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15 September 2022

Ms Jaclyne Fisher
Panel Member
Anti-Dumping Review Panel
10 Binara Street,
Canberra ACT 2601

By email: ADRP@industry.gov.au

2 Julianne Close
Bolwarra Heights NSW 2320

ABN 45 298 991 137

Ph : +61 411 439 366

Fx: + 61 2 49301217

Email: GTRConsulting2006@outlook.com

Ref: ADRP-AL Ext- PM Submission

Re: Review 155 –Exports of Certain Aluminium Extrusions from Malaysia and Vietnam – Review of Ministerial Decision in Continuation Inquiry 591

Dear Ms Fisher,

I refer to the notice published by the Anti-Dumping Review Panel (ADRP) on 17 August 2022 advising of the initiation of a review (Review 155) of the decision of the Minister for Industry and Science (Minister) made under section 269ZH(1)(a) of the Customs Act 1901 not to secure the continuation of Anti-Dumping measures applying to certain aluminium extrusions exported from Malaysia and the Socialist Republic of Vietnam (Reviewable Decision).

I represent in this matter, Press Metal Aluminium (Australia) Pty Limited (PMAA), an Australian importer and distributor of aluminium extrusions exported from Malaysia; PMB Aluminium Sdn Bhd (PMBA), a Malaysian producer of aluminium extrusions, and their related bodies corporate (collectively Press Metal).

On behalf of my clients, I submit that the Anti-Dumping Commissioner's (Commissioner) recommendation and the Minister's decision not to secure the continuation of the Anti-Dumping measures applying to aluminium extrusions exported to Australia from Malaysia and Vietnam was the correct and preferable decision.

The Commissioner's recommendation, based on the reasons as set out in Report 591, that the measures be allowed to expire because he was not satisfied that the expiration of the anti-dumping measures would lead, or would be likely to lead, to the material injury that the anti-dumping measures are intended to prevent was the correct and preferable decision.

Further reason why measures should not be continued

While I concur that this was the correct and preferable decision, there is a further reason why the measures should not be continued. Based on the evidence before the Commissioner, a fair comparison of our client's exports of aluminium extrusions from Malaysia, that is, the inclusion of a level of trade adjustment, would accurately reflect that they were not being exported at dumped prices.

In Continuation Inquiry 591 (Inquiry 591) my clients provided evidence to the Anti-Dumping Commission (Commission), in support of the fact that its exports of aluminium extrusions from Malaysia were not being exported at dumped prices. This evidence was consistent with the evidence it provided in Investigations 362, 540 and 541, Review 544 and Accelerated Review 577 where a level of trade adjustment was allowed and made.

My clients reiterated their position in their submission in response to the Commission's Statement of Essential Facts 591 (SEF591).



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A major determining factor in the Commission's assessment of a dumping margin for our client's exports in Inquiry 591 was the Commission's change in methodology resulting in the disallowance of a legitimate level of trade adjustment between the comparable domestic and export sales of our client.

The Commission's changed methodology was inconsistent with its previous investigations and reviews relating to this matter, including for the same six-month period in Accelerated Review 577 as in Inquiry 591. In Investigations 362, 540 and 541, Review 544 and Accelerated Review 577, where a level of trade adjustment was allowed and made, that level of trade adjustment was agreed to and made by the Minister on the recommendation of the Commissioner.

At paragraph 6.3.10 of Report 591 under the heading 'Commission's assessment' it is stated:

"While PMBA has submitted that there is a difference, its calculations are based on a weighted average difference across all models. This approach introduces other variations (e.g. by finish type) which would lead to price differences which are unrelated to the level of trade, and so is not a relevant comparison. Instead, the commission takes the same approach to model matching, using the MCCs to compare normal values to export prices for the most comparable products, to examine whether there is a difference in pricing for levels of trade. For the largest volume MCCs, the commission found that there were no consistent or distinct differences in sales prices that would establish a real difference in the level of sales. (Underlining added).

This statement is factually incorrect in both what the Commission has stated as what:

1. *PMBA has submitted ... its calculations are based on a weighted average difference across all models.; and*
2. *the commission takes the same approach to model matching, using the MCCs to compare normal values to export prices.*

In actual fact, PMBA submitted an analysis of all sales in the ordinary course of trade (OCOT) on a weighted average (Wt. Avg) basis by Model Control Codes (MCC) and in total for the investigation period (IP). This is consistent with the methodology applied by the Commission in previous investigations and reviews relating to this matter and in determining and comparing normal values, export prices and dumping margins.

Changed methodology and introduction of 'materiality' test

However, model matching is not in question. It is the change in methodology the Commission used to arrive at a finding that there was an *'immaterial price differences between the claimed levels of trade'* and the introduction of a 'materiality' test specifically for this particular adjustment. The Commission applied a methodology based on a limited sampling of MCC and customers and included all sales for the selected customers including non-OCOT sales. The methodology should have been to analyse all OCOT sales on a Wt. Avg basis by MCC and in total for the IP, as consistently applied in the previous investigations and reviews relating to this matter. Instead, the Commission chose to limit its analysis to a sampling of four (4) MCC out of a total of 10 MCCs and seven (7) customers out of a total of over [REDACTED] customers.

This is not the approach taken by the Commission in determining and comparing normal values, export prices and dumping margins. In fact, it is quite the opposite, the Commission



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goes to great lengths to ensure it has been given all sales and cost data. In the calculations of normal values and export prices it does not consider only a sample of sales but all OCOT sales, in the case of normal values and all export sales to the relevant country.

Nor does the Commission apply any sampling (let alone minimal sampling) or a materiality test in calculating other adjustments, such as, a freight adjustment. Why did the Commission deem it appropriate to introduce a sampling and materiality test in the specific case of a level of trade adjustment for inquiry 591?

My client's position is supported by an Expert's Report (the non-confidential version of which is Document 33 placed on the Commission's Public Record on 3 May 2022) confirming my client's position that, when an appropriate and consistent analysis is undertaken, there is a difference in level of trade between retail and distributor prices and the proper application of a level of trade adjustment results in a de minimis dumping margin. I assume that the confidential version of the Experts Report with all attachments was provided to you by the Commissioner as per your request of him of 17 August 2022.

This report was before the Commissioner when he made his recommendation to the Minister and was based on the verified information provided to the Commission by my clients. However, the Commissioner did not take this report into consideration, stating in the Final Report to the Minister that:

"... submissions published after 1 May 2022. In the Commissioner's opinion, to have regard to these submissions would have delayed the timely preparation of this report."

To the contrary, the Expert's Report provided independent support and confirmation of the information and calculations already provided by our clients to the Commission in its Exporter Questionnaire Response and other submissions provided throughout the Continuation inquiry and indeed, was consistent with information provided to the Commission throughout earlier investigations and inquiries relating to this matter. That is, it contained no 'new information' but only a more fulsome and accurate analysis of that information consistent with the methodology of the Commission in past investigations, inquiries and reviews.

In any event, the Expert's Report highlighted the deficiencies in the Commission's analysis on this issue, which existed and continued to exist regardless of the Expert's Report. Further, those deficiencies were identified in earlier submissions on behalf of my clients in response to SEF 591.

Despite the evidence before it, the Commission maintained its position to not make a level of trade adjustment based on:

1. finding immaterial price differences between the claimed levels of trade; and
2. not being satisfied that the claimed retail division of PMBA only sells to customers representing one level of trade only.

stating in its Final Report to the Minister that:

"The commission was not satisfied that it should make a level of trade adjustment for the normal value in relation to domestic sales.⁶⁸ This was based on finding immaterial price differences between the claimed levels of trade. The analysis was conducted down to specific MCCs. PMBA has disputed this finding.



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The commission is not satisfied that the claimed retail division of PMBA only sells to customers representing one level of trade only. From the evidence and data provided, it appears that the sales are from a different location other than PMBA's main distribution site, and not necessarily confined to an actually distinguishable level of trade (i.e. the sales need not be exclusively retail sales, for example). " (underling added).

At no stage during verification or at any time throughout the continuation inquiry was the sufficiency of the documentation provided, nor what additional information or documentation may be required to determine a level of trade difference, raised with PMBA.

My clients first became aware of the Commission's denial of a level of trade adjustment when it received a copy of the draft exporter verification report (Verification Report).

However, the email with the Verification Report attached came with the rider that:

1. *As advised during the virtual verification, this opportunity is to identify errors or confidential information; and*
2. *If PMBA disagrees with any of the findings, then it should detail its views in a submission to the case manager once the report has been published.*

The Verification Report was published on 17 March 2022, one day before the SEF was published. The Commission did not respond to our client's submission in response to the Verification Report or SEF591.

Regarding the claimed 'immateriality' of the price differences between retail and distribution levels of trade and putting aside the fact that 'materiality' is not a relevant consideration for making an adjustment required by section 269TAC(8)(c) of the *Customs Act 1901* and Article 2.4 of the WTO Anti-Dumping Agreement, no measure was identified by the Commission as to how the 'materiality' or otherwise of such price difference was to be measured or on what basis. As the Expert's Report demonstrates, the application of the level of trade adjustment results in the dumping margin changing from a finding of dumping to one of no dumping. By any measure that is 'material' in a dumping investigation, as was submitted to the Commission. The Commissioner did not set out in Report 591 why that was not 'material' or that that was not the appropriate measure for determining materiality.

In addition, as was submitted to the Commission (Document 34), when the level of trade adjustment has been made, there have still been problems with the manner in which the adjustment was made. In particular, the percentage adjustment applied as a downwards adjustment to retail prices was erroneously calculated as a proportion of retail prices when it should have been as a proportion of distribution prices. That is, the downwards adjustment was undertaken by reference to a percentage calculated by dividing the difference between the weighted average OCOT unit prices of domestic retail and domestic distributor sales by the weighted average OCOT unit price of domestic retail sales. The correct approach is to divide that difference by the OCOT unit price of domestic distributor sales. The reason for this is because the margin between retail and distributor prices is being confused with the mark-up on the distributor price required in order for the distributor and retailer both to be competitive in the market.

In other words, the calculation adopted is not consistent with a "producer's approach", that is, PMBA in this case, in order to derive a selling price. Confidential Appendix 3 of the verification report (Confidential Appendix D-2 in the EQ Response) lists all domestic sales by PMBA to its customers who are at various levels of trade. Some are distributors and some



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are retailers. For simplicity of explanation, putting aside market influences, volume discounts, being a price taker, etc., when negotiating prices PMBA looks at its fixed and variable costs and a mark-up to determine at what price it will sell to each of its customers, retailers and distributors, that price must be a price that is acceptable to its customers so that the customers can be competitive in their respective markets and achieve a profit. If not, the customer would not agree to purchase.

Prices are not determined by looking at a higher price level, that is, a retail price and deduct from that a percentage to arrive at a lower price level, that is, a distributor price. However, that is the effect of the Commission's methodology that has been applied in making level of trade adjustments. It is self-evidently not correct

In other words, retailers do not compete with distributors at the distribution level of trade, but distributors compete with retailers at the retail level of trade. Hence from a producer's perspective in supplying distributors and retailers, it is the price to the distributor that the producer needs to ensure enables the distributor to compete with retailers on price, not the other way around.

The correct approach, therefore, is to calculate the percentage mark-up of the distributor price in order to derive the retail price, as opposed to the margin between the retail and distributor price. In Confidential Appendix 3 the individual sales to distributors are not directly comparable to the individual sales to retailers. The prices at each level are prices that have been marked-up by PMBA to arrive at an agreed selling price to its customers. To achieve a fair comparison, a unit weighted average percentage mark-up of the 'distributor price' is required to be calculated and that percentage mark-up be deducted from the retail price to arrive at a 'fair' level of trade adjustment.

The effect of correctly applying a level of trade adjustment as set out above is that the margin of dumping is a negative margin.

Sales at a retail level

Regarding the assertion that PMBA did not indicate to the verification team that the customers of PMBA's division JB (JB) were 'retailers', at no point prior to the SEF591 being published was the Commission's concerns regarding this matter raised with our client. The evidence shows that this assertion is factually incorrect. Numerous times throughout the online verification our client verbally explained that PMBA's JB division customers were a different level of trade to PMBA's other customers. Also during the online verification the verification team specifically asked for a revised Appendix D-2 to separately identify JB customers. This was provided to the Commission. Further, our client's Confidential Exporter Questionnaire Response (EQ Response) at E-5 1, page 26 included an adjustment claim for PMBA's JB division domestic sales by retail Level of Trade difference based on price difference rather than profit difference. The Commission's mind was clearly directed to the fact that JB division sold only to the retail level.

Throughout all previous investigations and reviews into this matter our client has reported that JB only sell at the retail level. This has been consistently accepted and a level of trade adjustment was allowed and made by the Commission up until Inquiry 591.

We are at a loss at the Commission's reliance on an 'appearance':

"... that the sales are from a different location other than PMBA's main distribution site;



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and

... not necessarily confined to an actually distinguishable level of trade (i.e. the sales need not be exclusively retail sales, for example)."

What is the relevance of an 'appearance' that the sales are from a different location and what is the relevance if they are? The fact is that the sales by JB are only at a retail level, a fact that has been established and accepted in all previous inquiries and reviews in relation to this matter and nothing has change before, during or after inquiry 591.

Neither the sufficiency of any documentation provided during the course of Inquiry 591 , nor what additional information or documentation may be required to satisfy the Commission that sales by JB are only at the retail level, was raised with PMBA, either during or since verification.

Had this been a concern during verification or at any time during Inquiry 591, it should have been raised with our client so that the concern could and would have been addressed. There is no evidence referred to In the SEF or Report 591 that suggests that sales by PMBA through its division JB were other than to 'retailers', only unsubstantiated speculation and suggests that the findings of the Commission in the other investigations and inquiries, including Accelerated Review 577 that covers the same investigation period in part as Inquiry 591, were incorrect as the Commission had insufficiently verified information concerning this issue. In any event, my clients confirmed to the Commission in Inquiry 591 that all sales were to distributors and none were to retailers. There was no basis to doubt the veracity of that confirmation.

Of course, if you consider it necessary, you may require the Commissioner pursuant to section 269ZZL of the Customs Act 1901 to reinvestigate his finding on this issue and report back to you. Should such a reinvestigation be undertaken, my clients would, of course, fully cooperate as they have done at all other times, but the 'evidence' that is required to confirm that there are no sales other than to retailers should be clearly identified at the outset.

I am happy to discuss further any of the above matters and request that if you have any questions regarding this submission, please contact me on 0411 439 366.

Yours faithfully,

GTR Consulting

Kevin Reilly

Kevin Reilly
Principal