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 6 July 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: **Press Metal International Ltd**
Address: **No.21 Qili South Road,Leping Town,Sanshui District, Foshan City, Guangdong Province , China**
Type of entity (trade union, corporation, government etc.): **Corporation**

2. Contact person for applicant

Full name**: Paul Ingram**
Position:**Managing Director**
Email address: paul@pmaa.net.au
Telephone number: **+61 9756-5555**

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

Applicant is an 'interested party' because it is an exporter of aluminium extrusion products to Australia from the People's Republic of China.

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:

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), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness or diameter greater than 0.5mm, with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421mm.

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

Tariff Heading & Statistical Code	Description
7604.10.00 06	non alloyed aluminium bars, rods and profiles
7604.21.00 07	aluminium alloy hollow angles and other shapes
7604.21.00 08	aluminium alloy hollow profiles
7604.29.00 09	aluminium alloy non hollow angles and other shapes
7604.29.00 10	aluminium alloy non hollow profiles
7608.10.00 09	non alloyed aluminium tubes and pipes
7608.20.00 10	aluminium alloy tubes and pipes

7610.10.00 12	doors, windows and their frames and thresholds for doors
7610.90.00 13	other

8. **Anti-Dumping Notice details:**

Anti-Dumping Notice (ADN) number: **ADN No.2023/051**
Date ADN was published: **22 September 2023**

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:**

Please see Attachment A for each of the grounds on which the Applicant believes that the reviewable decision was not the correct or preferable decision.

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:**

Please see Attachment A for what, in the Applicant's opinion, is the correct or preferable decision resulting from each of the grounds set out in the responses to Question 9.

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

Please see Attachment A as to how each of the grounds set out in response to Question 9 support the making of the proposed correct or preferable decision in relation to each of those grounds on which it is believed the reviewable decision is not the correct or preferebale.

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 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

The proposed decision provided in response to question 10 is materially different from the reviewable decision for the reasons set out in Attachment A.

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

The following documents are attached to this application:

- **Attachment A to thi Application**
- **Anti-Dumping Notice (ADN) No.2023/051, published on 22 September 2023**

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: Paul Ingram

Name: **Paul Ingram**

Position:**Managing Director**

Organisation:**Press Metal Internationa Ltd**

Date**: 23 /October/2023**

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:N/A
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.

Signature: *Paul Ingram*
(Applicant's authorised officer)

Name: **Paul Ingram**

Position: **Managing Director**

Organisation:**Press Metal International Ltd**

Date: **23 /October/2023**

Australian Government
Department of Industry, Science and Resources

Anti-Dumping Commission

ANTI-DUMPING NOTICE NO 2023/051

Aluminium Extrusions

Exported to Australia from the People's Republic of China

Findings of Review No 609 into Anti-Dumping Measures

Notice under section 269ZDB(1) of the Customs Act 1901 and sections 8 and 10 of the Customs Tariff (Anti-Dumping) Act 1975

The Commissioner of the Anti-Dumping Commission (**the Commissioner**) has completed a review, which commenced on 8 August 2022, of the anti-dumping measures[1] applying to aluminium extrusions (**the goods**) exported to Australia from the People's Republic of China (**China**).[2]

The Commissioner's recommendations resulting from that review, reasons for the recommendations and material findings of fact and law in relation to the review are contained in *Anti-Dumping Commission Report No 609* (**REP 609**).

I, ED HUSIC, the Minister for Industry and Science, have considered REP 609 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts or law, set out in REP 609.

Under section 269ZDB(1)(a)(iii) of the *Customs Act 1901* (**the Act**), I declare that, for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975* (**Dumping Duty Act**), the dumping duty notice and the countervailing duty notice applying to the goods exported to Australia from China:

- with effect from the date of publication of this notice, are taken to have effect as if different variable factors had been fixed relevant to the determination of duty for particular exporters, namely all exporters except Qingyuan City Huanan Copper & Aluminum Co., Ltd (**Qingyuan**), Foshan Lvqiang Metal Product Co., Ltd. (**Foshan Lvqiang**), Antai Technology Co., Ltd (**Antai**) and Qingyuan XinYueYa Aluminum Industry Co., Ltd (**XinYueYa**).[3]

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[1] The anti-dumping measures are in the form of a dumping duty notice and a countervailing duty notice.

[2] Exports by Guangdong Jiangsheng Aluminium Co., Ltd and Guangdong Zhongya Aluminium Company Limited were not covered by this review, as the anti-dumping measures do not apply to these entities. Accordingly, this notice does not apply to these entities.

[3] I have accepted the Commissioner's recommendation in REP 609 not to alter the variable factors for Antai and XinYueYa. My declarations and determinations in this notice do not apply to Antai and XinYueYa. I

- with effect from the date of publication of *Statement of Essential Facts No 609*, being 8 June 2023, are taken to have effect as if different variable factors had been fixed relevant to the determination of duty for particular exporters, namely Qingyuan and Foshan Lvqiang.

Interim dumping and countervailing duty

I determine that in accordance with sections 8(5) and 8(5BB) of the Dumping Duty Act and the *Customs Tariff (Anti-Dumping) Regulation 2013* (**the Regulation**), the amount of interim dumping duty (**IDD**) payable on goods the subject of the dumping duty notice is an amount worked out in accordance with the following methods:

- for Goomax Metal Co., Ltd Fujian (**Goomax**), Guangdong Jinxiecheng Al Manufacturing Co., Ltd (**Jinxiecheng**), Guangdong Xingfa Aluminium Co., Ltd (**Xingfa**) and exporters categorised as 'residual exporters'[4] – the floor price duty method as specified in section 5(4) of the Regulation, and
- for Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd (**Kam Kiu**) and exporters categorised as 'uncooperative exporters', the combination of fixed and variable duty method as specified in sections 5(2) and 5(3) of the Regulation.

The amount of interim countervailing duty (**ICD**) payable on goods the subject of the countervailing duty notice in respect of all exporters will continue to be ascertained as a proportion of the export price of those particular goods.

Consideration of the lesser duty rule

In relation to Goomax, Jinxiecheng, Xingfa and Kam Kiu, in accordance with sections 8(5BAAA)(a) and 10(3DA)(a) of the Dumping Duty Act, I have not had regard to the desirability of fixing a lesser amount of duty, due to the situation in the market in the country of export.

In relation to those exporters categorised as 'residual exporters', 'uncooperative exporters' and 'non-cooperative entities', pursuant to section 8(5BA) and 10(3D) of the Dumping Duty Act, I have had regard to the desirability of specifying a method such that the sum of the ascertained export price, IDD and ICD does not exceed the non-injurious price of the goods. I have determined that it is not desirable to specify such a method, for the reasons the Commissioner recommended in REP 609.

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recently altered the dumping duty notice and countervailing duty notice to have effect as if different variable factors had been fixed for Antai and XinYueYa following accelerated reviews AR 618 and AR 619. I accepted the Commissioner's recommendations in REP 618 on 11 July 2023 (see ADN 2023/037) and in REP 619 on 31 July 2023 (see ADN 2023/039). The new variable factors for Antai were declared to have effect from 3 March 2023 and for XinYueYa from 24 March 2023.

[4] The residual exporters are listed at chapter 4 of REP 609.

Effective duties

The dumping and subsidy margins, the effective fixed rates of duty, and the duty methods are set out in the following table.

Exporter	Dumping margin	Subsidy margin	Effective fixed rate of ICD and IDD[5]	Duty method
Goomax	-7.5%	0.7%	0.7%	Fixed rate of ICD. Floor price duty method: Variable component of IDD equal to the amount, if any, by which the actual export price is below the ascertained normal value.
Jinxiecheng	-7.7%	0.0%	0.0%	
Xingfa	-1.8%	0.3%	0.3%	
Residual exporters	-1.1%	0.5%	0.5%	
Antai	-1.6%	2.1%	2.1%	
XinYueYa[6]	NA	0.2%	0.2%	
Kam Kiu	37.1%	2.0%	38.5%	Fixed rate of ICD. Combination of fixed and variable duty method, consisting of a fixed rate of IDD, plus a variable component of IDD equal to the amount, if any, by which the actual export price is below the ascertained export price.
Uncooperative exporters and non-cooperative entities[7]	37.1%	10.1%	42.9%	

Table 1: Summary of dumping and subsidy margins, effective fixed rates of duty and duty methods

The actual duty liability may be higher than the effective rate of duty due to several factors. Affected parties should contact the commission on 132 846 or +61 2 6213 6000 or at clientsupport@adcommission.gov.au for further information regarding the actual duty liability calculation in their particular circumstance.

To preserve confidentiality, details of the revised variable factors such as ascertained export price, ascertained normal value and amount of countervailable subsidy received will not be published.

Review of this decision

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

REP 609 has been placed on the public record, available at www.adcommission.gov.au.

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[5] The sum of the IDD and ICD may not equal the total effective fixed rate of IDD and ICD. This is because certain subsidies affect both the IDD and ICD. The Anti-Dumping Commission's (commission) practice is to back out such subsidies to avoid double counting.

[6] Antai and XinYueYa's variable factors were not altered in this review; however, they have been provided in this table for completeness. Refer to chapter 4.3.4 of REP 609 and ***Anti-Dumping Commission Report No 618*** and ***Anti-Dumping Commission Report No 619*** for further details about Antai and XinYueYa.

[7] Refer to chapter 4.3.3 for further details about Qingyuan and Foshan Lvqiang.

REP 609 has been placed on the public record, available at www.adcommission.gov.au.

Enquiries about this notice may be directed to the Case Manager by phone on +61 3 8539 2470 or by email investigations3@adcommission.gov.au

Dated this 20th day of September 2023.

ED HUSIC
Minister for Industry and Science

Attachment A

Press Metal International Ltd

Application for a Review of a Decision by the Minister in Review 609
Review of the anti-dumping measures applying to exports of aluminium extrusions exported from the People's Republic of China

Introduction

It is contended by the Applicant that the reviewable decision is not the correct or preferable decision on each of the separate grounds set out in Parts A, B and C of this Attachment, Those Parts also set out what is the correct and preferable decision in place of the reviewable decision based on each of those grounds, why the grounds as to why the reviewable decision is not the correct or preferable decision support the proposed correct and/or preferable decision and why the proposed correct and/or preferable decision is materially different from the reviewable decision.

Which of the proposed correct and/or preferable decisions is to replace the reviewable decision if it is determined that the reviewable decision is not the correct or preferable decision will, of course, depend upon which of the grounds in Parts A, B and C it is determined that the reviewable decision is not the correct or preferable decision.

Also, although the anti-dumping measures the subject of the reviewable decision concerned the dumping duty notice and the countervailing duty notice applying to exports from China, for convenience this application primarily refers only to the dumping duty notice. However, the application is made on the basis that the reviewable decision is not the correct or preferable decision in respect of both of the alterations to the dumping duty notice and the countervailing duty notice on the grounds set out in Parts A and C for the grounds set out in those parts and that the correct and/or preferable decision is as set out in those Parts for the reasons specified therein. In other words, Parts A and C apply equally to the reviewable decision as it relates to alterations to the dumping duty notice and the countervailing duty notice. Part B, of course, concerns only alteration to the dumping duty notice by the reviewable decision.

Part A – First Ground

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

The reviewable decision is not the correct or preferred decision because there was no basis for any alteration to the anti-dumping measures, that is, to the dumping duty notice.

Because the Australian industry was experiencing no injury, including no injury caused by the subject exports due to changes in the variable factors, there was no basis to alter the anti-dumping measures (i.e., dumping duty notice and/or the countervailing duty notice).

There was no injurious dumping, let alone injurious dumping resulting from changes in the variable factors, that required prevention by alteration of the dumping duty notice. Dumping of itself, if occurring, is not grounds for the imposition of anti-dumping measures nor the alteration of anti-dumping measures in the absence of material injury caused by dumping. Hence there was no basis for the reviewable decision in the absence of material injury being caused by changes in the variable

factors. In the absence of injury, let alone injurious dumping or injurious dumping resulting from changes in the variable factors, there was nothing that required prevention by alteration of the dumping duty notice.

Detailed reasons for the above contention as to why there was no basis for altering the anti-dumping measures as made by the reviewable decision are set out below.

A review under Division 5 of Part XVB of the *Customs Act 1901* is, of course, a review of the 'anti-dumping measures' that have been taken in respect of certain goods: section 269ZA(1)(a) of the *Customs Act 1901*.

The term '*anti-dumping measures*' is defined in section 269T(1) of the *Customs Act 1901* as meaning, in relation to goods, the '*publication of a dumping duty notice or a countervailing duty notice or both*' and a '*dumping duty notice*' is defined in that section as meaning, in so far as relevant here, a notice published by the Minister under Sections 269TG(1) or (2) of the *Customs Act 1901*, whereas a countervailing duty notice is a notice published by the Minister under Sections 269TJ(1) or (2) of the *Customs Act 1901*.

A dumping duty notice may only be published by the Minister under section 269TG(1) or (2) of the *Customs Act 1901* if the Minister is satisfied of the matters specified in those statutory provisions. Similarly as regards the publication of a countervailing duty notice.[1]

That is, the Minister must be satisfied that the exports in question are being dumped and, because of that, material injury to an Australian industry producing like goods to those exports is being caused or threatened. Absent any one of those key three requirements (i.e., dumping, material injury and causation) a dumping duty notice cannot lawfully be published as the Minister would not and could not possess the requisite satisfaction to publish such a notice.

The object, and the sole object, of the publication of a dumping duty notice and consequent imposition of dumping duties by operation of Section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* is to remove and/or prevent the material injury being caused to the Australian industry because of dumping. It is not to prevent dumping *per se*. Dumping *per se* is not actionable – it does not of itself permit the imposition of trade remedies. As stated in Article VI of GATT, dumping is only to be condemned if it causes material injury to a domestic industry in the importing country producing like goods. Otherwise it is unobjectionable and, of itself, constitutes 'free and fair trade' being no more than (international) price discrimination, which is lawful in most jurisdictions including Australia.

The circumstances in which anti-dumping measures may be reviewed, that is, the review of a dumping duty notice, is when an applicant considers that it may be appropriate to do so because '*one or more of the variable factors relevant to the taking of the measures in relation to that exporter or those exporters have changed*': section 269ZA(1)(b) of the *Customs Act 1901* (underlining added). The 'variable factors' referred to are the 'export prices', 'normal values' and 'non-injurious price' relevant to the publication of the dumping duty notice in question.

The application for the review is not of the variable factors but of the anti-dumping measures. Mere changes in the variable factors is not of itself a valid reason to alter the anti-dumping measures. That is, the changes to the variable factors may not be causing injury or, in other words, just as dumping may not be causing injury, changes in the variable factors relevant to the taking of the measures may not be causing injury. That is the reason for the review – to ascertain what changes in the variable

[1] For convenience dual references to dumping and subsidisation have been omitted with references only to dumping. However, references to dumping should be taken as equally being references to subsidisation.

factors have occurred and if those changes have resulted in injury being caused. If not, there is no reason to alter the anti-dumping measures because there is no injury to be prevented due to the changes in the variable factors.

In this respect, changes to the variable factors are merely the conditions upon which a review of the anti-dumping measures may be applied for and initiated. Of themselves, they are not the subject of the review, which is of the anti-dumping measures and, specifically, whether the changes in the variable factors are causing injury. That is, the measures require alteration to prevent injurious dumping that is occurring due to the changes in the variable factors. If no injury is being caused by dumping because of changes in the variable factors, then what would be the purpose in altering the dumping duty notice? What is the objective relevant to the taking of measures if no injury is being caused by dumping because of changes in the variable factors?

To reiterate, a change in any one or more of the variable factors, and regardless of the extent of the change, does not of itself justify an alteration to the dumping duty notice. A change in any of the variable factors does not necessarily mean that the dumping duty notice has ceased to be effective in achieving its object of removing or preventing injurious dumping, assuming it was ever effective. Whether an alteration of the dumping duty notice is warranted will depend upon the particular changes in the variable factors and the extent to which, if at all, those changes affect the effectiveness of the dumping notice in achieving its object of preventing injurious dumping.

If the changes in the variable factors reduce the effectiveness of the anti-dumping measures in preventing injurious dumping, then alteration of the dumping duty notice may be required to restore the effectiveness of the measures. Conversely, if, due to the changes in the variable factors, measures exceed what is required to prevent injurious dumping, then the dumping duty notice may be required to be altered to ensure that the measures do no more than prevent injurious dumping.

Here, the changes to the variable factors relevant to the publication of the dumping duty did not render the dumping duty notice ineffective in achieving its sole objective of removing or preventing injurious dumping caused by the exports from China. In the absence of any injury, there was no injury to be prevented, let alone injury caused by dumping. There thus was no reason to alter the dumping duty notice.

Indeed, Capral Limited's application made no mention of it incurring any injury, whether price or sales volume related injury, due to dumping by exports from China. This, of course, was because it was not incurring any injury but had been and was continuing to be enjoying increased prices, increased sales volumes, increased revenues and, consequently, increased profits, as disclosed in its Annual Reports and Shareholder Presentations referred to in submissions to the Anti-Dumping Commission by interested parties[2]. In this regard it is to be noted that in previous dumping investigations, reviews and inquiries undertaken by the Commission, the economic performance of Capral Limited was routinely taken as representative of the economic performance of the Australian industry as a whole.[3]

Further, as found in the review, the majority of exporters were not dumping and of those found to be dumping, their exports could not have caused injury and in fact were not causing injury.

In the circumstances, the alteration of the dumping duty notice by the reviewable decision could not have been for a proper purpose, namely, to prevent material injury being caused by dumping of the

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[2] See, for example, EPR Document No. 32 including Footnote 6 of that submission: 609_-_32_-_submission_-_exporter_-_tai_shan_city_kam_kiu_aluminium_extrusions_co_ltd_-_response_to_statement_of_essential_facts.pdf (industry.gov.au)

[3] See also ADRP Report No. 135 & 137,

subject exports due to changes in the variable factors. Why was the review applied for and the reviewable decision recommended and made if not for this purpose?

Although it is questionable at best as to why the review was applied for and initiated in the absence of the Australian industry experiencing any injury and unlikely to do so in the foreseeable future, the findings in the review nevertheless support the conclusion that the reviewable decision was not the correct or preferable decision.

In Review 609, there were:

- four (4) selected cooperative exporters whose exports were reviewed; and
- twenty-five (25) unselected residual exporters whose exports were not reviewed; and
- one (1) selected uncooperative exporter whose exports were not reviewed.

The Anti-Dumping Commissioner found, on the advice of the Anti-Dumping Commission, that exports during the review period by three (3) of the selected cooperative exporters and all residual exporters were un-dumped (i.e., had negative dumping margins) and that exports by the remaining few exporters were dumped with a positive dumping margin.

In other words, changes in the relevant variable factors had not resulted in dumping of exports from China being dumped. Rather, despite changes in the relevant variable factors due principally to changes in aluminium prices and despite the dumping duty notice not having been altered since late 2020 notwithstanding constant changes in the variable factors since then, the majority of exporters were not exporting at dumped export prices. Only a few were doing so and their dumped exports, regardless of the dumping margin, were not causing injury to the Australian industry.

Although in Review 609 there was no inquiry into whether the Australian industry had incurred material injury and, if it had, whether it was being caused by dumping of the exports in question, in particular because of changes in the variable factors, information and evidence was provided to the Commission that the Australian industry, as represented by Capral Limited and others, had not incurred any injury during the review period, let alone material injury caused by dumping by exports from any country.

Rather, the Australian industry was enjoying the strongest economic performance that it had enjoyed for some time due to the strong performance of the Australian residential construction industry. That industry drove sales volumes, prices, sales revenues of aluminium extrusion products and, therefore, profits of the Australian industry, which has been repeatedly acknowledged by members of the Australian industry and the Anti-Dumping Commission in dumping investigations, reviews and inquiries. As was publicly known and common knowledge within the industry, the strong economic of the residential construction sector was expected to continue for the foreseeable future despite increases in construction costs. No doubt this was due the announcements by Federal, State and Territory Governments to increase financial contributions to the residential construction sector to alleviate the housing shortage prevailing in Australia following the end of the pandemic. Hence the strong performance of the residential construction industry and, therefore, the strong economic performance of the Australian industry would continue for the foreseeable future.

So:

(i) despite the dumping duty notice having remained unaltered since the date originally published; and

(ii) despite the variable factors of export prices and normal values having changed due principally to the unprecedent historic increase in the London Metal Exchange (**LME**) price of aluminium,

this had not resulted in the exports by the majority of exporters being dumped as determined by the Anti-Dumping Commission; and

(iii) despite exports of a few of the exporters being found to have been dumped but no finding that such dumped exports were causing material injury; and

(iv) despite information and evidence that the Australian industry as represented by Capral Limited was not incurring any injury and had not incurred any injury during the review period and was unlikely to do so for the foreseeable future,

the Anti-dumping Commissioner, on the advice of the Anti-Dumping Commission:

(a) did not appear to consider that such circumstances warranted a review of the anti-dumping measures as to whether revocation of those measures was warranted and to so advise the Minister and recommend that he direct such a review be undertaken; but, instead,

(b) advised and recommended to the Minister that the Minister alter the dumping duty notice by making the reviewable decision so as to increase the level of the anti-dumping measures for all exporters including:

  (i) the selected cooperative exporters and the residual exporters whose exports were determined not to being dumped despite changes to their respective variable factors; and

  (ii) the remaining exporters whose exports were found to be dumped, which exports were not causing injury regardless of whether they being dumped due to changes in relevant variable factors or otherwise.

Precisely what object was intended to be achieved by increasing the level of the anti-dumping measures is not apparent when it was evident from the information and evidence before the Anti-Dumping Commissioner and the Anti-Dumping Commission that no injury was being caused to the Australian industry by exports of aluminium extrusions from China, whether or not at dumped prices.

Similarly, it was equally unapparent as to precisely what object was intended to be achieved by increasing the level of the anti-dumping measures for all exporters regardless of whether their exports were determined to being or not being dumped due to changes in their respective relevant variable factors. The fact that the anti-dumping measures had not been altered since when originally imposed had not led to a recurrence of injurious dumping by those exporters indicates that there was no reason to alter the dumping duty notice even if there were change in the variable factors. Obviously, changes in the variable factors was irrelevant to whether those exporters would recommence exporting at dumped prices, assuming that they had previously being exporting at dumped prices or to the occurrence of injurious dumping if dumping were to occur due to changes in the relevant variable factor.

Further, it was equally evident that, just as the Australian industry's prices rise and fall in line with the rise and fall of LME aluminium prices, so do the export prices and normal values of exports of aluminium extrusions from China. In other words, the rise and fall in LME aluminium prices and, for that matter, Major Japanese Port (**MJP**) prices is irrelevant to whether exports are being dumped. As found by the Anti-Dumping Commission, prices for inputs to manufacture, such as aluminium prices, flow through and are captured in the cost to make and sell aluminium extrusion products for export and for domestic consumption in equal measure. That is, the same costs are incurred in the production and sale of the goods for domestic consumption and for export.

How then is the fact that the variable factors had changed since the date on which the anti-dumping measures were originally imposed or last reviewed relevant to whether the anti-dumping measures required alteration and, if they did, to what extent. The fact that variable factors had changed

inevitably gives rise to the question: So what? Most things, if not all things, change over time – so what? The same question arises if dumping is occurring. Of itself, dumping is unobjectionable. Only when it cause material injury are anti-dumping measures warranted.

Similarly, a change or changes in the variable factors in itself is of no consequence. Only when changes to the variable factors cause material injury by rendering the anti-dumping measures ineffective or less effective are alterations to the dumping duty notice warranted. Of course, it would then need to be assessed to what extent have such changes caused injury in order to determine the extent to which the dumping duty notice requires alteration. Mere change in variable factors does not mean the anti-dumping measures must be altered in equal measure to prevent injurious dumping were it occurring. This would require an assessment to be undertaken as to the extent to which the anti-dumping measures required alteration to prevent the injurious dumping. Also, no doubt this was why, in part, the non-injurious price was included as a variable factor.

The relevant question, therefore, is not whether the variable factors have changed, which would seem inevitable, but, rather, what effect did those changes have on the effectiveness of the anti-dumping measures in preventing injurious dumping were it occurring?

This 'so what?' question is the question that was not addressed in Review 609. Essentially it was not known whether the anti-dumping measures were effective and, if not effective, to what extent and why including whether it was due to a change in the variable factors. The effectiveness of the anti-dumping measures was not known because it was not inquired into and nor was it known what effect the changes in the variable measures had on the effectiveness of the anti-dumping measures for the same reason. What was known was that the Australian industry was incurring no injury and that was likely to continue for the foreseeable future irrespective of any import competition.

Consequently, as a review of the anti-dumping measures, Review 609 was deficient because the anti-dumping measures were not reviewed in light of relevance of any changes to the variable factors to the object of the anti-dumping measures. Had they been, then the reviewable decision would not and could not have been made. There was no reason to alter the anti-dumping measures. There was no injurious dumping that an alteration of the anti-dumping measures was required to prevent, nor any evidence of this likely occurring in the foreseeable future.

Rather the opposite was in fact found in Review 609. That is, it was found that changes in the variable factors and, in particular, increases in export prices and normal values because of, amongst other things, increases in aluminium prices had not led to a recurrence of dumping by the exporters in question. This was notwithstanding that it would not be unreasonable to expect that dumping would be more likely to occur in such circumstances. However, it was evident from the findings in Review 609 that the changes in variable factors here were irrelevant to the occurrence of dumping.

Further, the increase in the price of aluminium to exceptional and unprecedent historically high levels, which had led to the increase in export prices and normal values (i.e., the changes in those variable factors) was temporary. Those prices had commenced to decline during the review period and continued to do so thereafter until they reached their typical historical levels, evidence of which was provided to the Commission. That decline in aluminium prices would be and was mirrored in a fall in prices of aluminium extrusion products both in domestic and export sales. Such a fall in prices would render it even more unlikely that there would be a recurrence of dumping by the subject exporters, let alone injurious dumping.

Conclusion

As stated, the reviewable decision is not the correct or preferred decision because there was no basis justifying any alteration to the anti-dumping measures. The Australian industry had not incurred and was not experiencing any injury and was unlikely to do so for the foreseeable future. In the absence of any material injury being caused by dumping, including any material injury being caused by changes in the variable factors, there was no basis to alter the dumping duty notice. The mere occurrence of change to one or more of the variable factors without more is of no consequence in the taking of dumping measures. There was nothing to be prevented by any alteration to the dumping duty notice in the absence of material injury caused by dumping due to changes in one or more of the variable factors. in such circumstances, to alter the dumping duty notice so as to increase the level of the anti-dumping measures is not for a proper purpose, namely, to prevent injurious dumping due to change in one of more of the variable factors.

The correct decision should have been for the dumping duty notice to remain unaltered.

Question 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 and preferable decision is that the dumping duty notice remain unaltered.

Question 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 response to Question 9 support the making of the proposed correct and preferable decision because they establish that there was no factual or legal basis permitting or requiring the alteration of the dumping duty notice, nor to alter the dumping duty notice in the manner and to the extent to which it was so altered. That is, alteration of the dumping duty notice was not required to prevent injurious dumping brought about by changes in one or more of the variable factors.

Specifically, there was no evidence that the anti-dumping duty notice required alteration to remove or prevent material injury from being caused to the Australian industry due to changes in one or more of the variable factors. There was no evidence that changes to the variable factors of export prices and normal values of exports of the subject goods during the review period had led to dumping causing material injury.

Rather, the changes to those variable factors established the opposite. That is, the changes to those the variable factors had not led to either the continuation or the recurrence of dumping or, in the isolated cases where this had occurred, it had not caused material injury to the Australian industry. In any event, in no case had changes in relevant variable factors resulted in dumping causing material injury.

There was thus either no dumping or no injurious dumping that required prevention by alteration of the dumping duty notice. Rather, that fact that there was no dumping and/or no injurious dumping despite changes to the variable factors and the absence of any changes to the dumping duty notice is evidence that alteration of the dumping duty notice was not required.

The more salient question is why it was considered that in the absence of dumping and, consequently, material injury caused by dumping, the appropriate response of the Minister:

- was not to initiate a review as to whether, in the circumstances, revocation of the anti-dumping measures was warranted; but rather,

- was to increase the level of the anti-dumping measures applying to the exports in question notwithstanding the absence of dumping and, therefore, material injury caused by dumping?

This response was inappropriate and not justified. Rather, in the absence of injurious dumping caused by one or more changes in the variable factors of export prices and normal values, the correct and preferred decision is that the dumping duty notice remain unaltered. Hence the proposed correct and preferable decision set out in response to Question 10.

Question 12: Set out the reasons why the proposed decision provided in response to question 0 is materially different from the reviewable decision:

The proposed decision is materially different from the reviewable decision because the proposed decision does not alter the anti-dumping measures (i.e., dumping duty notice) but leaves them unaltered, whereas the reviewable decision altered the dumping duty notice.

Part B – Second Ground

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

If alteration of the anti-dumping measures is considered warranted due to changes in the variable factors, the reviewable decision nevertheless is still not the correct or preferred decision. This is because the ascertained normal values for selected cooperative exporters and for residual exporters determined by the Minister in the reviewable decision for the purposes of the dumping duty notice was otherwise than in accordance with the relevant legislative provisions for the reasons set out below.

Section 269ZDB(1)(a)(iii) of the *Customs Act 1901* provides that, to the extent that the anti-dumping measures involved the publication of a dumping duty notice, the Minister must declare that the notice is to be taken to have effect or to have had effect, either in relation to a particular exporter or to exporters generally, as if the Minister had fixed different variable factors in respect of that exporter or of exporters generally, relevant to the determination of dumping duty payable on exports by those exporters.

Those different variable factors, pursuant to the provisions of Sections 268TG(1) or (2) and (3) of the *Customs Act 1901*, are what:

(a) was or would be the normal value of the goods; and
(b) was or would be the export price of those goods; and
(c) was or would be the non-injurious price of those goods.

Consequently, when making the declaration required by Section 269ZDB(1)(a)(iii) of the *Customs Act 1901*, the Minister must specify, at the time of making the declaration, the respective amounts that the Minister had ascertained for each of the variable factors referred to in Section 268TG(3) of the *Customs Act 1901*

In making the reviewable decision, the Minister ascertained the variable factors and, in particular, the normal value of the exports based on circumstances prevailing during the review period. However, as was well known at the time, the circumstances relevant to that variable factor had changed and had materially changed after the review period. Specifically, aluminium prices had declined by approximately US$1,000MT from over US$3,000MT to around US$2,200MT. This decline in aluminium

prices was acknowledged by the Anti-Dumping Commission in Report 609 and information and evidence of the decline in aluminium prices was provide by interested parties in their submissions to the Anti-Dumpng Commission..

Because the prices for aluminium extrusion products, whether for export or for domestic consumption, rise and fall in line with the rise and fall of aluminium prices, specifically, the London Metal Exchange (**LME**) prices for aluminium, it also was known that the constructed normal values based on the historically high aluminium prices were out-of-date. While acknowledging the fall in aluminium prices from their historic highs during the review period, the Anti-Dumping Commission considered that there was no certainty that aluminium prices would remain at the level to which they had fallen after the review period and, therefore, preferred to use the aluminium prices prevailing during the review period. This is surprising as the Commission would have been aware from its previous dumping investigations, reviews and inquiries into exports of aluminium extrusions that the aluminium prices during the review period were exceptional, unprecedented historically high aluminium prices, whereas those prevailing after the review period were at levels consistent with the typical historic level for aluminium.

Further, it was more likely that prices for aluminium after the review period would remain at that level, being the typical, historic level for aluminium prices, as opposed to the exceptional, unprecedented historically high aluminium prices during the review period. The likelihood of aluminium prices returning to those exceptional, unprecedented levels was, at best, remote and has not occurred.

It, therefore, was well known in advance of reporting to the Minister that:

(i) prices of aluminium extrusion products, whether being sold for domestic consumption or for export, rise and fall in line with the rise and fall in the price of aluminium; and

(ii) prices of aluminium were at exceptional and unprecedented historically high levels during the review period and this was reflected in the prices of aluminium extrusion products sold in domestic sales China, in export sales to Australia and in domestic sales in Australia; and

(iii) the rise and fall in prices for aluminium extrusions due to the rise and fall in aluminium prices was irrelevant to the likelihood of dumping occurring due to the rise and fall in aluminium prices. This is because the rise and fall of aluminium prices are equally reflected in prices in domestic and export sales due to aluminium prices affecting the cost of production of aluminium extrusion products produced for domestic and for export sales equally; and

(iv) export prices of exports occurring after the review period that were less than the constructed normal values calculated for such exports based on aluminium prices during the review would not be or were unlikely to be being dumped due to the fall in export prices since the review period simply reflected the fall in aluminium prices that had occurred since the review period and would be reflected in a constructed normal value for such exports calculated using aluminium prices current when the export prices of those exports were agreed.

Not only were these matters known in advance of reporting to the Minister, but also that no injury was being incurred by the Australian industry whether due to changes in the variable factors of export prices and normal values caused by the changes in aluminium prices or otherwise. Because the Australian industry was incurring no injury, changes in the relevant variable factors due to changes in aluminium prices were irrelevant even if the resulted in findings of dumping or increased dumping margins. No injury was being caused by dumping, and hence the irrelevancy of changes in the variable factors.

In this context, the question that becomes relevant is what was the purpose of the reviewable decision in altering the variable factors in the dumping duty notice as they applied to exports by the subject exporters if not to prevent injurious dumping of which there was none? If the law permits something to be done but only permits that thing be done for a particular purpose, then doing thing permitted by the law but for a purpose not permitted by the law renders what is done as unlawful as being for an improper purpose.

For example, if the purpose of altering the variable factors in the dumping duty notice was not to prevent injurious dumping, then the only purpose could be to:

(i) artificially maintain the high prices for aluminium extrusion products in the Australian market prevailing during the review period due to the unprecedented historically high aluminium prices during that period; and/or

(ii) exclude and/or restrict the volume of export from China by rendering their dumping duty inclusive prices uncompetitive in the Australian market due to the decline in aluminium extrusion prices in line with the decline in aluminium extrusion prices.

Of these, the more likely purpose would be the second, This is because prices in the Australian aluminium extrusion products market would be subject to the effects of import competition from other countries some of whose exporters are not subject to anti-dumping measures, such as Indonesia and Thailand and those whose exporters are subject to anti-dumping measures, such as Malaysia, but whose duty inclusive prices have been found to be the lowest and price leaders (refer ADRP Review 135 and the Preliminary Reinvestigation Report in Continuation Inquiry 591). Hence, despite the significant market share held by exports from China, it would be unlikely that the 'floor price' for such exports would result in the prices for aluminium extrusions products in the Australian market being at similar prices to that floor price following the fall in aluminium prices from their historic highs during the review period..

If, therefore, the object of the reviewable decision is to prevent injurious dumping, then to achieve that purpose the ascertained normal value in the altered dumping duty notice should be based on a constructed normal value using the aluminium prices prevailing after the review period in the cost of production. Those current aluminium prices would reflect the typical historical aluminium prices, as opposed to the exceptional, unprecedented historically high aluminium prices used in calculating the constructed normal values on which the ascertained normal value was based.

No objection is taken to the use of the historically high aluminium prices in the calculation of the constructed normal values for the purposes of comparing export prices with those constructed normal values. That is for determining dumping margins. The cost to produce aluminium extrusions for export and for domestic consumption using aluminium purchased at the same time would be the same. That is, the cost of the aluminium used to produce those aluminium extrusions for export and for home consumption would be the same notwithstanding that the price of aluminium was at an historic high. It would still be a like-for-like comparison.

However, use of the historically high aluminium prices in the calculation of the constructed normal values for another purpose, that is, the determination of the normal values on which the floor price duty method would be based was inappropriate. It was inappropriate because that ascertained export price, determined under Part XVB of the *Customs Act 1901*, would be used as the basis for the 'floor price' method for working out the interim dumping duty payable under the *Customs Tariff (Anti-*

Dumping Act 1975.[4] That 'floor price' would be based on a constructed normal value that, in turn, was based on exceptional, unprecedented historically high aluminium prices that were no longer current, In other words, the ascertained normal value on which the floor price was based was out of date even before the making of the reviewable decision. It was known that it would be out-of-date at that time.

It is public knowledge and certainly the Anti-Dumping Commission was aware that prices of aluminium extrusions rise and fall in line with the rise and fall of the prices of aluminium and, in particular, LME aluminium prices. This was evident in the increase in export prices of aluminium extrusions being exported from China, a fact that Capral Limited acknowledged in its application.

The Anti-Dumping Commission was also aware and knew that if and when prices of aluminium fell and, in particular, LME aluminium prices, then prices for aluminium extrusions would also fall in line with the fall in aluminium prices. Further, this would apply to all aluminium extrusions regardless of who was the producer or who was supplying them or in which countries. Further, the Commission was aware that aluminium prices and, in particular, LME aluminium prices had commenced to fall during the review period and had continued to do so to around US$2,200 M/T after the review period from over US$3,000MT during the review period.

The Commission also was aware and had demonstrated in its findings of fact in Review 609 that the rise and fall in aluminium prices was irrelevant to whether dumping was occurring. A rise and fall in aluminium prices would affect export prices of exports and their normal values equally when produced from the same aluminium, that is, aluminium purchased at or around the same time.

As it was known to the Commission during Review 609:

(i) the cost of aluminium to producers of aluminium extrusions was irrelevant to whether exports of aluminium extrusions were being dumped or not – that is a rise or fall in aluminium prices was irrelevant to whether exports were being dumped because that rise or fall would be equally reflected in a rise or fall in the export and domestic selling prices of aluminium extrusions;

(ii) aluminium prices during the review period were at unprecedented historically high levels, which unprecedented historically high prices would be unlikely to subsist;

(iii) those unprecedented historically high aluminium prices commenced to fall during the review period and continued thereafter to their typical historic level of around US$2,200 M/T;

(iv) prices of aluminium extrusions, both in domestic markets and in export markets, would also decline in line with the fall in aluminium prices in accordance with established industry practice,

it was also known that anti-dumping measures based on exceptional high prices for both aluminium extrusion products and the raw materials from which those products were produced during the period of review could not be to remove or prevent injurious dumping by the subject exporters.

This was because there was no injurious dumping occurring because of changes in the variable factors relevant to the exports of those exporters. In addition, whatever the position regarding the relevant variable factors during the review period, it was known that with the fall in aluminium prices from those prevailing in the review period, the position would be materially different in the period after the review period. That is, both export prices and normal values would be considerably lower in the

[4] It is acknowledged that the Review Panel may no have jurisdiction to review decisions under the *Customs Tariff (Anti-Dumping Act 1975*. However, review of decisions under that Act are not being sought in this application. Only the reviewable decision is the subject of this application.

period after the review period. Accordingly, determining an ascertained normal value based on a constructed normal value that, in turn, was based on aluminium prices prevailing in the review period could not be for the purposes of preventing injurious dumping even if injurious were occurring, which it wasn't. It could not have been to prevent injurious dumping because it was known that the measures of dumping would have fallen in the period after the review period due to the fall in aluminium prices. That is, even if injurious dumping were occurring, the ascertained normal value in the reviewable decision would have been excessive of the measures required due to changes in the relevant variable factors resulting from the fall in aluminium prices.

Rather, alteration of the anti-dumping measures (i.e., the dumping duty notice) and, in particular, the application for the alteration of the anti-dumping measures in such circumstances could only be for some other purpose or purposes.

As mentioned earlier above, those other purposes could only be:

- to maintain the price for aluminium extrusion products in Australia at artificially high levels by establishing a 'floor price' based on ascertained normal values that, in turn were based on the unprecedented historically high aluminium prices prevailing during the review period notwithstanding that such prices had returned to their typical, historic levels after the review period; and/or
- to exclude exports from China through a protectionist tariff in the form of dumping duties that would render exports from China entering the Australian market uncompetitive by requiring that the prices of such exports on entering into domestic market in Australia be not less than 'floor price', which was based on ascertained normal values, which, in turn , were based the unprecedented historically high prices prevailing during the review period and therefore significantly higher than prices in the Australian market due to the return of prices to their historic typical levels with the decline of aluminium prices from those historic highs.

In short, to so alter the anti-dumping measures could only be for an improper purpose, which, of course, would be unlawful.

Nevertheless, if it were considered necessary to maintain the anti-dumping measures to prevent injurious dumping, then that could be achieved by altering the anti-dumping measures to a level based on aluminium prices which had returned to their historic typical levels after the review period.

Whether regard could be had to information and evidence that aluminium prices, such as LME aluminium prices had returned to their historic levels after the review period was addressed in a number of submissions: see EPR Document Nos. 38 to 40 on the electronic public file: 609 - Aluminium extrusions from China | Department of Industry, Science and Resources.

Without entering into an extensive analysis of Capral Limited's arguments in its submissions (EPR Document Nos. 38 and 40), judicial authority and report of the Review Panel (ADRP Report No. 61) do not in fact support its contentions. There is nothing that prevents the Minister and, by extension, the Anti-Dumping Commissioner from taking into account information and evidence outside of an investigation or review period if relevant to, in this case, the review of the anti-dumping measures.

This was explicitly recognised in *Pilkington (Australia) Ltd v Minister of State for Justice & Customs* [2002] FCAFC 423 at paragraph [125]:

> "*…if, for instance, clear evidence came to light, after the Report, falsifying significant parts of its contents, we see nothing in Part XVB to prohibit the Minister from examining such material.*"

Further, it also should be noted that in ADRP Report No. 61, the Review Panel made the following observations:

> "*35. In considering Capral's ground of review it is important to note at the outset that it seems clear from Capral's application for review that its claim relates to the variable factors, which Capral contends should be adjusted to take account of sustained movements in LME and MJP premium prices following the investigation period, to ensure the measures imposed by the Parliamentary Secretary remain effective. In other words Capral is not challenging the ADC's finding in regard to past dumping or the calculation of the dumping margin for imports during the investigation period, but rather its claim is in respect of an adjustment to the variable factors referred to in s.269TG(3) for the purpose of the imposition of measures in respect of future dumped imports. During the First Conference the ADC confirmed that it considered Capral's claim related to the imposition of measures on future exports and that it did not consider that Capral was requesting a recalculation of the dumping margin in respect of past dumping. According to the ADC, its understanding was <u>that going forward Capral wanted the variable component of the combination measure to be indexed for the raw material price fluctuation, for the purpose of collecting future dumping duty</u>. This would appear to be the case from Capral's submission.*" (footnotes omitted, underlining added)

It would seem that Capral Limited was there arguing the opposite of what it was arguing in Review 609. That is, that anti-dumping measures be indexed according to raw material price fluctuations' such as the rise and fall of aluminium prices. It is not difficult to fathom the reasons why. Indexing of measures to raw material price fluctuations clearly defeats the object of anti-dumping measures and, consequently, would not be for a proper purpose.

In any event, there is no impediment to taking into account information and evidence relevant to the determination of the ascertained normal value and, thereby, the ascertained export price to be specified in the dumping duty notice that ultimately will be used to work out interim dumping duties payable under the *Customs Tariff (Anti-Dumping) Act 1975* using the 'floor price' duty method.

As there is no impediment to taking into account in the review not only matters such as the fact that aluminium prices had fallen from the historic highs during the review period to their more typical historic levels after the review period, but also using those prices in the calculation of the constructed normal values for the selected cooperative exporters, including Kam Kiu, and for the residual exporters. Substituting the aluminium prices during the review period with aluminium prices after the review period after the review period presumably would simply involve substituting the former prices with the latter in the relevant spreadsheet(s).

Question 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 and preferable decision here is that the dumping duty notice be altered with different ascertained normal values for exports by the selected cooperative exporters and residual exporters. That ascertained normal value be based on constructed normal values calculated using aluminium prices prevailing during a period commencing after the review period and ending before the date on which the Anti-Dumping Commissioner was required to report to the Minister. .

Question 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 response to Question 9 support the making of the proposed correct and preferable decision because they establish that an ascertained normal value based on a constructed normal value using aluminium prices during the review period were out of date even by the end of the review period and, therefore, such ascertained normal value was inappropriate for use in the floor price duty method. The proposed decision is preferable because the ascertained normal value would be based on a constructed normal value using aluminium prices using aluminium prices prevailing after the review period that not only were more current but also were consistent with the typical, historic level of aluminium prices. Further, those grounds also established that there was no obstacle to having regard to aluminium prices after the review period.

Question 12: Set out the reasons why the proposed decision provided in response to question 0 is materially different from the reviewable decision:

The proposed decision is materially different from the reviewable decision because the proposed decision provides for an ascertained normal value based on a constructed normal value using aluminium prices that are materially lower than the aluminium prices used in the constructed normal value on which the ascertained normal value in the reviewable decision was based.

Part C – Third Ground

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

The reviewable decision is not the correct or preferred decision because the reviewable decision failed to include, as required, a statement specifying that a different variable factor, namely, a different non-injurious price to the non-injurious price specified in the original dumping notice applied to exports by exporters generally. That is, the reviewable decision is not the correct or preferred decision because it did not include a new non-injurious price as required and for reasons that did not support not making such a determination.

Whether a non-injurious price was required to be declared

When publishing a dumping duty notice under Section 268TG(1) or (2) of the *Customs Act 1901*, Section 268TG(3) of that Act require the Minister to include a statement specifying the respective amounts that the Minister ascertained, at the time of publication of the notice:

(a) was or would be the normal value of the goods; and
(b) was or would be the export price of those goods; and
(c) was or would be the non-injurious price of those goods.

So, when making a decision under Section 269ZDB(1)(a)(iii) of the *Customs Act 1901* to alter a dumping duty notice, the Minister must declare that the dumping duty notice in question is to be taken to have effect in relation to the subject exporters as if the Minister had fixed different variable factors in respect of those exporters relevant to the determination of dumping duty payable on exports by those exporters. One of the variable factors to be included in that declaration is the non-injurious price of the exports by the subject exporters.

A different non-injurious price was not included in the reviewable decision. The reasons why it was not included were set out in Section 6.4 of Report 609.

Essentially the reason was due to the operation of Section 8(5BAA) of the *Customs Tariff (Anti-Dumping) Act 1975*. That Section provides that the Minister is not required, in determining the method by which the interim dumping duty payable on goods the subject of the dumping duty notice is to be calculated, to make a determination under Section 8(5B) of that Act. A determination under Section 8(5B) of the *Customs Tariff (Anti-Dumping) Act 1975* is to specify a non-injurious price so that the sum of interim dumping duty payable does not exceed the non-injurious price.

As noted in Report 609, Section 8(5BAA) of the *Customs Tariff (Anti-Dumping) Act 1975* is a discretionary statutory provision. It permits the Minister not to determine a non-injurious price in a number of circumstances including where the normal value of exports to Australia is determined under Section 269TAC(1) of the *Customs Act 1901* because of the operation of Section 269TAC(2)(a)(ii) of that Act.

For the reasons set out in Section 6.4 of Report 609, it was recommended that the Minister not determine a non-injurious price because:

> "*...For residual, uncooperative exporters and non-cooperative (sic) entities from China subject to the anti-dumping measures, the commission notes that none of the exceptions in sections 8(5BAAA) and 10(3DA) of the Dumping Duty Act apply. The Minister is therefore required to consider the desirability of applying a lesser amount of duty in accordance with sections 8(5BA) and 10(3D) of the Dumping Duty Act.*
>
> *The Commissioner recommends that the Minister exercise their (sic) discretion not to apply a lesser amount of duty. The commission considers that it is reasonable for residual and other exporters to receive the same outcome as selected cooperating exporters in the circumstances of this case. This is because although the normal value for residual exporters, uncooperative exporter and non-cooperative entities was ascertained under sections 269TACAB(2) and 269TAC(6) respectively, the normal value was based on the constructed normal values established for selected cooperating exporters, calculated under section 269TAC(2)(c) because of the operation of section 269TAC(2)(a)(ii).*" (underlining added)

Thus, while the Minister was required to consider the desirability of determining a non-injurious price for residual and uncooperative exporters, the Commission considered that it was 'reasonable' for those exporters to receive the same outcome as the selected cooperative exporters. It was 'reasonable' because the normal value of exports by residual and uncooperative exporters was 'based' on the constructed normal value of the selected cooperative exporters.

Section 8(5BAA) of the *Customs Tariff (Anti-Dumping) Act 1975*, however, does not preclude the Minister from considering the desirability of determining a non-injurious price for the selected cooperative exporters. No reason was given in Report 609 as to why the Minister, although not being required to consider the desirability of a non-injurious price for those exporters, should not consider the desirability of determining a non-injurious price for those exporters.

It, therefore, is apparent from Sectio 6.4 of the Report that, although not precluded from considering the desirability of determining a non-injurious price for the selected cooperative exporters, that no such consideration should be given in the circumstances. It simply was not considered.

The issue, therefore, is whether, in the circumstances here, consideration should have been given the desirability of determining a non-injurious price for the selected cooperative exporters. It is submitted

that this should have been considered due to the fact that the Australian industry was experiencing no injury including any injury from exports at dumped export prices. Therefore, a minimum price necessary to prevent material injury being caused by dumping would be significantly less than the floor price, that is the ascertained normal value based on the constructed normal values for the selected cooperative exporters. This is evident when consideration is given to what would be a non-injurious price, that is, the minimum price necessary to prevent injury. This is discussed later below, but, clearly, it would be less than the ascertained normal value determined in the reviewable decision.

While not being required to consider the desirability of determining a non-injurious price for the selected cooperative exporters due to Section 8(5BAA) of the *Customs Tariff (Anti-Dumping) Act 1975*, in the circumstances such consideration should have been given and, had it been given, it would have been determined desirable to determine a non-injurious price because the minimum price necessary to prevent injurious dumping would be significantly less than the floor price (i.e., the ascertained normal values based on the constructed normal values). This, of course, would extend to all other exporters, that is, to residual exporters and to uncooperative exporters. The amount of such a non-injurious price is discussed later below.

Finally, while noting Section 8(5BAA) of the *Customs Tariff (Anti-Dumping) Act 1975*, it must be noted that that Act only comes into operation on the publication of a dumping duty noticed and not beforehand. That is, the provisions of that Act do not somehow override the obligations of the Minister under Part XVB of the *Customs Act 1901*. The Minister's obligations under Section 268TG(1) or (2) of the *Customs Act 1901* and, consequently, Section 269ZDB(1)(a)(iii) of the *Customs Act 1901* remain and require the Minister to include a non-injurious price in a decision under Section 269ZDB(1)(a)(iii) of the *Customs Act 1901* to alter a dumping duty notice.

What should be the non-injurious price

Having determined that a non-injurious price should have been considered and made when making the reviewable decision, the issue then is what is the non-injurious price? While a non-injurious price was calculated by the Commission based on a so-called unsuppressed selling price (refer Section 6.4.2 of Report 609), it is useful to first recall the purpose of a non-injurious price.

A non-injurious price of goods exported to Australia is the minimum price necessary to '*prevent the injury, or a recurrence of the injury, …. , referred to in paragraph 269TG(1)(b) or (2)(b) [of the Customs Act 1901*': see Section 269TACA of the *Customs Act 1901*.

The 'injury' referred to in that Section is, of course, material injury to an Australian industry producing like goods caused or being caused by exports of the goods under consideration at dumped export prices.

Here, the issue is whether there can be a non-injurious price when the Australian industry is not incurring any injury. That is, what is to be prevented by anti-dumping measures if no material injury is being caused to the Australian industry by dumping, nor any evidence that material injury caused by dumping is likely to recur.

In addressing this issue, it should be noted that:

(i) first, the exports of the selected cooperative exporters (other than Kam Kiu) or the residual exporters could not be causing material injury because of dumping, because it was determined that their exports were not being dumped; and

(ii) second, the exports of the other exporters, that is, those whose exports were found to be being dumped during the review period, were not causing material injury because of

dumping. As the Australian industry was not incurring any injury during the review period, the exports of these exporters were not causing any injury despite their exports being determined to be being dumped; and

(iii) third, no exports from any country, whether subject to anti-dumping measures or not and whether being exported at dumped prices or not, were not causing any injury to the Australian industry.

In short, no exports from any country, whether at dumped prices of not, were causing any injury to the Australian industry. The Australian industry was not incurring any injury. No exports, therefore, were causing any injury to the Australian industry regardless of what price they were exported to Australia.

In such circumstances there arguably can be no minimum price to prevent material injury being caused by dumping because no such injury was being caused. It is not possible to prevent something that does not exist and is not likely to occur in the foreseeable future.

There was no evidence that the selected cooperative exporters (other than Kam Kiu) and the residual exporters would resume exporting at dumped prices and because of that cause material injury. Rather, the evidence is to opposite effect. That is, notwithstanding changes in the variable factors and despite there being no alteration to the dumping duty notice since its publication in 2020, exports by the selected cooperative exporters (other than Kam Kiu) and the residual exporters were not being exported at dumped prices. There was no evidence that this would change or was likely to change in the foreseeable future, nor, given the prevailing market conditions, was there any reason to commence dumping.

Further, of those exporters whose exports were found to be being dumped, none were causing injury to the Australian industry because of dumping or otherwise. That is, regardless that of what price those exporters were exporting to Australia and whether those prices were dumped, they were not causing injury and there was no evidence that this was likely to change in the foreseeable future.

If there is no dumping causing material injury and no evidence of any likely recurrence of dumping causing material injury, then arguably there is nothing to be prevented by anti-dumping measures. However, if anti-dumping measures are to be retained in such circumstances because they cannot be revoked, then, arguably, the level of the measures should be zero.

A zero rate of dumping duty is appropriate when the is no material injury being caused by dumping that is to be prevented, nor any evidence of a recurrence of dumping causing material that needs to be prevented. In this regard, it must be noted that just as 'Free' is a rate of customs duty under the *Customs Tariff Act 1995*, a 'zero' or '$0' can be a rate of dumping duty. In such circumstances, the rate of duty exists - it is just that no amount of duty is payable pursuant to that rate.

Further, a zero rate of duty is appropriate when, as here, there is no dumping of exports by the exporters in question and due to the absence of dumping no material injury being caused by dumping to be prevented by the imposition of dumping duties but revocation is not possible because the statutory requirements for revocation have not been satisfied. The provision of a zero rate of dumping duty achieves the objective of maintaining the anti-dumping measures but without requiring payment of dumping duties because there is no injurious dumping to be offset and providing the opportunity for those measures to be reviewed if circumstances change and an alteration of the measures was required.

Alternatively, if it is considered that the minimum price necessary to prevent material injury or its recurrence must be a minimum floor price of some amount, then the starting point must be the

lowest export price of any exports from any country by any exporter. This must be the case because no export price of any exports from any country, whether dumped or un-dumped, is causing injury. If exports with the lowest export price are not causing material injury, then that export price should be the non-injurious price or, at least, the starting price in determining a non-injurious price.

As is its usual practice, the Commission calculated a non-injurious price based on a so-called unsuppressed selling price (**USP**): see Section 6.42 of Report 609. That USP was calculated by using the using the 'constructed approach' having regard to the 'weighted average CTMS for Australian industry members in the inquiry period and a reasonable amount for profit. Given the extremely limited participation by members of the Australian industry in the review and information provided to the Commission by members of the Australian industry, it would be interesting to know which members of the Australian industry whose data was used. It is unlikely to be representative of all members of the Australian industry.

In any event, that calculation is not relevant unless the USP is lower than the lowest export price. If no injury is being caused by exports at the lowest export price, which obviously is the case, then clearly a USP that is higher than that export price is not the minimum price necessary to prevent injury. There would be an export price, if not more, lower than the USP that is not causing injury regardless of whether the export price is a dumped price. The USP cannot be the minimum price because there are other prices that are lower that are not causing injury.

Hence the non-injurious price, that is, the minimum price necessary to prevent material injury must be the lowest export price of any exports to Australia by any exporter from any country and regardless of whether that export price is dumped or un-dumped.

This is the analysis that should have been undertaken and, had it been undertaken, a new non-injurious price would have been included in the reviewable decision.

The reviewable decision, therefore, was not the correct or preferable decision because it did not include a non-injurious price when, in the circumstances, the desirability of a non-injurious price for all exporters should have been considered. Had it been considered, a different non-injurious price to that in the dumping duty notice would have been determined. The amount of that injurious price would be, if not zero, the lowest export price of exports to Australia by any exporter from any country and whether or not dumped given that the Australian industry was incurring no injury from such exports.

Question 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 and preferable decision is that the anti-dumping measures as they apply to all exporters be based on the non-injurious price of those exports being a minimum export price of 'zero' or '$0' or, alternatively, if that minimum export price is not acceptable, then the lowest export price of exports to Australia by any exporter from any country and whether or not dumped for the reasons given in the response to Question 9.

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

The grounds raised in Question 9 support the making of the proposed correct and preferable decision because they established that there was no injurious dumping to be prevented. In fact there was no injury being experienced by the Australian industry let alone material injury being caused by dumping due to a change in the variable factors. Hence the correct and preferable decision, in the absence of an ability to revoke the measures, was to set a minimum price for the exports at 'zero', that is '$0' or,

alternatively, if that minimum export price is not acceptable, then the lowest export price of exports to Australia by any exporter from any country and whether or not dumped for the reasons given in the response to Question 9.

Question 12: Set out the reasons why the proposed decision provided in response to question 0 is materially different from the reviewable decision:

The proposed decision set out in response to Question 10 is materially different from the reviewable decision because it specifies a non-injurious price for exports by the subject exporters, being a minimum price for such exports of 'zero', that is '$0' or, alternatively, if that minimum export price is not acceptable, then the lowest export price of exports to Australia by any exporter from any country.