exported from Malaysia. Consequently,

in the absence evidence to the contrary, it is reasonable to assume that the existing antidumpig measures were achieving their intended purpose of counteracting the injurious effects of dumping.

4.5 In addition**, attached** is a spreadsheet setting out Capral's economic performance over the injury derived from publcly avialable data, that is, from the financial information in Capral's Annual Reports available on its website and copies of which were provided to the Commission during the investigation and are on the public file. This spreadsheet speaks for itself but ultimately discloses that the issue concerning its economic performance (i.e., profit/loss) was largely due to internal cost factors and not to import competition including from the GUC. 4.6 This is also reflected in the following Table derived from information contained in Capral's Annual Reports, copies of which were provided to the Commission during the investigation:

	CAPRAL				
	2015	2016	2017	2018	2019
TOTAL REVENUE	402.81	425.21	449.18	455.60	419.17
GP %	36.49%	40.71%	37.63%	34.93%	34.91%
EBITDA %	1.26%	4.97%	4.38%	2.88%	4.76%
NP%	-0.62%	3.37%	2.87%	1.41%	-1.01%
BEP (Sales)	66.74	57.48	71.89	74.72	71.64

4.6 Consequently, it is reasonable to conclude that Capral's economic performance since 2016 reflected the usual 'ebb and flow' of business. Nothing more.

Conclusion

4.7 Capral seemingly incurred injury during the injury period in the form of reduced sales revenues from reduced sales volumes and,consequently, reduced profits, but such 'injury' was attributable to the normal 'ebb and flow' of business in a contracting market during the injury period but commenced to revive in 2020, which was reflected in increased sales volumes and profit. Further, as the above Tables demonstrate, Capral's economic performance was significantly affected by factors other than import competition, including from the GUC.

5. Ground 5 Causation

5.1 Section 8 of Report 540 addresses the issue of whether and to what extent 'dumping' of the GUC caused any material injury to the Australian industry and, at Section 8.2, refers to two alternate methods of assessing 'causation' were suggested by the Commissioner, namely, a 'coincidence' methodology and a 'but for' methodology. The Commissioner apparently opted for the 'but for' methodology, also known as a conterfacutal methodology.

5.2 Reference here also shouldbe made to Frontier Economics Pty Limited's report '*Economic framework for injury and causation analysis*' (April 2017), commissioned by the Commission and a copy of which is on the Commission's website: Economic framework for injury and causation analysis (industry.gov.au)

5.3 That report draws a clear distinction between 'injury' and 'causation':

> "*The injury analysis should draw a clear link between the factors causing injury and the impact on the Australian industry through to its impact on profit, and factors resulting from declines in profit such as a loss of investment (if relevant).*"

5.4 As 'dumping' consists of the product under investigation entering the commerce of the importing country (Australia) at prices (export prices) less than their normal value (domestic selling price in the country of export), it is that price (export price) that can only be the 'cause' of injury. It causes injury (reduced revenues and profits) by undercutting the prices of the domestically produced product (price undercutting), which, in turn, can cause the domestic industry to reduce its prices (price depression) or preclude it from increasing its prices in accordance with increased costs to make and sell (price suppression) and/or cause a loss of sales volumes for the domestic industry. If occurring, these then cause the domestic industry to incur reduced revenues and, consequently, reduced profits (injury). This is the causal link that needs to be established and is reflected in Article 3 of the WTO Anti-Dumping Agreement.

5.5 After considering volume effects and customer effects in Section 8.5 of Report 540, the relevance of which is unclear, the Commissioner proceeded to address price undercutting. Given the absence of participation of members of the Australian industry in the investigation, as well as other interested parties involved in the Australian aluminium extrusion market, it is difficult to understand on what information and evidence before the Commissioner that enabled it to assess whether price undercutting was in fact occurring in the Australian market and, if it was, by whom and to what extent and what effect, if any, it was having on the members of the Australian industry in their respective economic performance over the inury period. In the absence of relevant evidence, it would not seem possible.

5.6 Nevetheless, the Commissioner undertook an alaysis of price undercutting. In that analaysis the Commissioner considered that there were two levels of trade in the Australian market at which imports and locally produced goods competed:

> "*At the first level of trade, Australian industry is in direct competition with overseas producers of the goods for the supply of extrusions to Australian importers who are either involved in the distribution of imported goods onto the Australian market or transform the imported goods into other products, e.g. windows, doors.*
>
> *At the second level of trade, Australian industry competes against importers of the goods from overseas who sell those imports onto the Australian market.*" (Section 8.6 of Report 540, p. 98)

5.7 In assessing price undercutting at these levels of trade, the Commissioner relied upon data from:

- cooperating importers and exporters for goods from Malaysia;
- cooperating importers and exporters for Review No.544;

- cooperating importers and exporters for Continuation Inquiry No.543; and
- the Australian industry.

5.8 Given that the majority of members of the Australian industry (i.e., eight out of nine members) did not provide information and evidence of their respective pricing into the Australian market at any level of trade in any investigation, review or inquiry into aluminium extrusions[12], it is unclear precisely what data from the Australian industry is being referred to by the Commissioner. The only data possibly relevant would have been that rpovided by Capral.

5.9 Further, given the absence of such information and evidence from the majority of members of the Australian industry and from other participants in the Australian market (e.g. distributors, resellers, wholesalers, etc.):

- how was it possible for the Comissioner to compare prices at the first level of trade between imports and locally produced aluminium extrusions; and
- how was it possible for the Commissioner to assess whether and to what extent export prices of the GUC had 'flowed through' to prices at the second level of trade and competed with the prices of locally produced product at that level of trade,

as well as competition on pricing between members of the Australian industry? This was not explained by the Commissioner in Report 540, if in fact it was undertaken.

5.9 The only information and evidence referred to by the Commissioner is that that which was provided by Capral. This is not to doubt the veracity of such information and evidence from Capral of its prices in the Australian market, but Capral is neither the Australian industry nor the Australian market. Capral's prices may be consistent with those in the Australian market but that would require evidence as to prices in the Australian market to establish this and such evidence was not forthcoming nor, apparently, sought by the Commission during the investigation.

5.10 Further, it is to be noted that in Review 544 the Commission confined that review to whether the 'variable factors' (i.e., export prices, normal values and non-injurious price) had changed since the original investigation in 2016 (i.e., Investigation 362). That is, the scope fo the review of the antidumping measures in Review 544 did not extend to whether the product under review (i.e., aluminium extrusions) was causing injury to the Australian industry to enable the Commissioner to recommend to the Minister the extent by which, if at all, the variable factors should be altered to offset the injurious effects, if any, then being caused by the product under review being at the then 'dumped export prices'. Hence, there was no evidence sought and obtained in that review as to the economic performance of the Australian industry, which comprised of the same members as in Investigation 540, for the purposes of that review. Consequenlty, there was no evidence in Review 544 as to whether exports of the aluminium extrusions from Malaysia the subject to measures being reviewed

[12] For example, Investigations 540 and 541 and Review 544

were continuing to cause injury to the Australian indsutry. There, therefore, were no findings in that review that would or could be of relevance to Investigation 540.]

5.11 Notwithstanding the foregoing and after considering submissions by interested parties, including by Criterion, on price undercutting, the Commissioner stated that:

> "*At the first level of trade, the Commission compared Australian industry's prices to the prices paid by importers of the goods from the subject exporters. The basis of the price comparison relied on prices at Free into Store (FIS) delivery terms. FIS terms being the price which is inclusive of all costs arising to deliver a consignment to a customer, e.g. the actual cost of the goods purchased, importation costs, inland transport, customs duties. The Commission's analysis at this level of trade also had regard to specific examples provided by Capral in its application where it provided information relating to 6 customers who were also sourcing their supply from the subject exporters and Capral at the same time (otherwise known as dual sourcing).*
>
> *At the second level of trade, the Commission compared Australian industry's prices to the selling price at which imported goods were sold by importers onto the Australian market. At this level of trade, the selling prices are inclusive of all costs borne to bring those goods into store from a supplier and the seller's relevant selling, general and administration costs.*
>
> *The price undercutting analysis found that at either level of trade, Australian industry's prices were generally undercut by the price of the goods that were supplied by the subject exporters."* (footnotes omitted) (Section 8.6 of Report 540, pp.98 & 99)

5.12 References in this extract to "Australian industry's prices" can only be to Capral's prices as the Commission was not provided with information and evidence on pricing in the Australian market at any level of trade by any Australian particpant in that market other than Capral, as is evident from the Commission's public file and the documents on that file. Also as the Commission's actual analysis is contained in confidential attachments to Report 540, it is not possible to comment further other than to observe that absent relevant information verified through objective, probative evidence, it would seem not possible to make a finding that the prices at which the product under investigation entered the commerce of Australia undercut the prices of members of the Australian industry and, if so, to what extent and to what effect or whether members of the Australian industry were undercutting each other's prices. Nor would it seem possible to assess whether and to what extent that the prices at which the product under investigation entered the commerce of Australia 'flowed through' to the second level of trade and undercut the prices of members of the Australian industry or that members of the Australian idnsutry undercut each other's prices at that level of trade. Section 8.6 of Report 540 does not support such analysis having been undertaken or, for that matter, whether or to what extent the Commission investigated these issues with particpants in the Australin market other than Capral.

5.13 In circumstances where it is not possible to make a finding of fact supported by evidence that the product under investigation was undercutting the prices of the locally produced product of the Australian industry due to dumping, an assessment of the flow on effects from price undercutting, such as price depression, price suppression and reduced sales volumes, would not seem possible and apparently was not undertaken based on Report 540. That is, due to the absence of relevant evidence it would not seem possible to causally link the 'dumped' export prices of the product under investigation to any 'injury' incurred by the Australian industry in the form of reduced revenues and profits through price undercutting and through to price supression and/or depression and/or reduced sales revenues to 'injury' (i.e. reduced revenues and profits).

5,14 In addition, Criterion reiterates its submissions of 5 January 2021 (Document 26 on the Commissions's public file) on not only Capral's economic performance but also on 'price undercutting'. That is, Criterion reiterates its submissions that a variety of other factors were affecting Capral's economic performance and, in relation to price undercutting, even if the GUC were exported at un-dumped' export prices, such exports would still cause injury to Capral. There does not appear to be ananlysis of the extent by which injury would still be incurred by Capral if exports of the GUC were at 'undumped' export prices. Accordingly, to what extent, if any, price undercutting by the GUC because of 'dumping' is not known because it does not appear to have been any analysis. Consequently, it could not be known to what extent, if any, injury incurred by Capral can be attributed to 'dumping' of the GUC.

Conclusion

5.15 Due to the absence of evidence before the Commissioner at the time of reprting to the Minister as to prices in the Australian aluminium extrusion market for the subject goods, especially those of members of the Australian industry apart from Capral, it would not seem possible to causallly link 'dumped' export prices through to any 'injury' incurred by the Australian industry in the form of reduced revenues and profits, assumping there was evidence that the Australian industry as a whole had incurred injury, which there was not. Based on Report 540, such analysis appears not to have been undertaken.

6. Ground 6 Materiality

6.1 Given the absence of evidence or sufficient evidence that the Australian industry as a whole had incurred 'injury' during the injury period or causally linking any 'injury' to the product under investigation in Investigation 540, it is unnecessary to comment on whether any injury caused to the Australian indsutry as a whole by the product under investigation (i.e., that can be attributed to 'dumping') was 'material' does not arise.

6.2 Hence, no discussion is required other than to observe that the 'materiality' or otherwise of the injury the Commissioner claimed to have been caused to the Australian industry by the product under investigation due to dumping was not addressed or, to the extent that it was addressed in Section 8.11 of Report 540, it was not properly or adequately addressed.

6.3 That is, the Commissioner did not set out any criteria against which the injury claimed to have been incurred to the Australian industry was 'material' or, to the extent that it was 'material', that 'materiality' could be attributed to 'dumping' of the product under investigation. There is no such analysis.

6.4 The sole finding of 'materiality' was that:

"*the Australian industry would have been able to increase its prices in a market not affected by the goods exported at dumped prices. Such increases would have reflected positively on the Australian industry's revenue, profits and profitability over the investigation period."* (page 116)

6.5 As previously, noted a claim that the Australian indsutry could have increased its prices is mere speculation unsupported by evidence. Nor is it stipulated by how much the Australian industry could increase its prices and, importantly whether it would. Also, if the Australian indsutry did increase its prices, how this would flow through to increased revenues and profits, particularly when the avialble evidence, especially from Capral, was that any injury was due to sales volumes not prices. What effect would an increase in prices have on sales volumes and, consequently,revenues and profits? There also was apparently no assessment of whether the volume of exports of the product under investigation at dumped prices and the magnitude of the dumping margins was sufficient not only to cause injury but also to cause material injury.

6.6 Finally, as has been noted throughout this application, the majority of members of the Australian industry failed to participate in the Investigation 540 and provide information and evidence relevant to the investigation, resulting in a lack of evidence sufficint to make findings of fact supported by evidence that the Australian industry as a whole had incurred injury or the nature or extent of any such injury. In such circumstances, it is difficult to comprehend how the Commissioner could make any finding that any injury was caused by the product under investigation and, if it was, that the extent of such injury so caused by 'dumping' of the product under investigation was 'material'.

7. Conclusion

In light of the foregoing, the correct or preferable is that the Minister decide not to publish a dumping duty notice under ss.269TG(1) and (2) of the *Customs Act 1901* in respect of the GUC. That is, the decision to publish a dumping duty notice under ss.269TG(1) and (2) of the *Customs Act 1901* in respect of the GUC be revoked.

To reiterate, the grounds for why this is the correct or preferable decision are that there was no evidence or insufficient evidence that the Australian industry as a whole, as opposed to part thereof, incurred 'material injury' during the injury period.

In the absence of evidence of injury to the Australian industry as a whole, the issue of whether injury had been caused to the Australian industry during the injury period through the injurious effects of exports of the GUC at 'dumped' export prices cannot arise.

Nevertheless, the Commissioner's analysis in Report 540 failed to establish causal links between the GUC entering the commerce of Australia at 'dumped' export prices' and the 'injury' purportedly incurred by the Australian industry during the injury period.

Further, of those members of the Australian industry who cooperated and particpated in the investigation, primarily, Capral, the 'injury' seemingly incurred was due to other factors than import competition from the GUC according to their publicly avialble financial statements.

For these reasons, the Minister's decision to publish a dumping duty notice should be revoked and be replaced with the correct or preferable decision that a dumping duty notice not be published in respect of the GUC.

Customs Act 1901 – Part XVB

Aluminium Extrusions (Mill Finish) Exported to Australia from Malaysia

Findings in Relation to a Dumping Investigation

Public notice under subsections 269TG(1) and (2) of the *Customs Act 1901*[1]

Anti-Dumping Notice (ADN) No. 2021/033

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of mill finish aluminium extrusions, exported to Australia from Malaysia by:

- Press Metal Sdn Bhd;
- Milleon Extruder Sdn Bhd;
- LB Aluminium Sdn Bhd;
- Kamco Aluminium Sdn Bhd;
- Superb Aluminium Industries Sdn Bhd; and
- Genesis Aluminium Industries Sdn Bhd.

The goods the subject of the investigation (the goods) are:

Aluminium extrusions produced via an extrusion process, of alloys having metallic elements falling within the alloy designations published by The Aluminium Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill) (excluding all other surface finishes), whether or not worked, having a wall thickness or diameter greater than 0.5 mm., with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421 mm.

Further information on the goods:

The goods under consideration include aluminium extrusion products that have been further processed or fabricated to a limited extent, after aluminium has been extruded through a die. For example, aluminium extrusion products that have been worked (e.g. precision cut, machined, punched or drilled) fall within the scope of the goods.

The goods under consideration do not extend to intermediate or finished products that are processed or fabricated to such an extent that they no longer possess

[1] All legislative references are to the *Customs Act 1901* (the Act), unless otherwise specified.

the nature and physical characteristics of an aluminium extrusion, but have become a different product.

The goods are generally, but not exclusively, classified to the following tariff subheadings in Schedule 3 of the *Customs Tariff Act 1995*:

Tariff classification (*Schedule 3 of the Customs Tariff Act 1995*)			
Tariff code	**Statistical code**	**Unit**	**Description**
7604.10.00	06	Kg	Non alloyed aluminium bars, rods and profiles
7604.21.00	07	Kg	Aluminium alloy hollow angles and other shapes
7604.21.00	08	Kg	Aluminium alloy hollow profiles
7604.29.00	09	Kg	Aluminium alloy non hollow angles and other shapes
7604.29.00	10	Kg	Aluminium alloy non hollow profiles
7608.10.00	09	Kg	Aluminium tubes and pipes, not alloyed
7608.20.00	10	Kg	Aluminium tubes and pipes, alloyed
7610.10.00	12	Kg	Aluminium doors, windows and their frames and thresholds for doors
7610.90.00	13	Kg	Other aluminium structures and parts thereof

Table 1 Summary of tariff subheadings

These tariff classifications and statistical codes may include goods that are both subject and not subject to this investigation. The listing of these tariff classifications and statistical codes are for convenience or reference only and do not form part of the goods description.

The Commissioner reported his findings and recommendations to me in *Anti-Dumping Commission Report No. 540* (REP 540), in which he outlines the investigations carried out and recommends the publication of a dumping duty notice in respect of the goods. I have considered REP 540 and accepted the Commissioner's recommendations and reasons for the recommendations, including all material findings of fact or law on which the Commissioner's recommendations were based, and particulars of the evidence relied on to support the findings. The report is available at: www.adcommission.gov.au.

On 29 April 2021, the Commissioner terminated the dumping investigation into the goods exported from Malaysia by Superb Aluminium Industries Sdn Bhd.[2] *Termination Report No. 540* (TER 540) sets out the reasons for that termination. That report is also available at: www.adcommission.gov.au.

Particulars of the dumping margins and an explanation of the methods used to compare export prices and normal values to establish each dumping margin are set out below in Table 2.

[2] ADN No. 2021/034 refers.

Exporter	Dumping Margin (%)	Method to establish dumping margin
Kamco Aluminium Sdn Bhd	13.2	Weighted average export prices were compared with weighted average corresponding normal values over the investigation period in accordance with subsection 269TACB(2)(aa) of the *Customs Act 1901.*
LB Aluminium Sdn Bhd	4.9	
Milleon Extruder Sdn Bhd	13.1	

Table 2 Summary of dumping margins

I, CHRISTIAN PORTER, the Minister for Industry, Science and Technology (the Minister), have considered, and accepted, the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 540.

I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those goods and because of that, material injury to the Australian industry producing like goods might have been caused if the security had not been taken. Therefore under subsection 269TG(1) and section 45 of the Act, I DECLARE that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

(i) the goods; and

(ii) subject to section 45 and subsection 269TN(2) of the Act, like goods that were exported to Australia from Malaysia and entered for home consumption on or after 10 December 2020, which is when the Commonwealth took securities, following the Commissioner's Preliminary Affirmative Determination published on 9 December 2020, under section 269TD of the Act, but before the publication of this Notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been caused or is being caused. Therefore under subsection 269TG(2) of the Act, I DECLARE that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to the goods and like goods exported to Australia from Malaysia by Kamco Aluminium Sdn Bhd, LB Aluminium Sdn Bhd and Milleon Extruder Sdn Bhd.[3]

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped

[3] This declaration does not apply to Press Metal Berhad, Superb Aluminium Industries Sdn Bhd and Genesis Aluminium Industries Sdn Bhd for the reasons outlined in REP 540.

imports on prices in the Australian market in the form of price undercutting and the consequent impact on the Australian industry including:

- reduced sales volume;
- reduced market share;
- price depression;
- price suppression;
- reduced profits and profitability;
- reduced revenue;
- reduced return on sales;
- reduced capacity utilisation;
- reduced employment numbers; and
- reduced wages.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor (or factors) other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export prices, non-injurious prices, and normal values of the goods (as ascertained in the confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how measures and/or securities are applied to 'goods on the water' is available in ACDN 2012/34 at: www.adcommission.gov.au.

REP 540 and other documents included in the public record may be examined at the Anti-Dumping Commission office by contacting the case manager on the details provided below. Alternatively, the public record is available at: www.adcommission.gov.au.

Enquiries about this notice may be directed to the case manager on telephone number +61 3 8539 2418 or by email at: investigations3@adcommission.gov.au.

Dated this 31 day of 05 2021

CHRISTIAN PORTER

Minister for Industry, Science and Technology

JUDGMENT No. 92 / 91

CATCHWORDS

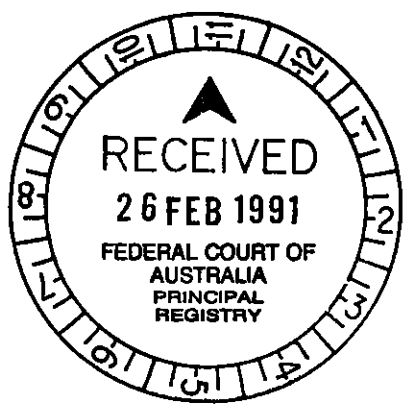
ADMINISTRATIVE LAW - Failure to consider relevant considerations - Report under s. 9 of the *Anti-Dumping Authority Act* 1988 - Imposition of duty under s. 8 of the *Customs Tariffi (Anti-Dumping) Act* 1975 - Meaning of "an Australian industry" in s. 269TG of the *Customs Act* 1901 - Material injury to a regional market within the Australian industry - Relevance of GATT Anti-Dumping Code in interpretation of the anti-dumping legislation - Korean exports of clinker to Western Australia.

Customs Act 1901: s. 269TAC, s. 269TAE, s. 269TG
Customs Tariff (Anti-Dumping) Act 1988: s. 8
Anti-Dumping Authority Act 1988: s. 9, s. 10
Administrative Decisions (Judicial Review) Act 1977
Acts Interpretation Act 1901: s. 23
GATT Anti-Dumping Code

SWAN PORTLAND CEMENT LIMITED & COCKBURN CEMENT LIMITED v THE MINISTER FOR SMALL BUSINESS AND CUSTOMS & THE ANTI-DUMPING AUTHORITY

G 377 of 1990

LOCKHART J.
SYDNEY
26 FEBRUARY 1991



IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G377 of 1990
)
GENERAL DIVISION)

BETWEEN: SWAN PORTLAND CEMENT LIMITED and COCKBURN CEMENT LIMITED

Applicants

AND: THE MINISTER FOR SMALL BUSINESS AND CUSTOMS

First Respondent

THE ANTI-DUMPING AUTHORITY

Second Respondent

JUDGE MAKING ORDER: LOCKHART J.

WHERE ORDER MADE: SYDNEY

DATE ORDER MADE: 26 FEBRUARY 1991

MINUTE OF ORDER

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicants pay the costs of the respondents.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G377 of 1990
)
GENERAL DIVISION)

BETWEEN: SWAN PORTLAND CEMENT LIMITED and COCKBURN CEMENT LIMITED

Applicants

AND: THE MINISTER FOR SMALL BUSINESS AND CUSTOMS

First Respondent

THE ANTI-DUMPING AUTHORITY

Second Respondent

26 February 1991

REASONS FOR JUDGMENT

LOCKHART J.

The applicants, Swan Portland Cement Limited ("Swan") and Cockburn Cement Limited ("Cockburn"), manufacture cement clinker ("clinker") for their own use in the production of cement. They also manufacture cement. The clinker is produced in the main from local sources. The applicants are the sole manufacturers of clinker in Western Australia and they do not export any part of the clinker or cement they produce.

Until about April 1987 the applicants were the sole suppliers of cement in Western Australia. In about April 1987 Merman Pty. Limited ("Merman"), a Western Australian company trading as Atlas Cement, commenced to import supplies of clinker from the Republic of Korea ("Korea"). Merman has also since about April 1987 manufactured and sold cement in Western

Australia and has used the imported clinker from Korea for use in its cement manufacturing operations.

Clinker is a manufactured product of a pellet type made from calcium carbonate or limestone to which is added other materials. It is then fired in a kiln to a very high temperature and produces little round pellets called clinkers. Portland cement is made from clinkers by grinding them with gypsum.

On 24 December 1987 Swan and Cockburn lodged with the Australian Customs Service ("ACS") an application for the imposition of anti-dumping duties on imports of clinker supplied to Merman by the Korean exporter, Ssangyong Cement Industrial Company Limited of Korea ("the exporter"). A third party, ITC Australia, joined in the application. The three parties alleged that the exporter was supplying clinker at dumped prices and that the dumped imports of clinker from Korea were causing material injury to the Western Australian industry. In the application the three parties estimated Merman's level of imports of clinker to be approximately 66,000 tonnes per annum and stated that sales of cement in Western Australia were approximately 550,000 to 600,000 tonnes per annum.

ACS decided to hold an inquiry into the complaint. On 2 March 1988 ACS published a formal notice of the initiation of the inquiry. Subsequently ACS sought certain information from Merman. Merman responded by applying to this Court for orders

staying the inquiry, but the application failed: see *Merman Pty. Limited v Comptroller-General of Customs* (Lee J., 16 September 1988). In the meantime the inquiry proceeded and on 31 August 1988 ACS published its preliminary finding in which it concluded, inter alia, that:

1. there was sufficient evidence to indicate that the imports of clinker from Korea had been exported at dumped prices;

2. the margins of dumping were significant;

3. there was a regional impact (i.e. in Western Australia) of the dumped clinker from Korea of sufficient severity to constitute material injury to the Australian industry producing clinker; and

4. there was a threat of material injury to the Australian industry producing clinker from future imports of clinker at dumped prices from Korea.

The report recommended that, as an interim measure, "provisional anti-dumping measures should be imposed at a level sufficient to relieve the material injury caused by the imports of cement clinker at dumped prices from the Republic of Korea".

On 1 September 1988 the *Anti-Dumping Authority Act* 1988 ("the *Anti-Dumping Authority Act*") came into operation. That Act

established the Anti-Dumping Authority ("the Authority") which consists of a single member appointed by the Governor-General with the functions set out in s. 5 of that Act. Those functions include preparing and giving to the Minister reports under s. 9 of the Act. Section 9 provides:

> *"9(1) The Minister may, by notice in writing delivered to the Authority, request the Authority to consider, and prepare and give to the Minister a report on, an anti-dumping matter specified in the notice, and the Authority shall comply with the request as soon as practicable.*
>
> *(2) The Authority may, where it considers it appropriate to do so, consider, and prepare and give to the Minister a report on, any anti-dumping matter."*

Section 10 of the *Anti-Dumping Authority Act* provides that, without limiting the matters to which the Authority may have regard in performing its functions:

> *" ... the Authority shall, in performing its functions and exercising its powers, have regard to:*
>
> *(a) the Commonwealth Government's policy in relation to anti-dumping matters; and*
>
> *(b) Australia's obligation under the General Agreement on Tariffs and Trade;*
>
> *not to use the imposition of duties under the Anti-Dumping Act to assist import competing industries in Australia or to protect industries in Australia from the need to adjust to changing economic conditions."*

On 1 September 1988 the Minister for Small Business and Customs, pursuant to the Minister's powers under s. 9(1) of the *Anti-Dumping Authority Act*, requested the Authority to prepare a report as to whether duty should be imposed under s. 8 of the *Customs Tariff (Anti-Dumping) Act* 1975 (*"the Anti-Dumping Act"*) on clinker exported from Korea.

The Authority commenced its inquiry, received submissions from and conferred with representatives of interested parties including Swan and Cockburn.

The Authority issued its report No. 1 on 23 December 1988 ("Report 1") in which it found that:-

(a) clinker had been dumped from Korea in Australia, the export prices of the five shipments landed in Australia in 1987-88 having ranged from 58% to 83% of their normal value in Korea;

(b) the Australian industry producing "like goods" to the dumped imports was the industry producing clinker;

(c) the question whether goods had been dumped must be determined with reference to the Australian clinker industry "taken as a whole", and not only to the West Australian market;

(d) the imports had caused material injury to the Western Australian industry consisting of the applicants, but not to the Australian industry as a whole; but that the Australian industry taken as a whole had suffered some degree of injury; and

(e) it be recommended to the Minister that he accept an undertaking from the exporter that it would not in future export clinker to Australia at an export price less than $33.97 per tonne FOB or as may be determined from time to time pursuant to s. 4A of the *Anti-Dumping Act*.

On this basis the Authority recommended that the Minister suspend indefinitely his consideration of whether a declaration should be made under s. 8 of the *Anti-Dumping Act*.

On 5 January 1989 the Minister adopted the recommendations of the Authority. He accepted the undertaking from the exporter and no further action was taken on the complaints.

On 2 February 1989 a second proceeding was commenced in this Court (the first proceeding being the one heard by Lee J.) when the applicants filed an application to which the Minister and the Authority were respondents. The applicants sought a review under the *Administrative Decisions (Judicial Review) Act* 1977 ("*the Judicial Review Act*") of the decision of the Authority to make the recommendations set out in its report and the decision of the

Minister to accept those recommendations.

One of the grounds relied on by the applicants in the proceeding which was heard by Wilcox J. was that the method by which the Authority fixed the value of NIFOB was erroneous. NIFOB (meaning a non-injurious free on board price) is a price constructed by the Authority or by the ACS, as the case may be, which if charged by the exporter to the importer would put the importer on an equal footing with the Australian manufacturers. It is referred to as NIFOB because it is a price which is non-injurious to the Australian industry. His Honour regarded this as the critical decision made by the Authority. Wilcox J. found that the Authority had assessed the NIFOB wrongly and he commented that "the critical task (i.e. for the Authority in reconsidering the case) will be the rethinking of the NIFOB". His Honour held that in this respect the recommendations of the Authority and the decision of the Minister were "legally flawed", and he ordered that the Authority's minute of recommendation and the Minister's decision to adopt it be set aside and the matter referred back to the Authority for further consideration.

The Authority then considered further the question whether a dumping duty notice should be published in respect of the clinker.

The Authority reconsidered the matter and presented a further report to the Minister in report No. 21 of May 1990

("Report 21").

Report 21 comprises some 30 pages divided into the following chapters: 1 "Summary, General Comments and Recommendation"; 2 "Background"; 3 "Previous Inquiries into Clinker from Korea"; 4 "Federal Court Case"; 5 "Material Injury"; 6 "Non-Injurious Free-on-Board Price" and 7 "Conclusions".

The report contains many statements and findings which are material for the purposes of the present case, but it is not necessary to set them out in full. I shall, however, in the course of dealing with the submissions mention some of the contents of the report. It is helpful to set out chapter 1 "Summary, General Comments and Recommendations" in so far as it bears on the present case; the relevant parts extracted from that chapter are as follows:

> *"Specifically, the Court found that the Authority had assessed the NIFOB wrongly. The Court commented that 'the critical task [for the Authority, in reconsidering the case] will be the rethinking of the NIFOB'. The judgement makes it clear that the Court did not expect the Authority to have to revisit other major issues, such as the question of material injury to the domestic industry.*
>
> *The present report results from the Authority's further consideration of the matter.*
>
> *One effect of the Federal Court's decision was that the exporter was released from its undertaking. Following the court decision the Korean exporter advised the Authority that it was not prepared to offer a new*

undertaking until the Authority had established that the Australian cement industry, taken as a whole, had suffered material injury as a result of imports from Korea.

Because of the withdrawal of the offer of the undertaking the Authority has had to address the question of material injury. To simply rework the NIFOB, as the Federal Court suggested, when the Minister would be powerless to impose dumping duties (because material injury or the threat of material injury had not been established) or to accept an undertaking (which, for the same reason, would not be offered) would be merely academic. This point is explained more fully in Chapter 4.

The Authority, in conducting this inquiry, has initially examined the impact imports from Korea had on the Western Australian industry, before considering any impact on the Australian industry. The results are discussed at Chapter 5, 'Material Injury'.

From its examination of information provided by the industry, the Authority considers that the industry in Western Australia improved its position markedly in 1989. Sales increased by 4.3 per cent compared to 1988, and the industry moved from a high loss in 1988 to almost break-even in 1989. While both Cockburn's and Swan's production of clinker fell in 1989, the Authority notes that both firms converted 'swing' kilns from clinker to lime production during the year, owing to the increase in local demand for lime. As a result both firms' capacity to produce clinker fell in 1989 - and both imported clinker to meet the demand for the finished product, cement.

Imports of clinker from Korea dropped a little in volume between 1988 and 1989 - by about 2.5 per cent. More importantly they fell from 51 per cent of total imports into Australia in 1988 to 25 per cent in 1989.

The Authority has concluded that the Western Australian clinker industry is not now suffering material injury from the entry of dumped clinker from Korea.

The Authority also examined the impact of imports from Korea on the Australian industry. The Authority notes that the Australian cement industry has been experiencing buoyant conditions and that Australian production of cement in 1989 was a record. The Authority understands that several major suppliers had difficulty in keeping up with demand and that some firms had to ration supply to their customers. It is apparent that the Australian cement industry is doing well and the Authority is quite unable to conclude that the industry, as a whole, is suffering material injury from the dumped imports of clinker.

The Authority does not consider that there is a 'clearly foreseeable and imminent' threat of future material injury to the Australian industry from imports of cement clinker from Korea.

The Authority has spent considerable time and effort examining the impact of clinker imported from the Republic of Korea on the Australian cement industry. This examination has led the Authority to the clear conclusion that dumped exports of clinker from Korea have not caused and are not threatening to cause material injury to the Australian industry producing like goods. Given that conclusion, it would be quite improper for the Authority to recommend anti-dumping action to the Minister; and the Authority will make no such recommendation.

The Authority understands that substantial investment is being planned by a company or companies within the Australian cement industry, and that some players in the industry are concerned that investment of that sort may not be viable if clinker continues to be dumped on the Australian market (more details are at Confidential Attachment 9).

The Authority has borne these views in mind in assessing (as it must, in law) whether or not there is a 'clearly foreseen and imminent' threat of material injury. As noted above, it has concluded that no such threat exists. It now notes, however, that it will of course have no hesitation in

recommending anti-dumping action if, at some time in the future, the prerequisites for such action are satisfied: that is, if dumping can be demonstrated to be causing or threatening material injury to the Australian industry.

Partly in that context, and partly because the Federal Court considered that 'the critical task [before the Authority] will be rethinking of the NIFOB', Chapter 6 of this report discusses the principles by which the Authority would be guided should the calculation of a NIFOB for cement clinker become necessary. The Authority hopes that this discussion will assist producers, exporters and importers in their planning.

The Authority recommends that the Minister for Small Business and Customs take no action under section 269TG of the Customs Act 1901, formerly section 8 of the Customs Tariff (Anti-Dumping) Act 1975, on imports of cement clinker from the Republic of Korea."

Report 21 contains the conclusions of the Authority at page 29 in these terms:

"The ADA concludes that:

- *there have been exports of cement clinker to Australia from the Republic of Korea at dumped prices;*
- *the Western Australian industry is not currently suffering material injury arising from the entry of clinker from Korea at dumped prices;*
- *material injury has not been caused to the Australian industry producing cement clinker, taken as a whole, by reason of the entry of clinker from Korea at dumped prices;*
- *there is no foreseeable and imminent threat of material injury to the Australian industry producing cement*

clinker, taken as a whole."

There are certain attachments to Report 21 which were confidential. I need not refer to them.

The recommendation of the Authority that the Minister take no action on the importing of clinker from Korea was accepted by the Minister on about 13 June 1990.

On 11 July 1990 the applicants commenced the present proceeding by filing an application for review of the recommendation and decision of the Authority and the decision of the Minister to accept the recommendation.

The applicants seek: a declaration that they constitute an Australian industry within the meaning of s. 269TG of the *Customs Act* 1901 (*"the Customs Act"*); orders setting aside the recommendation by the Authority in report 21 and the decision of the Minister to accept the recommendation from the Authority; and certain consequential directions and orders.

I referred earlier to ss. 9 and 10 of the *Anti-Dumping Authority Act*. Other relevant statutory provisions commence with s. 269TG of the *Customs Act* which provides that subject to s. 269TN (which is not relevant for present purposes), where the Minister is satisfied as to any goods that have been exported to Australia, that:

> *"(a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and*
>
> *(b) because of that:*
>
> *(i) material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered; or*
>
> *(ii) ...*
>
> *the Minister may, by notice published in the Gazette, declare that s. 8 of that Act [i.e. the Anti-Dumping Act] applies to those goods."*

Section 269TAC of the *Customs Act* makes provision for the "normal value" of goods and, amongst other things, defines that expression in the context of the "normal value" of goods exported to Australia as being

> *"the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods."*

Section 269TAE deals with "material injury" to an Australian industry. It stipulates criteria to which the Minister may have regard in determining for the purposes of s. 269TG whether material injury to an Australian industry has been or is being caused or is threatened or would or might have been caused, or whether the establishment of an Australian industry has been

materially hindered, by reason of any circumstances in relation to the exportation of goods to Australia from another country (the country of export).

Section 8(5) of the *Anti-Dumping Act* empowers the Minister, by notice in writing signed by him, to direct that the dumping duty in respect of goods:

> *"is an amount to be ascertained by reference to the value, or to the weight or other measure of quantity, of the goods less the amount, if any, by which that amount exceeds the dumping duty that would be payable in respect of the goods under sub-s. (4), and the notice has effect accordingly."*

Section 8(5A) provides in that in exercising his powers under sub-s. (5) in relation to dumping duty in respect of goods, the Minister shall have regard to the desirability of ensuring that the amount of dumping duty in respect of those goods is not greater than is necessary to prevent the injury or a recurrence of the injury, or to remove the hindrance, referred to in paragraph 269TG(1)(b) or (2)(b) of the Customs Act, as the case requires.

The applicants attack the findings of the Authority made in Report 21 of May 1990 and the Minister's subsequent decision on a number of grounds. The primary submission of counsel for the applicants, and one which underlies the attack of the applicants on specific findings of the Authority in Report 21, relates to

the meaning of "an Australian industry" in the context of s. 269TG(1)(b)(i) of the *Customs Act*. Neither the *Customs Act* nor the *Anti-Dumping Act* contain any definition of the expression "Australian industry". The Minister must make a positive finding that, because of the dumping action, "material injury to an Australian industry producing like goods has been or is being or is threatened ...", as a necessary prerequisite to his being empowered to declare, by notice published in the Gazette, that s. 8 of the *Anti-Dumping Act* applies to the relevant goods.

Counsel for the applicants submitted that, although "an Australian industry" generally will be defined with reference to the industry as a whole in Australia, there may be circumstances where an isolated section of the Australian industry can be treated as "an Australian industry" for the purposes of s. 269TG.

It was argued that on the facts of this case, because the Western Australian clinker market is essentially a discrete market due to its distance from the rest of Australia and the substantial transport costs involved, it is to be regarded as the Australian industry for relevant purposes.

Reliance was placed by counsel for the applicants upon Article 4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the "GATT Anti-Dumping Code"), which provides so far as relevant as follows:

" *ARTICLE 4*
Definition of Industry

1. In determining injury the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that

(i) ...;

(ii) in exceptional circumstances the territory of a Party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market."

It was argued that the GATT Anti-Dumping Code applied to assist in the interpretation of Australia's anti-dumping legislation because the expression "Australian industry" is ambiguous and Article 4 may be resorted to for the purpose of

resolving the ambiguity.

Counsel for the applicants argued further that it was necessary to interpret "an Australian industry" in the way they suggested, for otherwise the purpose of the legislation, being to ensure that industries in Australia are not damaged by competition from foreign exports at prices lower than those realised in their domestic market, would not be fulfilled. The language involves a degree of flexibility and that flexibility, the applicants argued, was employed in order to enable identification of the relevant industry as one which is confined to the market in which the industry operates. This point was expanded by the applicants' use of a "pricing argument". In summary it went as follows:

(a) prices for goods in one market may be different from prices for the same goods in another market;

(b) the anti-dumping legislation necessitates reference to prices in the market in which the "Australian industry" in question operates (see s. 269TAE(1)(e), (2)(e) of the *Customs Act* and s. 8(5A) of the *Anti-Dumping Act*);

(c) the determination of dumping involves comparison of the normal value and the export price of the putatively dumped goods to yield a precise dumping margin;

(d) a precise calculation is also involved in calculating the amount of dumping duty in order to comply with s. 8(5A) of the *Anti-Dumping Act*;

(e) the process will work in the context of a more or less

discrete market when it is sensible to posit a domestic price and a level of export price; however, it becomes unworkable if the respondent's contention as to the meaning of "an Australian industry" is accepted; for, in that case, how can "the price" for the purpose of s. 269TAE(1)(e) of the *Customs Act* and s. 8(5A) of the *Anti-Dumping Act* be determined; and

(f) therefore the definition of "industry" must be congruent with the area (both economic and geographic) within which it is sensible to speak of a price, i.e. a market.

Relying on those arguments, the applicants submitted that Western Australia is to be regarded for the purposes of the clinker industry as a separate market and separate industry.

Counsel for the applicants did acknowledge that the judgment of Wilcox J. in the second round of this curial battle stood squarely in the path of the acceptance of his argument, but he submitted that his Honour was in error with respect to the interpretation of the expression "an Australian industry" and that I should not follow his Honour.

Wilcox J. found that the words "Australian industry" (see s. 269TG(1)(b) and 269TAE(1)) referred to the industry in particular goods in Australia as a whole; but his Honour said that this did not require that material injury be caused or threatened to each individual participant in the industry. He said that the expression is not limited to industries which

operate throughout the whole of Australia. His Honour said:

> *"The industry must be considered as a whole; a material injury to a part may constitute a material injury to the whole. Were it otherwise, a predatory dumper might, with impunity, 'pick off' one local manufacturer at a time. "*

His Honour rejected the argument of the applicants that an industry is "an Australian industry" within the meaning of the legislation if it is identifiable as a discrete industry which operates within Australia.

In my opinion, the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria. The difficulty seems to me to lie, not in defining the expression, but in determining on the facts of a given case whether a particular industry answers the statutory description of an Australian industry. The latter is not a question of construction; it is a question of identification by the relevant fact finding body, in this case, the Authority.

The determination whether material injury to an Australian industry producing like goods has been, or is being caused, or is threatened, is not an exercise of counting heads of markets, production or distribution centres or things of this kind. It

is essentially a practical exercise designed to achieve the objective of determining whether, when viewed as a whole, the relevant Australian industry is suffering material injury from the dumping of goods.

The present case raises the difficulties nicely. There is no dispute about the relevant market being the market in Western Australian for clinker. To say that the clinker industry must be regarded throughout Australia as a whole does not mean that the threat caused by dumping only in Western Australia and which may injure only the players in the market in Western Australia, cannot constitute material injury to the Australian clinker industry as a whole. Plainly it may where, for example, the continuance of the dumping may annihilate the West Australian industry. I find no difficulty with the proposition that an injury of this kind may constitute material injury to the Australian market as a whole. It depends on the facts of the case and inevitably it is a question of degree that involves balancing all relevant considerations and integers before concluding whether or not the dumping constitutes material injury to the Australian industry. For these reasons I reject the applicants' argument that it was necessary to interpret "an Australian industry" as they contended to achieve the purpose of the legislation of ensuring that industries in Australia are not damaged by competition from foreign exports at dumped prices.

I have considered the "pricing argument" put forward by the

applicants and reject it for three reasons. First, the term "industry" on its plain meaning does not have any geographical connotations and it certainly does not equate with the term "market". The term "industry" is defined in "The Shorter Oxford English Dictionary" as (relevantly) "a particular branch of productive labour, a trade or manufacture". "The Australian Commercial Dictionary", 5th Edition, defines "industry" as consisting of "a group of firms producing closely related and therefore competitive products". "A Dictionary of Economics", 4th Edition, Barnes & Noble, Inc. NY defines "industry" as being "a productive enterprise, especially manufacturing or certain service enterprises such as transportation and communications, which employs relatively large amounts of capital and labour. It is also used to identify a special segment of productive enterprise such, for example, as the steel industry". The "Dictionary of Business and Economics", The Free Press, defines it as a "specific branch of mining, manufacturing, or processing, in which a number of firms produce the same kind of commodity or service, or are engaged in the same kind of operation".

While the above definitions are by no means identical, in no definition is there a reference to geographical or market considerations. An industry, using its plain meaning, is defined only by the product involved. The description "Australian", when added to "industry"provides the only geographical reference in s. 269TG of the *Customs Act*.

Secondly, while it is true that the concept of "price" is important to the anti-dumping legislation, it is not accurate to say that, if you construe "Australian industry" as I have, then a price for the entire Australian industry must be found. I agree that it would be false to use a constructed average price. What must be considered is not a price but the prices of the goods in the markets that are within the Australian industry. Section 269TAE of the *Customs Act* states that the Minister may have regard to certain matters. Section 269TAE(1)(e) links price and Australian industry in the following terms:

> *"(e) the difference between:*
>
> *(i) the price that has been or is likely to be paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and*
>
> *(ii) the price that has been or is likely to be paid for goods of that kind exported to Australia from the country of export and sold in Australia."*

"Price" is an economic concept that is referable to a market, not an industry. The market forces of supply and demand set a "price" for goods. Therefore to find the price it is necessary to look at the market or markets that comprise the "Australian industry". As a result the Minister may have to consider different prices for s. 269TAE(1)(e)(i) and different answers to the "differences between" (i) and (ii) of s. 269TAE(1)(e). This is not inconsistent with the *Customs Act*. Section 23 of the *Acts*

Interpretation Act 1901 makes it clear that, unless the contrary intention appears, words in the singular number include the plural. The "price" in s. 269TAE(1)(e) can easily be read (and often will be read) as "prices". Of course this may lead the Minister to determine that one market within the industry is being injured while others are not being injured, due to different pricing structures. The present case is an example of that difference of injury but as I have said, such a situation may still lead, in certain cases, to a determination by the Minister that the Australian industry is being materially injured.

Thirdly, once it is accepted that there may be different levels of injury determined under s. 269TAE(1)(e) then it is logical that different levels of dumping duty may have to be imposed on a foreign exporter depending on the market in which the goods are dumped. Section 8 of the *Anti-Dumping Act* allows dumping duty to be imposed pursuant to a s. 269TG of the *Customs Act* declaration equal to the amount by which the amount of the export price of the goods is less than the amount of the normal value of the goods. The level of dumping duty may be varied in accordance with s. 8(5) but s.s 8(5A) must be taken into account when this is done. There is no reason in s. 8 why the Minister has to impose one level of dumping duty. The Minister has the power to impose different levels of dumping duty in particular cases depending on the injury or injuries involved.

The GATT Anti-Dumping Code is not part of Australian municipal law. That does not mean that it cannot be considered by Australian courts. Section 10 of the *Anti-Dumping Authority Act*, as I have noted, requires the Authority, in performing its functions and exercising its powers, to have regard to Australia's obligations under the General Agreement on Tariff and Trade ("GATT") not to use the imposition of duties under the *Anti-Dumping Act* to assist import competing industries in Australia or to protect industries in Australia from the need to adjust to changing economic conditions. Therefore in the given context GATT is directly relevant to the operation of Australia's anti-dumping legislation. However, s. 10 of the *Anti-Dumping Authority Act* does not instruct or authorise the Authority to have regard to all of Australia's obligations under GATT. The section instructs the Authority to have regard only to a particular obligation. See *Atlas Air Australia Pty Limited v The Anti-Dumping Authority*, unreported, Federal Court NG401 of 1990, Wilcox J., 15 October 1990. The obligation referred to in s. 10 bears no relevance to the question of the meaning of "an Australian industry".

There is an established doctrine that an international agreement to which Australia is a signatory may be resorted to for the resolution of ambiguity in the interpretation of relevant Australian legislation: see *D & R Henderson (Mfg) Pty Ltd v Collector of Customs for the State of New South Wales* (1974) 48 ALJR 132 per Mason J. at 135; *Atlas Air Australia Pty Limited v*

The Anti-Dumping Authority (supra).

In my opinion, the term "Australian industry" in the context of "material injury to an Australian industry producing like goods" within the meaning of s. 269TG of the *Customs Act*, other provisions of that Act and the *Anti-Dumping Act*, is not ambiguous. It may not be easy in a particular case to identify a particular Australian industry, but that is not a problem of interpretation so much as applying facts to an ordinary English expression. The interpretation of the term "Australian industry" is clear and unambiguous. It bears the meaning which I have mentioned earlier.

In Report 1 the Authority took the view that it was required to consider whether material injury had been caused to the Australian clinker industry taken as a whole. It said that, although there was no question that the industry as so defined suffered some degree of injury because one part of it (Western Australia), amounting to perhaps ten per cent of the whole, had been injured, there was a real question as to whether the injury to the whole industry had been "material". The Authority pointed to the fact that the dumped goods had accounted for less than two per cent of the Australian market and that the loss of profits, while material to the Western Australian companies, amounted to only about 4 per cent of the profits of the whole Australian industry. The Authority said it would be reluctant to conclude that the imports had caused material injury to the Australian

industry as a whole and mentioned as one reason for this conclusion that, unless quite unusual circumstances existed, the Authority would not accept that there had been material injury where the domestic industry had the vast majority, and the dumped imports only two per cent, of the Australian market and where industry profits had dropped by only four per cent.

The Authority in Report 1 also pointed to the unusual features of the present case, namely, that there was practically no trade between Western Australia and other States and that all the dumped imports had come into Western Australia only. It stated that these features led to a peculiar danger. It said that "on the bald figures" there had not been material injury to the Australian industry taken as a whole, but that the dumped imports into the West could continue, and perhaps increase, to the point where the Western Australian industry could suffer very severe damage, still without material injury to the Australian industry as a whole. It said:

> *"A predatory exporter ... could then turn his attention to another of the essentially discrete markets within Australia. ... Such a scenario could lead the Authority to assess the 'injury' to the Australian industry as a whole as more severe than the bald figures would suggest."*

The Authority went on to say that this "scenario" appeared unlikely for various reasons and then considered a number of matters which it perceived as relevant. Finally the Authority

recommended to the Minister that the undertaking as to price offered by the exporter be accepted and that the Minister's consideration of whether or not a declaration should be made under s. 8 of the *Anti-Dumping Act* be suspended indefinitely.

When the Authority made its Report 21 of May 1990, following the judgment of Wilcox J., it proceeded to consider whether or not material injury existed to the Australian clinker industry. The Authority naturally took as its starting point where it had left off with the prior report and brought it up to date by considering the intervening events and their impact upon the period as a whole, viewed from the time the alleged dumping had commenced to occur. The Authority again took the view, reinforced by substantially the same approach taken by Wilcox J., that the relevant industry was the Australian clinker industry viewed as a whole. The Authority concluded that the dumped exports of clinker from Korea had not caused and were not threatening to cause material injury to the Australian industry producing like goods.

The Authority also concluded that the West Australian clinker industry, even if viewed separately from the rest of Australia, "is not now" suffering material injury from the entry of dumped clinker from Korea and it supported that conclusion with findings of fact.

I reject the arguments of the applicants that the Authority

wrongly regarded the relevant Australian industry as the Australian industry as a whole rather than an Australian industry constituted by manufacturers of clinker in Western Australia. For the reasons I have already given, in my view the Authority used the correct interpretation of the expression "Australian industry" in this country's anti-dumping legislation. I propose to follow the judgment of Wilcox J. It is the judgment of another single Judge of this Court and it should be followed unless I am convinced that the earlier judgment is plainly untenable. I in fact agree in substance with the judgment of Wilcox J. on this matter. See *Leary v Federal Commissioner of Taxation* 80 ATC 4012; *Marbutt Gunnerson Industries Pty. Limited v Federal Commissioner of Taxation* 81 ATC 4464 at 4468; *Zibillari v The Queen* (1980) 31 ALR 693 at 695, 703 and 704; *Re Athanassopoulos* (1982) 61 FLR 294.

Another reason for dismissing the arguments of the applicants is that the Authority concluded, in the alternative, that even if the Western Australian clinker industry is viewed separately from the remainder of Australia, it was not at the time of Report 21 suffering material injury from the entry of dumped clinker from Korea. This is a finding of fact which has not in my view been shown to be in error.

I turn to the more specific complaints of the applicants against the findings of the Authority in Report 21; but these complaints are subsidiary to the principal question which raises

the construction of the phrase "an Australian industry".

Counsel for the applicants submitted that, in carrying out its reconsideration of the anti-dumping questions following the orders of Wilcox J., the Authority erroneously considered the question of material injury to the Australian clinker industry by referring to and considering information, documentation and data only from the period of time commencing after the Australian industry had suffered material injury, rather than reconsidering the whole question of material injury by reference to and consideration of material also from the period of time commencing just prior to the commencement of the material injury alleged to be suffered by the Australian industry.

This question involves a close examination of both Report 1, before the judgment of Wilcox J., and Report 21 which followed it. I have carefully examined the two reports and I cannot find support for this contention. It is true that the Authority when commencing its second investigation, which culminated in Report 21, in one sense took the earlier report as its starting point, but it is plain that the Authority did not divide its consideration into the earlier and the later periods and regard the later period as the only relevant period without reference to the period preceding the first report. It seems plain to me that the Authority considered the whole period of time commencing before the alleged dumping occurred and concluding with its Report 21 of May this year.

Indeed, the Authority referred to the fact that Wilcox J.'s judgment made it clear that the Court did not expect the Authority to "revisit other major issues, such as the question of material injury to the domestic industry". But the Authority said that one effect of the Federal Court's decision was that the exporter was released from its undertaking and the exporter was not prepared to offer a new undertaking until the Authority had established that the Australian cement industry, taken as a whole, had suffered material injury as a result of imports from Korea. The Authority then went on to say, correctly in my view, that to simply rework the NIFOB would be merely academic. The Authority then proceeded to examine afresh the impact of the imports from Korea on the West Australian industry and considered any impact on the Australian industry as a whole, and considered in both cases whether there had been "material injury". This ground of attack is not made out.

The applicants next asserted that, in assessing the effect of dumping on the volume of production or sales by the applicants during the 1989 year, the Authority failed to consider whether the reason for alteration in the volume of production or sales was material injury caused by the dumped imports of clinker or the conduct of the applicants themselves for the purpose of alleviating or mitigating the alleged material injury to them.

The particular finding of the Authority which is relied on in support of this submission is the finding of the Authority in

its Report 21 that it considered the industry in Western Australia improved its position "markedly" in 1989. The Authority said:

> *"Sales [that is in the cement industry] increased by 4.3 per cent compared to 1988, and the industry moved from a high loss in 1988 to almost break-even in 1989. While both Cockburn's and Swan's production of clinker fell in 1989, the Authority notes that both firms converted 'swing' kilns from clinker to lime production during the year, owing to the increase in local demand for lime. As a result both firms' capacity to produce clinker fell in 1989 - and both imported clinker to meet the demand for the finished product, cement.*
>
> *Imports of clinker from Korea dropped a little in volume between 1988 and 1989 - by about 2.5 per cent. More importantly they fell from 51 per cent of total imports into Australia in 1988 to 25 per cent in 1989."* (see p. 2)

The Authority dealt with the matters pertaining to this submission specifically in Chapter 5 "Material Injury". I see no point in setting out the many detailed considerations and findings made there by the Authority. They speak for themselves. I can see no support for the argument of the applicants. The Authority appears to me to have given close and careful consideration to the reasons for the alteration in volume of production or sales of cement and to the relevance of the production of clinker by the Western Australian manufacturers, also considering the importation of clinker from Japan by both Cockburn and Swan in 1989 to supplement their local production. I reject this submission.

Next it was contended on behalf of the applicants that the Authority failed to consider whether or not prices charged by the applicants in 1989 were less than those charged in the period before the dumping of clinker; and also failed to consider whether or not the prices charged by the applicant in 1989 were affected by partial alleviation or mitigation of the alleged material injury suffered by them after the dumping of clinker commenced.

Again there is no substance in this submission. The prices charged by the applicants in 1989 and the reasons for them were closely considered by the Authority in Report 21 and its conclusions were reached after due consideration of all the material. I reject the submission.

It was then submitted on behalf of the applicants that the Authority failed to consider the losses made by the applicants in 1987 and failed to consider whether the profit results of the applicants in 1989 were or were not a result of continuing injury to the applicants resulting from dumped imports of clinker.

The Authority did consider the earlier losses made by the applicants and the profits made later. Further, the Authority did examine the reasons for the losses in the earlier year and for the profits of the 1989 year and these are spelt out in the report itself. There is no substance in this contention.

The final submission was that the Authority failed to assess the normal value of the clinker exported from Korea in compliance with the orders of Wilcox J. Again there is no substance in this contention because, as mentioned earlier, the Authority took the view, in my opinion correctly, that it had to examine initially the impact of imports from Korea on the Western Australian industry before considering any impact on the Australian industry as a whole. It took the view (page 2 of Report 21) that "to simply rework the NIFOB" when the Minister would be powerless to impose dumping duties or to accept an undertaking would be merely academic and this point was explained in detail by the Authority in Chapter 4 "Federal Court Case". I reject this submission.

Much of the criticism of the findings of the Authority is that the applicants would prefer the material to have been assessed differently from the way in which it was assessed by the Authority. This is the very activity in which the Court cannot engage when reviewing administrative decisions under the *Judicial Review Act*. The Court is limited to the grounds set out in the *Judicial Review Act* and involves the Court in the role, not of an initial fact finder, but of ensuring that errors of law have not been committed by the fact finding body and that natural justice has not been denied the applicant for review. This is a case where the Authority has given, so far as I can see, close and careful consideration to the complex facts surrounding the clinker and cement industries in Australia, in particular Western Australia, and has not been shown to have erred.

For these reasons the challenge to the Authority's decisions and the consequential decisions of the Minister fail. The application is dismissed with costs.

I certify that this and the preceding thirty-three (33) pages are a true copy of the reasons for judgment herein of the Honourable Mr. Justice Lockhart.

Associate 

Dated: 26 February 1991

Counsel for the Applicants	:	M.H. Tobias QC, B. Walker
Solicitors for the Applicants	:	C.G. Gillis & Co.
Counsel for the First & Second Respondents	:	C.J. Stevens
Solicitors for the First & Second Respondents	:	Australian Government Solicitor
Date of Hearing	:	30, 31 October 1990
Date of Judgment	:	26 February 1991

	2015	2016	2017	2018	2019	2020
Sales	402.64	424.81	448.68	455.1	418.956	432.009
Other Income	0.17	0.4	0.5	0.5	0.212	0.305
T O T A L R E V E N U E	**402.81**	**425.21**	**449.18**	**455.6**	**419.168**	**432.314**
Sales Volume	**0.578**	**0.634**	**0.632**	**0.605**	**0.567**	**0.61**
Revenue per ton	**696.61**	**670.05**	**709.94**	**752.23**	**738.90**	**708.21**
(-)						
COGS	237.01	242	268.65	284.4	260.587	266.419
Freight	10.33	11	11.52	12.05	12.237	12.038
Change in Inv	8.5	-0.9	-	-	-	-
G P	146.97	173.11	169.01	159.15	146.344	153.857
G P %	**36.49%**	**40.71%**	**37.63%**	**34.93%**	**34.91%**	**35.59%**
Variable OH	125.13	135.36	129.09	126.64	125.573	106.034
(-) Fixed Cost						
Depreciation	6.4	5.9	5.84	5.62	18.439	18.352
Finance cost	1.2	0.9	0.97	1.08	5.762	6.03
Òther fixed costs	16.75	16.6	20.24	19.4	0.81	0.569
N P	-2.51	14.35	12.87	6.41	-4.24	22.872
N P %	-0.62%	3.37%	2.87%	1.41%	-1.01%	5.29%
E B I T D A	5.09	21.15	19.68	13.11	19.961	47.254
E B I T D A %	1.26%	4.97%	4.38%	2.88%	4.76%	10.93%
T O T A L R E V E N U E	**402.81**	**425.21**	**449.18**	**455.6**	**419.168**	**432.314**
G P %	**36.49%**	**40.71%**	**37.63%**	**34.93%**	**34.91%**	**35.59%**
E B I T D A %	**1.26%**	**4.97%**	**4.38%**	**2.88%**	**4.76%**	**10.93%**
N P %	**-0.62%**	**3.37%**	**2.87%**	**1.41%**	**-1.01%**	**5.29%**
BEP	**66.74**	**57.48**	**71.89**	**74.72**	**71.64**	**70.11**
T O T A L R E V E N U E	402.81	425.21	449.18	455.6	419.168	432.314
% increase in Revenue		5.56%	5.64%	1.43%	-8.00%	3.14%
G P %	**36.49%**	**40.71%**	**37.63%**	**34.93%**	**34.91%**	**35.59%**
% increase in GP		11.58%	-7.58%	-7.16%	-0.05%	1.94%
E B I T D A %	**1.26%**	**4.97%**	**4.38%**	**2.88%**	**4.76%**	**10.93%**
% increase in EBITDA		293.63%	-11.92%	-34.32%	65.49%	129.53%
N P %	**-0.62%**	**3.37%**	**2.87%**	**1.41%**	**-1.01%**	**5.29%**
% increase in NP		-641.60%	-15.10%	-50.90%	-171.90%	-623.03%
BEP	**66.74**	**57.48**	**71.89**	**74.72**	**71.64**	**70.11**

	2015	2016	2017	2018	2019	2020
TOTAL REVENUE	402.81	425.21	449.18	455.6	419.168	432.314
Sales Volume	**0.578**	**0.634**	**0.632**	**0.605**	**0.567**	**0.61**
Revenue per ton	**696.61**	**670.05**	**709.94**	**752.23**	**738.90**	**708.21**
GP %	36.49%	40.71%	37.63%	34.93%	34.91%	35.59%
EBITDA %	1.26%	4.97%	4.38%	2.88%	4.76%	10.93%
NP%	-0.62%	3.37%	2.87%	1.41%	-1.01%	5.29%
BEP	66.74	57.48	71.89	74.72	71.64	70.11
TOTAL REVENUE	402.81	425.21	449.18	455.6	419.168	432.314
		5.56%	5.64%	1.43%	-8.00%	3.14%
GP %	36.49%	40.71%	37.63%	34.93%	34.91%	35.59%
		11.58%	-7.58%	-7.16%	-0.05%	1.94%
EBITDA %	1.26%	4.97%	4.38%	2.88%	4.76%	10.93%
		293.63%	-11.92%	-34.32%	65.49%	129.53%
NP%	-0.62%	3.37%	2.87%	1.41%	-1.01%	5.29%
		-641.60%	-15.10%	-50.90%	-171.90%	-623.03%