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**Australian Government**

**Anti-Dumping Review Panel**

Anti-Dumping Review Panel  
C/O Legal Branch

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By EMAIL

Commissioner of the Anti-Dumping Commission  
Anti-Dumping Commission  
GPO Box 2013  
Canberra ACT 2601

Dear Commissioner,

## **ADRP Review No. 155 – Aluminium Extrusions exported from Malaysia and the Socialist Republic of Vietnam**

The Anti-Dumping Review Panel (Review Panel) is currently conducting a review of the decision by the Minister for Industry and Science made under section 269ZH(1)(a) of the *Customs Act 1901* (the Act) not to secure the continuation of anti-dumping measures applying to Aluminium Extrusions exported from Malaysia and the Socialist Republic of Vietnam (Vietnam) (the Reviewable Decision).

The Review Panel accepted an application for review from Capral Limited (Capral).

As you are aware, I am conducting the review.

Pursuant to s.269ZZL of the Act, I require the following finding in Report 591 (REP 591), relating to Capral grounds of review, be reinvestigated:

- The finding that material injury to the Australian industry is not likely to continue or recur in the absence of measures. 'This is because there is no demonstrable connection between:

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- the price advantage that dumping gives to exporters from Malaysian and Vietnam, and
- the economic condition of the Australian industry, specifically in terms of how it sets its prices, which is distinct from the influence of other sources'.<sup>1</sup>

### **Background:**

Capral's grounds of review relate to whether material injury will continue or is likely to recur in the absence of anti-dumping measures. It questions whether the finding relating to a demonstrable connection between the dumped pricing of the above-mentioned exports and material injury is correct and whether the Anti-Dumping Commission (ADC) has understood:

- the impact of the dumped prices in the Australian market;
- how the lag of movements in the London Metal Exchange (LME) primary aluminium price being reflected in the selling prices of Vietnamese and Malaysian exports results in the erosion of selling prices in the Australian market;
- the current price undercutting of Capral's prices, which it considers widespread;
- the ongoing low and dumped prices of exports from Malaysia and Vietnam which it considers continues to impact Capral's pricing; and
- the lack of analysis of prices from other sources in the market, when it is acknowledged that the aluminium extrusions market is price sensitive.

Capral's review application does not raise any grounds relating to the Commissioner's findings in regard to dumping of exports from Malaysia (except by Alumac) and from exports from Vietnam. Nor does it raise any ground regarding the finding that subsidisation of exports from Malaysia has not continued, nor is it likely to recur.

I provide below a summary of my reasons for making the request under s.269ZZL of the Act.

Pursuant to s.269ZHF(2) of the Act, the issue that must be addressed in the Commissioner of the Anti-Dumping Commission (Commissioner's) recommendation to the Minister relates to whether the Commissioner is satisfied that, if the measures expired, would it lead or be

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<sup>1</sup> REP 591 Section 1.2 Findings and recommendations, page 9.

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likely to lead to the continuation or recurrence of dumping or subsidisation and the material injury that the anti-dumping measures are intended to prevent. In REP 591 it is stated that:

*Based on this report, the Commissioner of the Anti-Dumping Commission recommends that the measures be allowed to expire as they are 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 measure are intended to prevent.<sup>2</sup>*

The Minister accepted the recommendation that the measures be allowed to expire (Australian Dumping Notice No. 2022/42 refers).

REP 591 also indicates that:

*The commission notes that its assessment of the likelihood of certain events occurring and their anticipated effect, as is required in a continuation inquiry, necessarily requires an assessment of a hypothetical situation. The Commission must consider what will in the future should a certain event, being the expiry of measures, occur. However, the Commissioner must nevertheless base their conclusions and recommendations on facts and not merely conjecture.<sup>3</sup> (my emphasis)*

### Price Analysis:

#### Non-injurious price (NIP):

I note that the Dumping and Subsidy Manual (December 2021 edition) specifically refers to undertaking a comparison of the ‘... prices of exports compared with the NIP and the unsuppressed selling price (USP)’ as one of the assessments that may be undertaken in the assessment of the likelihood of continuing or recurring injury in a continuation inquiry.<sup>4</sup> The NIP is the minimum price necessary to remove injury.<sup>5</sup> In circumstances where there is a high degree of price sensitivity in the market, an analysis of the NIP of exports relative to the selling prices of the Australian industry provides an indication of whether injurious dumping is occurring. It is acknowledged that this does not necessarily mean it is material injury.

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<sup>2</sup> REP 591, page 7.

<sup>3</sup> REP 591, page 62 citing ADRP Report No 44 (Clear Float Glass).

<sup>4</sup> Dumping and Subsidy Manual (December 2021) page 138.

<sup>5</sup> The NIP is not only used for the purposes of levying a lesser duty. In certain circumstances it may also provide a base for assessing the level of a non-injurious price.

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REP 591 contains no information on the assessment of the NIP for exports from Malaysia and Vietnam.

The ADC advised at the conference held on 14 September 2022 that it had considered the NIP in the Statement of Essential Facts No 591 (SEF 591) and this information is available.<sup>6</sup> Analysis of the NIPs of Malaysian and Vietnamese exports may provide additional price information regarding whether material injury is likely to continue or recur from dumped exports.

### Price Undercutting Analysis:

REP 591 describes the price undercutting analysis at two levels of trade. The first level of trade is said to be between exporters supplying Australia, that is, the price paid by importers to exporters together with the costs of exportation and importation, with the Australian industry's sales at weighted average free into store (FIS) selling price. Generally, the selling price with importation and exportation costs between the exporter and importer is referred to as the landed duty paid into store (LDPIS) cost.

The second level of trade is said to be the sales by importers (this includes the importers selling, general and administration costs (as well as profit)) which is said to be equivalent to the sales by Capral through its distribution network. Both analyses were undertaken for each of the different finishes of aluminium extrusions, noting that the mill finish was the largest volume of sales at the first level of trade during the inquiry period.<sup>7</sup>

At conference, certain information used by the ADC in REP 591 as part of the price undercutting analysis was found to have been compared at an incorrect level.<sup>8</sup> The comparison of the first level of trade selling prices in REP 591 reflected the selling prices of importers (onto the Australian market) rather than the exporters LDPIS cost to the importers. This appears to have impacted all the exporters assessed and would have implications for the analysis at both levels of trade. At conference, the ADC was unable to provide a view as to the impact on the price undercutting analysis for each of the levels of trade because of this comparison.<sup>9</sup>

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<sup>6</sup> Conference held with the ADC dated 14 September 2022 available on the public file.

<sup>7</sup> REP 591 Section 8.7 Will material injury continue or recur.

<sup>8</sup> Conferences with the ADC on 7 and 14 September 2022 outline the confidential price undercutting information referred to in this regard.

<sup>9</sup> Conference with the ADC on 14 September 2022.

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On this basis, it would be difficult for the Review Panel to rely on the price undercutting analysis outlined in REP 591 in considering the price impacts on material injury considerations, both in the inquiry period and as a factual base for the hypothetical future.

REP 591 included a hypothetical analysis of non-dumped prices on a monthly basis at the first level of trade (at confidential attachment 25). The prices used were distorted to some extent by the level of trade issue identified in the earlier analysis. Accordingly, this analysis also requires further consideration.

Capral's claims specifically relate to the price impact of the dumped exports from Malaysia and Vietnam in the Australian market. I note that the ADC did make the following observations regarding price in REP 591:

- ... *the rate of increase in the prices for like goods was less than the rate of increase of cost to make and sell (CTMS) from July 2017 to June 2019 during the period of analysis;*
- *CTMS then decreased from July 2019 at a steeper rate than prices over the same period;*<sup>10</sup> and

*The commission considers that the lower prices of exports from Malaysia and Vietnam are a relevant factor influencing the economic condition of the Australian industry, in terms of its ability to increase prices or compete on price in a price sensitive market.*<sup>11</sup>

The ADC also indicates, following its analysis of price undercutting, that, 'The commission confirms that its further analysis supports the view that the dumped prices are not having an observable effect on Australian industry prices'.<sup>12</sup>

The further analysis of price undercutting may assist in resolving these differences found in relation to the ADC's comments on price analysis.

### Pricing behaviour of importers and exporters:

The findings in REP 591 also include a comment regarding pricing behaviour by importers on which I express reservations:

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<sup>10</sup> REP 591 pages 31 – 32.

<sup>11</sup> REP 591 page 79.

<sup>12</sup> REP 591 page 81.

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*Taken together, this causes the commission to conclude that, in the absence of measures, there would likely be little change to pricing behaviours by exporters and importers.*<sup>13</sup>

While there is information in REP 591 baselining the exporters pricing behaviour since the imposition of measures, I could find no comparative information about importers pricing behaviour since the imposition of measures. It is therefore unclear on what basis the comment on pricing behaviour of importers is made, particularly in the context of future behaviour if the measures expire.

It is worth reflecting on the theory underpinning the impact of taking anti-dumping measures.<sup>14</sup> When dumping measures are imposed, it is expected that one of two behaviours result. Firstly, exporters will increase their prices to a non-dumped level increasing their own revenues and ceasing dumping. The domestic industry will no longer be subject to dumped prices and the market will return to one not affected by dumped prices as the exporter increases the price to the importer which flows through to the domestic market.

Alternatively, if exporters do not increase export prices, importers subject to dumping duties (to the extent of the dumping), will have additional costs (the dumping duty) and will respond by increasing their prices onto the domestic market to reflect the additional costs. Again, it is expected that the domestic market will no longer be impacted by the dumped exports as the prices will rise to a non-dumped level. The price in the domestic market is increased by the extent of the dumping margin.

It is not unexpected that an exporter's pricing behaviour may not change following the imposition of measures. However, the importer is expected to pass on increased costs associated with the anti-dumping measures and its pricing behaviour should change.

If the anti-dumping measures are removed, an importer can continue to price at the level established while anti-dumping measures were in place, thus achieving a higher return. Alternatively, an importer may decrease its prices by the removal of the anti-dumping

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<sup>13</sup> REP 591 page 9.

<sup>14</sup> For the purposes of this commentary, countervailing duties, circumvention, sales dumping, the duty collection method of interim dumping duties and final dumping duties and the lesser duty rules will be disregarded as they do not affect the underlying principle of the price behaviour associated with dumping of exporters and importers.

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measures and retain its existing margin. Which option an importer adopts is dependent on a range of business and market related factors.

In REP 591, analysis of the pricing behaviour of importers since the imposition of anti-dumping measures is not apparent. I also note that the analysis of prices of importers during the inquiry period is limited, as only one importer's information was verified during the inquiry.<sup>15</sup> In my view, it is not apparent how the ADC concluded that importers' pricing behaviour will not change with the expiration of measures. I acknowledge that there are a number of complexities associated with analysing prices in the aluminium extrusions domestic market. However, there must be a factual base to the consideration of what is likely to happen. Given the dumping theory outlined above, it is more likely than not, in a price sensitive market, that importers would change prices should the measures expire.

Given the reliance on the price undercutting analysis in REP 591 and in light of the issues identified with the ADC's analysis, it is difficult to form any conclusions on price impact of the dumped exports from Malaysia and Vietnam during the inquiry period or what is likely to happen in the future. Capral refers to the restraint the current anti-dumping measures are having in the market; this may require further consideration in light of the issues identified above. There are also comments in REP 591 that appear to suggest that prices are being impacted by the Malaysian and Vietnamese exports and that it is a price sensitive market. Further consideration of price impacts and whether material injury is likely to continue or recur if measures expire is required given these issues.

### **Whether material injury is likely to continue or recur if the measures expire:**

My colleague recently expressed the following comments in relation to continuation inquiry considerations in a reinvestigation letter to the ADC, with which I agree and consider relevant:

*A continuation inquiry does include a consideration of hypothetical injury. It is quite possible that the measures in place during the inquiry period are preventing material injury to the Australian industry. After all, that is what is intended by applying the measures and it is contemplated by s.269ZHF(2) in the reference to a recurrence of the material injury.*

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<sup>15</sup> REP 591 sent importer questionnaires to 12 importers and received responses from two importers, only one of these importers was verified, the other only provided partial information.

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*In the first instance decision of Justice Rares in Siam Polyethylene Co Ltd v Minister of State for Home Affairs [No 2]<sup>16</sup>, his Honour stated "... a review under Div 6A of Pt XVB is not intended as a complete replication of the process under Div 3 involved in the initial imposition of anti-dumping measures. But, the continuation review under Div 6A is still directed to the purpose of preventing material injury or the threat of such an injury caused by dumping."<sup>17</sup> While his Honour's decision was overturned on appeal, I do not read the judgment of the Full Court as disagreeing with this approach. It can be readily inferred that the legislative objective is to prevent such injury occurring or recurring.*

*Accordingly, I am concerned that the Commission, in its approach to the task to be undertaken in a continuation inquiry, may have misunderstood what is required. It is not sufficient simply to consider what has occurred during the inquiry period but based on the material and evidence obtained during the inquiry to consider what is likely to occur if the measures in place are not continued. This includes a consideration of what hypothetically may happen, including any material injury which may not be occurring during the inquiry period and the threat of such injury.<sup>18</sup>*

There are various references in REP 591 as to the downward pressure on prices being exerted by dumped goods and that it is a price sensitive market. The ADC indicates that it could not find direct evidence of the impact of the prices of such dumped exports on Capral's prices. This needs to be revisited in the context of:

- Capral's specific claims in its review application and its continuation application;
- the reviewed price undercutting analysis; and
- the price analysis of the NIP with the LDPIS prices from exporters and Australian industry FIS prices.

The ADC also sought to differentiate its findings in REP 591 from the material injury findings in Report 362 (REP 362). It did not consider the same price relationship was established in

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<sup>16</sup> [2009] FCA 838.

<sup>17</sup> As above at [41].

<sup>18</sup> Letter to the ADC from the Review Panel requiring a reinvestigation into exports of canned pineapples dated 12 January 2022.



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REP 591 as that found in REP 362 for injury purposes. It also noted the very different economic conditions apparent in the inquiry period in REP 591.<sup>19</sup>

I acknowledge the different economic conditions now apply but it would be appropriate to revisit the price relationship aspect given the possible changes to the price analysis as result of the further consideration.

In REP 591 there is a strong focus on the inquiry period with limited consideration of what is likely to occur if measures expire. This is evidenced by the reliance on the following finding:

*... as there was no demonstrable connection between the price advantage that dumping gives to exporters from Malaysia and Vietnam and the economic condition of the Australian industry, specifically in terms of how it sets its prices, which is distinct from the influence of other sources of the goods.*

It would also be important to consider possible scenarios associated with the expiration of anti-dumping measures in light of the reviewed price analysis.

Please report the result of the reinvestigation within 128 days, that is, by **10 February 2023**.

If you require more time, including time to allow interested parties the opportunity to comment on an aspect of the reinvestigation, please contact the Secretariat.

Thank you for your assistance.

Yours sincerely,



Jaclyne Fisher

Panel Member  
Anti-Dumping Review Panel  
5 October 2022

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<sup>19</sup> Conference with the ADC dated 7 September 2022 Question 6.