PUBLIC RECORD

Australian Government
Department of Industry, Science, Energy and Resources

Anti-Dumping Commission

Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

Member Paul O'Connor
Anti-Dumping Review Panel
c/o- ADRP Secretariat

By e-mail: ADRP@industry.gov.au

Dear Member O'Connor,

ADRP Review No. 135 and 137: Aluminium Extrusions (Mill Finish) and Aluminium Extrusions (Surface Finish) exported from Malaysia

I write with regard to the notice under section 269ZZI of the *Customs Act 1901* (Cth) (the **Customs Act**) published on 14 July 2021. This notice advised of your intention to review the decisions of the Minister for Industry, Science and Technology (the **Minister**) to publish dumping duty notices under subsections 269TG(1) and (2) of the Customs Act.

The notices apply to *Aluminium Extrusions (Mill Finished)* and *Aluminium Extrusions (Surface Finished)* exported from Malaysia (the **Reviewable Decisions**).

I have considered the applications submitted by Milleon Extruder Sdn. Bhd (**Milleon**) and Criterion Industries Pty Ltd (**Criterion**) for a review of the Reviewable Decisions. I make submissions, pursuant to section 269ZZJ(aa) of the Customs Act at **Attachment A** (in respect of Milleon) and **Attachment B** (in respect of Criterion) (public versions).

The Anti-Dumping Commission remains at your disposal to assist you in this matter, and would be happy to participate in a conference if you consider it appropriate to do so.

Yours sincerely

Dr Bradley Armstrong PSM
Commissioner, Anti-Dumping Commission
13 August 2021

Attachment A

COMMISSIONER, ANTI-DUMPING COMMISSION SUBMISSION

Milleon (ADN 2021/033)

Introduction[1]

1. I make this submission in response to an application (**the Application**) by Milleon Extruder Sdn. Bhd (**Milleon**) to the Anti-Dumping Review Panel (the **ADRP**) for review.[2]

2. The previous Commissioner of the Anti-Dumping Commission (Mr Dale Seymour) (the **then Commissioner**) received an application from Capral Limited (ABN 78 004 213 692) (**Capral**) to undertake an investigation into allegedly dumped goods, in respect of certain Aluminium Extrusions (Mill Finish) and (Surface Finished) exported from Malaysia. These goods were exported by the following exporters:

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

3. There are two types of goods, the subject of dumping duty notices, which were investigated by the Anti-Dumping Commission (the **Commission**). Namely, Aluminium Extrusions (Mill Finish) which were the subject of investigation report 540 and Aluminium Extrusions (Surface Finished) which were the subject of investigation report 541.

4. Capral's application was not rejected and investigations into both types of goods was undertaken. Report No. 540 (**REP 540**) set out my reasoning and recommendations in respect of Aluminium Extrusions (Mill Finish) (the **Investigation**).[3]

5. The result of the Investigation was that on 31 May 2021, the Minister for Industry, Science and Technology (the **Minister**) declared that imports of Aluminium Extrusions (Mill Finish) from Malaysia, entered for home

[1] All legislative references in this submission are to the *Customs Act 1901* (Cth) ('the Act') and, specifically, Part XVB of the Act, unless otherwise specified.
[2] ADRP Review 135 – *Anti-Dumping Review Panel,* Application – Milleon Extruder Sdn. Bhd, published 14 July 2021.
[3] Anti-dumping measures were imposed after consideration of *Anti-Dumping Commission Report No. 540 - Aluminium Extrusions (Mill Finish) exported from Malaysia.*

consumption on and after 31 May 2020, by *some* of the subject exporters, including Milleon,[4] are subject to dumping duties (the **Reviewable Decision**).[5]

Grounds for Milleon's application

6. Following receipt of Milleon's Application, the ADRP published an intention to conduct a review.[6] In that notice, the ADRP proposed to conduct a review of the Reviewable Decision in relation to the following grounds:[7]

    (i) The Commissioner failed to properly address the trade level difference identified by Milleon.

    (ii) The Commissioner failed to have proper regard to the evidence of the price premium as warranting an adjustment and chose a relatively minor cutting cost for one of three special domestic customers to make an adjustment for all three customers.

    (iii) The Commissioner failed to make an adjustment for management costs incurred in selling activities.

7. This submission addresses each of the grounds above.

8. Milleon's complaint alleges a 'special' (or premium) price for its Aluminium Extrusions (Mill Finish) sold in the majority to specific customers in Malaysia, which it claims are different from the 'standard' Aluminium Extrusions produced for export to Australia. Milleon's essential complaint being that the Commission's assessment has resulted in a distortion to the normal value of the goods.

9. I set out my submission below, as to why I consider that Milleon's complaint and grounds for review ought to be rejected.

Trade Level Difference – Ground 1

10. Milleon claims a difference in trade level attributed to sales of the goods, because allegedly 'special' like goods are sold to particular customers in Malaysia.

[4] The recommendations in REP 540 imposed measures on Kamco Aluminium Sdn Bhd, LB Aluminium Sdn Bhd and Milleon Extruder Sdn Bhd, but not on Superb Aluminium Industries Sdn Bhd, which was found not to have dumped the goods. Genesis Aluminium Industries Sdn Bhd did not export the goods and Press Metal Sdn Bhd had ceased to export the goods.
[5] Refer to Anti-Dumping Notice (ADN) Nos. 2021/033 and 2021/035, available on the Commission's website.
[6] ADRP Review 135 – *Anti-Dumping Review Panel,* Public Notice – Intention to conduct a review, published 14 July 2021.
[7] These grounds are set out in ADRP Review 135 – *Anti-Dumping Review Panel,* Application – Milleon Extruder Sdn Bhd, published 14 July 2021 at pages 6-14.

11. The Commission's verification report[8] recorded that Milleon's sales were at 'arms length' and profitable and made in the Ordinary Course of Trade (**OCOT**) in sufficient volumes. This finding in the verification report was not disputed by Milleon at the time that the report was published.[9]

12. Milleon raised its level of trade claim when the Commission asked it to review the draft verification report and dumping margin calculations. At that point, Milleon stated that it had set out details about level of trade differences in its questionnaire. However, Milleon's answers to the questions concerning level of trade, which were set out at B-1.6 and D-1.4 of its questionnaire response, did not correspond with what Milleon had argued.

13. The Commission invites exporters to review draft reports and calculations, so as to provide an opportunity for them to comment on commercially sensitive information and, importantly, to identify errors in the report and calculations. The Commission usually requests that exporters who disagree as to the findings in the draft report and calculations should make submissions for the Commission's consideration.

14. Subsequent to verification, Milleon made a number of submissions before and after the publication of the SEF setting out its view that 3 particular domestic customers paid a premium for specific types of the goods. Milleon asserted that there are 'trade level differences' between the goods it sold domestically to purchasers on the basis of their quality, and those it exported to Australia ('standard goods'). However, none of those submissions furnished evidence of sufficient granularity for the Commission to be able to take it into account.

15. The Commission considered Milleon's submissions at length in REP 540 and could not identify a relevant trade level difference in respect of Milleon's sales of the like goods to the 3 particular customers.[10]

16. Milleon argues that it makes domestic sales of like goods that are not exported to Australia and therefore should not be included in the determination of normal value. However, all like goods in the OCOT are included in the normal value. There is no ability to remove certain models from the like goods determination in the circumstances Milleon describes.

17. If the special like goods were not profitable or recoverable, then that would be relevant and they would be removed from the determination of normal value. But that is not the case here.

18. Milleon submits that:

[8] https://www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-archive-cases/540, Exporter Verification Report, Electronic Public Record EPR (20) published 28 August 2020.
[9] *Ibid*. Page 5.
[10] *Anti-Dumping Commission Report No. 540 - Aluminium Extrusions (Mill Finish) exported from Malaysia.* See pp.57-69.

> *"The high quality sales can reasonably be regarded as not being in the 'ordinary course of trade' for the purposes of working out the normal value for the exported goods for the reasons noted."* [11]

19. Exclusions from the OCOT are set out in section 269TAAD of the Act. That is, sales that are not recoverable or profitable. In certain circumstances, the Commission may consider that profitable sales are not in the OCOT, but usual sales of a specific type, subset or model of the like goods are not relevant for determining if sales are in the OCOT. The Dumping and Subsidy Manual (the **Manual**) notes that relevant circumstances to remove sales from OCOT may include sample sales, or promotional sales made at special prices (for example) but these are not relevant in the circumstances.[12]

20. The Commission made an adjustment to account for differences. However, Milleon does not agree with the adjustment as made. The Commission was not satisfied that Milleon could substantiate, with evidence, a preferable method for determining the adjustment.

21. For convenience and the purposes of this submission, from this point on, these categories of goods will be referred to throughout as 'special like goods'.

Evidence of a price premium – Ground 2

22. The evidence before the Commission was not sufficient to quantify the claimed price differences, so as to meaningfully distinguish that any 'premium' was relevant to a trade level difference per se (i.e. the Commission could not distinguish any particular pattern of trade, as amongst the relevant buyers, nor by comparing specific types of purchases).

23. Apart from the asserted differences in production process,[13] financial evidence of which could not be furnished or demonstrated by Milleon, the most readily identifiable physical characteristic of the special like goods was their length. That length ranged between 0.90 and 1.94 meters.

24. The Commission did observe, however, that some of the special like goods were possibly distinguishable from 'standard' goods on the basis of price (Milleon furnished some evidence of price differences but could not account for those differences in terms of the costs of production). It remains unclear if the disparities in price represent a margin for profit, as opposed to 'building in' additional costs for production.

[11] ADRP Review 135 – *Anti-Dumping Review Panel,* Application – Milleon Extruder Sdn. Bhd, published 14 July 2021 at page 11.
[12] *Dumping and Subsidy Manual.* Anti-Dumping Commission. November, 2018. See pp.32-33
[13] Milleon provided video footage of its production process, but the Commission was not able to use that information to reach an informed conclusion as to costs or production (as opposed to service) differences between the 'special like goods' and 'standard like goods'.

25. It was observed in REP 540 that it was possible that the 'premium' in price for the special like goods may simply have been connected with the contractual purchasing arrangements (at least one of the purchasers appeared to pay a higher price for the goods than the 2 others, on the basis of a contractual 'lock in' to prevailing LME prices for Aluminium ingot).[14]

26. The length of the special like goods appeared to the Commission to be the only criteria that could form the basis for an adjustment to the normal value of the like goods. This was considered, so as to ensure that the comparison between the domestic and export goods is 'like-for-like'.

27. The Commission considered it appropriate to apply a normal value adjustment to the relevant special like goods transactions, so as to deduct the part of the price that could be demonstrated to reflect precision cutting operations.

Differences between the Domestic and Exported Goods

28. Aluminum extrusions are produced in an array of shapes, sizes and lengths. It can be difficult to identify when a domestic model is directly comparable to an exported model. Consequently, 'surrogate' domestic models which would undergo the same production processes as those exported are identified to properly compare the export price and the normal value.

29. In order to ensure that 'like-for-like' comparisons could be made with accuracy, the Commission used a Model Control Code (**MCC**) structure developed for Investigation 540. Until the Statement of Essential Facts (**SEF**) was published, Milleon did not comment either adversely or otherwise on the use of the MCC for that purpose.[15]

30. Within the context of the MCC structure 'special' and 'standard' like goods which mapped to the models denoted as M-6A-T1 and M-6C-T1 were considered sufficiently similar to exports of Milleon's goods. However, the product codes of the 'special' like goods identified by Milleon were not exported to Australia. In other words, the 'special like goods' comprised a further subset of these particular MCCs.

31. The domestic like goods that mapped to M-6A-T1 were comprised of 377 individual base product codes, which related to the design of the extrusion cross section. When the length component was added, the number of product codes increased to 491.

32. By comparison, there were 298 product codes within the range of exported goods that mapped to the MCC denoted as M-6A-T1.

[14] *Anti-Dumping Commission Report No. 540 - Aluminium Extrusions (Mill Finish) exported from Malaysia.* See page 60 and pp.65-68.
[15] *https://www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-archive-cases/540*, Exporter Verification Report, Electronic Public Record EPR (20) published 28 August 2020. Page 5.

33. So as to effectively compare domestic and export models, the Commission aggregates the like goods of comparable or closely resembling characteristics into the MCC structure. The MCC is based on the established understanding of the aluminium extrusion product. It captures differences in physical characteristics that give rise to distinguishable and material differences in price, including key production cost drivers and price determinants, e.g. finish, material alloy and tempering.

    In Milleon's case, within the MCC denoted as M-6A-T1, the vast majority of like goods relevant to Milleon's 'standard' designation fell within this MCC category. The remaining volume of domestic sales were of the 'special' sub-set, the subject of its claim. These goods also fell within the same MCC.
34. One inference that may be drawn is that the domestic and exported goods are not necessarily distinguishable in respect of price.

Milleon's domestic sales

35. The special like goods represented approximately [X] of total domestic sales in the MCC denoted as M-6A-T1. Aluminium extrusions (mill finish) in the range of 5.50 to 6.50 meters long, which is a commonly sold length in the industry represented approximately [X] of total domestic sales in the same MCC. The remaining [X] comprised over 60 different length variations, but were predominately around 3, 4, 5, 7 and 9 meters.

36. A further quantity of 'standard' like goods of the same length range as the special like goods were also sold domestically by Milleon.

Milleon's export sales

37. Milleon exports three different categories of extrusions of the following lengths: (1 to 2 meters), (5.50 to 6.50 meters) and (2.4 to 3.0 meters).

38. Eighty percent (80%) of Milleon's exported goods were between 5.50 to 6.50 meters long, 5.5% were between 1 and 2 meters long, and the remaining fifteen percent (15%) comprised of extrusions that were either 2.4, 4.0 and/or 3.0 meters in length.

39. Across the three different length categories of aluminium extrusions (mill finished) exported to Australia by Milleon, the Free on Board (FOB) price varied by only AUD$[X] per kilo.

40. Goods in the 1 to 2 meters category were at the top of the price range. The variance between the top and bottom price range represented [X] of the AUD$[X] weighted average FOB price for all goods.

41. Given the approach required to achieve the short length of the special like goods, the Commission held the view that the corresponding exported goods of the same length similarly underwent the same production process.

42. Although Milleon did not provide price lists for goods of different lengths, information before the Commission appeared to show that special precision cutting charges are usually applied to products under 2 meters in length.

Difficulties attributing costs

43. All production of aluminum extrusions is subject to some form of quality control which would involve using measuring devices such as those used for the special like goods. The extent to which these processes applied to the special like goods and the extent to which they are attributable to the disparity between the prices attributable to them is the crux of this dispute.

44. Generally speaking, additional production processes equate to a higher cost of production. Having regard for this, the Commission agreed, in principle, that additional functions required to produce the special like goods may have incurred additional costs.

45. On 18 November 2020, a request for information (RFI) was put to Milleon. The questions listed at 4, 5, 6, 7, and 8 sought information on the relevant costs. However, Milleon did not provide sufficiently comprehensive responses and evidence to support its claim.[16]

46. The Commission considered that the questions in the RFI were clearly asking for the costs associated with the special like goods. Milleon was unable to quantify them.

47. Sales to the premium customers represented [X] of Milleon's total sales of like goods which mapped to the MCC denoted as M-6A-T1. However, it is not clear that the claimed additional processing costs were specific to the special like goods. For example, the goods were not sold on every day of the year. This suggests that the staff assigned to the special like goods process would possibly be allocated to other duties.

48. The Commission found that the pattern of sales for special like goods and standard like goods were similar in terms of sales volume in discreet transactions, except that the special like goods relative to other extrusions were generally at the upper end of the price range. For one particular customer, the prices were consistently higher, but also not materially higher when considered relative to other transactions.[17] It is submitted that this

[16] The Request for Information document was provided to the ADRP.
[17] A difference of only [X] Malaysian Ringgit above the other prices for the special like goods was consistently observed in respect of one customer in the transactional assessment undertaken by the Commission. This price difference appears to be explained by the prevailing price for aluminium billet

higher price is an outlier, for the reasons noted earlier, and that the upper level of the range prices have been adequately accounted for by the precision cutting price adjustment.

Management Costs – Ground 3

49. Finally, the Commission reiterates its conclusion, recorded in REP 540, that Milleon's 'management costs' were found to be indirect expenses which could only be attributable to all of the company's sales. Therefore, it is not appropriate to allocate those expenses exclusively to the like goods. Some explanation of the chronology of the claim and the Commission's responses is set out in the following paragraphs to explain the Commission's assessment.

50. As noted earlier, Milleon did not indicate, at questions B5, E4 or E5 of its exporter questionnaire response that adjustments were necessary to account for direct selling expenses. Those expenses being in the form of 'management costs' relevant to its domestic sales of like goods.[18]

51. On 21 September 2020, however, Milleon made a submission to the Commission. That submission claimed that certain wages and remuneration expenses for staff (within what Milleon referred to as a 'management team') should have been classified as a direct selling expense, relevant to its domestic sales of like goods sales.

52. Calculations provided by Milleon outlined that [X] of a wages and remuneration cost base totalling [X] Malaysian Ringgit should have been allocated to the volume of like goods sales that did not involve the use of a commission agent.

53. The Commission found that the cost base relied on by Milleon represented the total of the wages and remuneration expense accounts (inclusive of directors remuneration) reported in its SG&A listing (set out at G-4.1 of its questionnaire). The same listing which was subject to verification.

54. No explanation was provided for how the allocation rate presented by Milleon had been determined, or how it set about to identify relevant management team expenses, which were the subject of the allocation. Milleon's submissions after 21 September 2020 also did not provide information of sufficient granularity to justify or progress Milleon's claim.

55. The Commission also observed that not all company positions identified in Milleon's organisation chart appeared to be relevant to direct sales functions. In addition to the issues discussed in relation to Milleon's submissions, the examination of its organisation chart suggested that Milleon's management

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on the LME during the investigation period and the difference where contractual terms 'lock in' an earlier, higher LME price – Aluminium billet comprising approximately 80% of the production cost. See Analysis of Domestic Sales Spreadsheet (Confidential).

[18] GP16 in the Milleon Verification Work Program at Confidential Attachment 1 to 540 Public Record Item No. 020 refers.

team cost allocation was overstated. It appeared likely that it included wages and remuneration expenses for staff that were not relevant to the purported sales function.

56. The evidence submitted to the Commission was taken into account and allocated consistently with the principles set out in the Manual.[19] Those principles provide that certain management expenses which are indirect expenses don't need to be included in the determination of the selling, general and administrative (SG&A) expenses.

57. Milleon's management team expenses could potentially have been taken into account for an adjustment, if they had been explained and could be allocated to the selling component. However, there was no reliable information on which to assess whether the claimed costs were sufficiently accurate or relevant.

[19] *Dumping and Subsidy Manual.* Anti-Dumping Commission. November, 2018. See pages 43-44 which deals with indirect expenses and page 78 in respect of adjustments for commissions paid to agents.

Attachment B

COMMISSIONER, ANTI-DUMPING COMMISSION SUBMISSION

Criterion (ADN 2021/033 and ADN 2021/035)

Introduction[1]

1. I make this submission in response to an application (**the Application**) by Criterion Industries Pty Ltd (**Criterion**) to the Anti-Dumping Review Panel (the **ADRP**) for review.[2]

2. The then Commissioner of the Anti-Dumping Commission (Mr Dale Seymour) (the **then Commissioner**) received an application from Capral Limited (ABN 78 004 213 692) (**Capral**) to undertake investigations into allegedly dumped goods. The applications applied in respect of certain Aluminium Extrusions (Mill Finish) and (Surface Finished) exported from Malaysia. These goods were exported by the following exporters:

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

(Collectively referred to as the **Subject Exporters**)

3. There are two types of goods, the subject of dumping duty notices, which were investigated by the Commission. Capral's application was not rejected and investigations into both types of goods were undertaken.

4. Report No. 540 (REP 540) set out my reasoning and recommendations in respect of Aluminium Extrusions (Mill Finish). Report No. 541 (REP 541) set out my reasoning and recommendations in respect of Aluminium Extrusions (Surface Finished) (the **Investigations**).[3] Descriptions of each of these types of goods are set out, respectively, in REP 540 (at pages 18-19) and REP 541 (at pages 19-20).

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[1] All legislative references in this submission are to the *Customs Act 1901* (Cth) ('the Act') and, specifically to Part XVB of the Act, unless otherwise indicated.

[2] ADRP Review 135 (Aluminium Extrusions - Mill Finish) and ADRP Review 137 (Aluminium Extrusions - Surface Finished) exported from Malaysia – *Anti-Dumping Review Panel,* Application – Criterion Industries Pty Ltd, published 14 July 2021.

[3] Anti-dumping measures were imposed after consideration of *Anti-Dumping Commission Report No. 540 - Aluminium Extrusions (Mill Finish) exported from Malaysia* and *Report No 541 - Aluminium Extrusions (Surface Finished) exported from Malaysia.*

5. The result of these Investigations was that on 31 May 2021, the Minister for Industry, Science and Technology (the **Minister**), declared that imports of the two types of goods from Malaysia, entered for home consumption on and after 31 May 2020, by *some* of the subject exporters,[4] are subject to dumping duties (the **Reviewable Decisions**).[5]

Grounds for Criterion's Application

6. Following receipt of Criterion's Application, the ADRP published an intention to conduct a review.[6] In that notice, the ADRP proposed to conduct a review of the Reviewable Decision in relation to the following grounds:[7]

   (a) There is and was no evidence or sufficient evidence before the Anti-Dumping Commissioner and, consequently, the Minister, that the Australian industry as a whole, as opposed to part thereof, had incurred material injury during the injury period.

   (b) In the absence of evidence or sufficient evidence that the Australian industry had incurred material injury, the issue of whether exports of the Goods Under Consideration (**GUC**) at 'dumped' export prices had caused material injury to that industry did not and could not arise.

   (c) Even had there been sufficient evidence that the Australian industry as a whole had incurred material injury, there was insufficient evidence that exports of the GUC through the injurious effects of 'dumping' had caused material injury to the Australian industry as a whole during the injury period.

7. This submission addresses the first and primary ground of Criterion's submission. Namely, that there is and was no evidence or sufficient evidence before the Anti-Dumping Commissioner that the Australian industry as a whole, as opposed to part thereof, had incurred material injury during the injury period.

8. Having addressed the primary ground, the other grounds either do not arise or merge in resolution.

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[4] REP 540 recommended that measures be imposed on Kamco Aluminium Sdn Bhd, LB Aluminium Sdn Bhd and Milleon Extruder Sdn Bhd, but not on Superb Aluminium Industries Sdn Bhd, which was found not to have dumped the goods. Genesis Aluminium Industries Sdn Bhd did not export the goods and Press Metal Sdn Bhd had ceased to export the goods. REP 541 recommended measures on Kamco Aluminium Sdn Bhd, LB Aluminium Sdn Bhd, Milleon Extruder Sdn Bhd and Superb Aluminium Industries Sdn Bhd. Measures were not imposed on Genesis Aluminium Industries Sdn Bhd which was not found to have dumped the goods.

[5] Refer to Anti-Dumping Notice (ADN) Nos. 2021/033 and 2021/035, available on the Commission's website.

[6] ADRP Review 137 – *Anti-Dumping Review Panel,* Public Notice – Intention to conduct a review, published 14 July 2021.

[7] These grounds are set out in ADRP Review 137 – *Anti-Dumping Review Panel,* Application – Criterion Industries Pty Ltd, published 14 July 2021 at page 11.

9 I do **not** agree that the original notices should be revoked and I consider that the Minister's decisions in respect of the Investigations should be affirmed.

What is an Australian Industry?

10 The aluminium extrusions industry that forms the subject of these submissions consists of 9 members of varying sizes across different jurisdictions spread across the eastern seaboard of Australia (VIC, NSW, and QLD).

11 The key issues that form the crux of Criterion's complaint arise partly from the fact that Australian Industry is not defined in the Act. The definition section set out in section 269T(4)(a) and (b) of the Act provides that, "if there is a person or persons who produce like goods in Australia", then "there is an Australian industry in respect of those like goods, and "the Australian industry may consist of that person or those persons".

12 In other words, an Australian industry may comprise as little as one person (a sole trader, for example). That is not in dispute.

13 Criterion submits that an Australian industry must mean the whole of that industry. In particular, Criterion relies on the reasoning of Lockhart J in *Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority* [1991] FCA 42 (**Swan Portland**), where it was observed that:

> *In my opinion, the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria.*[8]

14 An Australian industry must refer to an industry that is not to be unduly limited or confined solely by geographic criteria. Nor is it to be narrowly construed on the basis of other criteria, if they are irrelevant. However, Criterion takes the reasoning set out in Swan Portland further, so as to confine the implications of the market analysis in these Investigations.

15 Criterion prosecutes a three limbed argument:

(1) If determined solely by market criteria, the Australian industry must include every single member of that industry;

(2) If determined solely by market criteria, a majority of members of that industry must have suffered material injury and must furnish evidence of it to the Commission (i.e. if only one part of an Australian industry can be shown to have suffered injury within a particular market, then that will not

[8] *Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority* [1991] FCA 42. Paragraph 39.

necessarily be sufficient to show that injury has been incurred by the whole of that industry).

(3) Finally, if any particular member (or members) of that Australian industry can be shown to be profitable, it follows that injury has not been incurred by the whole of that Australian industry.

16 This submission disagrees that the above criteria are relevant to the definition and analysis of an Australian industry for the purpose of determining injury.

The Australian industry and the issue of standing/representation

17 The Australian industry consists of 9 members. The applicant, Capral, is one (albeit significant) member of the Australian industry. Although, at the time of initiation and thereafter, Capral's application was also supported by 6 other Australian industry members who submitted letters of support.

18 The application was not supported by every member of the Australian industry, but that is not a requirement under the Act, as is clear. Section 269TB(6) of the Act provides that:

(6) An application under subsection (1) in relation to a consignment of goods is taken to be supported by a sufficient part of the Australian industry if the Commissioner is satisfied that persons (including the applicant) who produce or manufacture like goods in Australia and who support the application:

(a) account for more than 50% of the total production or manufacture of like goods produced or manufactured by that portion of the Australian industry that has expressed either support for, or opposition to, the application; and

(b) account for not less than 25% of the total production or manufacture of like goods in Australia.

19 Capral itself accounts for more than 30% of the total production or manufacture of the like goods, being the subject of the Investigations. Furthermore, the letters of support for Capral's application represent the support of those members of the Australian industry that account for at least 70% of the total production or manufacture of the like goods, the subject of the Investigations.[9]

20 The Act sets the requirement for participation at no higher a level of representation than the support of those members that comprise between 25% and 50% of total production or manufacture. On this basis, the

[9] In fact, the supporters of the Investigations represent significantly more than half of the Australian industry on the basis of their capacity as producers (more than 70%) and by simple headcount (7 of 9 members). By contrast, the applicants in the Swan Portland case, being manufacturers of concrete 'clinker,' located in a remote area of Western Australia, represented approximately 50% of the Australian industry. This was determined after a competitor producer, Merman, established itself and started importing and producing clinker. *Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority* [1991] FCA 42. Paragraph 4.

Commissioner was satisfied that the requirements under section 269TB(6) are met.

21 However, Criterion posits that, given the Australian industry consists of 9 members, a higher threshold of active participation is required than one, or even three of those members, irrespective of the scale of their production. The reason being that, according to Criterion, the evidence of injury must be sufficient (i.e. material) and must bear some nexus showing that the injury has been incurred (or is a threat to) the whole of that industry.

22 Criterion's Application acknowledges that a threshold of evidence requiring the whole of the Australian industry might be problematic at paragraph 2.7:

> *It does not follow that each such entity must necessarily have incurred 'injury' for the industry as a whole to have incurred injury but it must be a majority of members of the industry. It also will depend upon the nature and extent of the injury as to whether the Australian industry as a whole has incurred material injury.*[10]

23 The difficulty that arises, however, is that there is no such requirement set out either in the Act or in the case law. In particular, there is no statutory requirement to obtain the support of 'a majority' of members of the Australian industry (nor does Criterion specify what it considers would be sufficient). The only factor that is informative in any material sense is the standing requirement set out in section 269TB(6) of the Act, which has been clearly established for these Investigations.

24 That threshold requires at least a 25% level of participation solely by the producer members and no more than 50% of participation by the producer members who have also expressed support for the application. Capral and six other producer members expressed support for the application.[11]

25 There is no requirement in the Act that all (or even a majority of) members of an Australian industry must actively participate and adduce specific evidence of injury.

26 As a proportion of the entire Australian industry, measured by total production each of Capral, G.James Australia Pty Ltd (**G.James**) and Independent Extrusions Australia Pty Ltd (**INEX**) represent the following percentages of production of the two types of like goods (these figures are a rounded approximation but they are within 1% of accuracy):

[10] *Anti-Dumping Review Panel,* Application – Criterion Industries Pty Ltd, published 14 July 2021, at page 16.
[11] Section 269TB(6)(a) and (b) of the *Customs Act 1901* (Cth). REP 540 set out at page 12 each of the Australian industry members that submitted letters of support.

Australian Industry Member	540 – Mill Finished Goods	541 – Surface Finished Goods
Capral	38%	39%[12]
G James	[X]	[X]
INEX	[X]	[X]
Total	**70%**	**70%**

Table 1 Australian Industry Volumes of Production

27 I note that the remaining 6 members of the industry are not of the scale of Capral, G. James and INEX (mostly being smaller scale enterprises) and, therefore, also occupy and carve out slightly different business functions in the aluminium industry market. Moreover, the majority of them supported the application.[13]

28 The Swan Portland case does not set out any particular requirement that evidence of injury to an Australian industry requires a survey or furnishing of evidence from a majority of members of that industry (by simple headcount). I submit that would entail a misreading of the decision, which interpolates a meaning and significance that is not present in the reasoning.

29 Rather, the Swan Portland case appears to require that, if there is alleged to be injury to an Australian market, then it follows that the Commission must take into account the alleged injury having regard for the whole of that market. This is undertaken as a matter of course for all investigations into alleged dumping of like goods.

30 The assessment of material injury by the Commission always (as is the case in these Investigations) assesses impact having regard for the whole of the Australian industry in respect of the specific market for the relevant goods. This is why the Commission's Manual sets out that "the material injury determination must be assessed against the Australian industry as a whole."[14] Not for the purpose of forcing the Australian industry itself into supporting an investigation, but for the purpose of making an informed assessment of the relevant market(s) and the goods within that market.

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[12] In REP 541, Capral is represented as comprising 33% of the Australian industry's production volume (see page 83). However, upon a more recent examination and review of the data, the Commission notes that Capral actually represents closer to 38%-39% of all production of the like goods. All figures represented here are considered the most accurate. They have been rounded up to the closest percentages. The text in red is confidential to G.James and INEX and should be redacted for publication.

[13] Only 2 of the 9 members did not expressly support the application (and, arguably, these members do not constitute even a significant minority, if assessed on the basis of volumes of production). *Anti-Dumping Commission Report No. 540 - Aluminium Extrusions (Mill Finish) exported from Malaysia* at page 82.

[14] *Dumping and Subsidy Manual.* Anti-Dumping Commission. November, 2018. Page 17.

31 I note that the Commission did make efforts to seek information from all of the Australian industry members upon receiving submissions during the SEF regarding this matter. A summary of the specific data collected from the three largest members at the time that the Statement of Essential Facts was published could not be summarized on the electronic public record (EPR) for confidentiality reasons. However, the data was summarised in the findings, which are set out in REP 540 and 541.

32 The key issue appears to be that Capral, G.James and INEX comprise a significantly representative portion of the Australian industry, but is evidence of injury to these entities sufficient to comprise evidence of injury to the industry as a whole? In Swan Portland, Lockhart J observed that:

> *It depends on the facts of the case and inevitably it is a question of degree that involves balancing all relevant considerations and integers before concluding whether or not the dumping constitutes material injury to the Australian industry.*[15]

33 I submit that evidence of injury to a member representing at least one third of the industry's total production is sufficient, provided the nexus with material injury can be demonstrated. But even if this is not correct, the evidence adduced in this case extended to show injury to the dominant members comprising up to three quarters of that industry's total production.

34 The Commission has analysed evidence of various categories of injury caused to Capral but it has also analysed evidence relevant to the industry members responsible for the largest volumes of production. Those members are clearly representative of that industry and material injury to them is relevant and probative (particularly price, revenue, volume and profit injury, caused by the price of dumped goods undercutting the price of like goods sold by the Australian industry).

35 REP 540 and 541 consistently set out the various types of economic injury suffered by Capral, as well as having regard for other potential injury factors and regard for the conditions of competition between the Australian industry members and other overseas exporters.[16]

Injury, Causation and the Australian Market

36 I submit that the Australian industry was injured by the dumped goods, as evidenced by the causation analysis that is relevant to Capral, G.James and INEX in REP 540 and REP 541. These members suffered price injury caused by the dumped goods which had the effect of lowering prices.

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[15] Per Lockhart J, *Swan Portland Ltd & Anor v. Minister for Small Business & Customs & the Anti-Dumping Authority* [1991] FCA 42 at paragraph 41.
[16] See section 8.10 of *Anti-Dumping Commission Report No. 540 - Aluminium Extrusions (Mill Finish) exported from Malaysia.* In particular 8.10.4 at page 108. See section 8.10 of *Anti-Dumping Commission Report No. 541 - Aluminium Extrusions (Surface Finished) exported from Malaysia.* In particular 8.10.4 at page 110.

37 Criterion appears to set the bar for injury at such a high and narrow threshold that it would disable any investigation from looking at anything other than profit and loss financial statements.

38 Firstly, it does this by demanding that evidence of injury from 6 out of 9 members of that industry should be a necessary requirement to satisfy me that injury is material and probative. But that is not a statutory requirement.

39 Secondly, Criterion imposes its own interpretation and assessment of what constitutes injury to an Australian industry (for which there is no statutory basis). According to Criterion "Reduced revenues and profit are the only measures of 'injury' to an industry – that is why they are a business, namely to generate revenue and make profits for their owners."[17]

40 But this ignores the basis of the various indicia set out in section 269TAE, as well as the statutory proviso at section 269TAE(2) of the Act, which requires the Commission to have regard to various forms of injury that an industry may suffer (as well as other trends that might be contrary to those factors). These are detailed in each of REP 540 and 541. For instance, at paragraph 3.1 of the Application, Criterion describes the Commission's assessment as comprising what it describes as a 'list of injuries'. And yet, in a circular fashion, it then proceeds to insist that the Commission has not identified what 'constitutes' injury.

41 Furthermore, it has been argued in the Application that the various forms of injury set out in REP 540 and REP 541 are actually matters of causation. But there is little (if any) compelling argument set out in the Application as to how the injuries specifically identified by the Commission in REP 540 and 541 might be misconceived, or in error. Rather, the Applicant proceeds to dismiss the causation and injury analysis for not fitting into its own schematic concept of what injury should be.

42 Much of the Application also seems to be preoccupied with the probative value of financial statements and reports showing overall annual profits, which are not necessarily relevant to the question of material injury in respect of the like goods. A company may be profitable overall and yet still suffer material economic injury in a particular market.

43 REP 540 and REP 541 show that the goods from Malaysia were sold into Australia's market at dumped prices. The fact that the goods are sold by the identified Malaysian exporters at dumped prices receives little (if any) consideration in the Application submitted by Criterion.

44 However, the evidence in respect of Capral, G.James and INEX shows that the prices of the Malaysian exporters have undercut what could otherwise

[17] ADRP Review 137 – *Anti-Dumping Review Panel,* Application – Criterion Industries Pty Ltd, published 14 July 2021 at paragraph 3.12, page 31.

have been higher prices for the like goods sold by the 3 largest Australian industry members.[18]

45 It is important to note that the price effects analysis set out in REP 540 and REP 541 is counterfactual.[19] That is, having identified that the goods of the relevant Malaysian exporters were being sold into Australia at dumped prices, the logical assessment is to determine what price the Australian industry might have achieved, if the dumped prices could be removed or modified by the conditions of competition.

46 A primary source of information for the Commission's price effects analysis in REP 540 and REP 541 was the assessment of price undercutting.[20] The price undercutting assessment complemented the Commission's Australian market analysis.[21] It does so by providing insights into matters relating to competition between Australian market suppliers, price relationships, and having regard to what extent prices may have been modified, if the goods from Malaysia had not been dumped.

47 The analysis also provided evidence to support the assessment of Capral's claims set out in the initial application and supported by 7 members of the Australian Industry. The primary claim being that the Australian industry had experienced price injury caused by imports of dumped goods from Malaysia.

48 The Commission's price undercutting analysis identified that, in relation to a certain sales volume, the price of like goods sold by Capral through both of its market channels (i.e. direct from its production operations (mill) or via its network of distribution centres) were comparable to the prices obtained by Australian importers of the dumped goods.[22] [23]

49 The price undercutting analysis led to a finding that Capral's like goods were competing against Malaysian exporters. It also supported Capral's characterisation of competition between the market participants.

50 A further outcome of the price undercutting analysis identified that dumped goods were sold onto the Australian market by importers of the goods who were engaged in the distribution level of trade within the Australian market.[24] It was also found that the Australian market prices of the like goods sold at this level of trade were comparable to Capral's prices. This indicated that

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[18] Section 8.7 'Price Effects' in REP 540 and REP 541 refers. The 3 largest members by volumes of production.
[19] Section 8.3 'Approach to causation analysis' in REP 540 and REP 541 refers.
[20] Section 8.6 'Price Undercutting' in REP 540 and REP 541 refers.
[21] Chapter 5 in REP 540 and REP 541 refers.
[22] Section 8.6 'Price Undercutting' in REP 540 (p.99) and REP 541 9 (p.100) refers.
[23] The volume of sales relevant to this finding was identified in the detailed sales transaction reports at Confidential Attachments 2 and 3 to Capral's verification report. The Capral verification report is available on the case public record for 540 at Item No. 009 and for 541 at Item No. 010.
[24] Market structure is discussed in Section 5.3 to REP 540 and REP 541 refers.

competition between Capral's like goods sales and sales by exporters of the dumped goods mostly occurred at the distribution level of trade.

51 In addition to the examination of Capral's sales data, the Commission's price undercutting analysis had regard for the sales information provided by G.James and INEX.[25] This information supported a finding that these entities achieved sales volumes at prices which were undercut by, or comparable to, the price of the dumped goods from Malaysia, when sold at the distribution level of trade in the Australian market.[26]

52 The Commission's price effects analysis included an examination of Australian selling prices of the goods imported from China and Vietnam. It was acknowledged that goods from these countries are subject to anti-dumping measures and they represented the two other largest sources of supply to the Australian market. The Commission concluded that a strong causal link between Capral's price injury claims and imports of the goods from these countries was unlikely.[27]

53 The counterfactual scenario outlined in REP 540 and REP 541 found that if the goods from Malaysia had not been dumped, the prices of the like goods would have been higher than the prices that Capral, G.James and INEX had actually achieved.[28] These findings also took into account the price of goods sourced from other countries.

54 The price range between the factual (dumped selling price) and counterfactual (undumped selling price) scenarios constitutes the quantum of the price injury that was (at the very least) experienced by Capral, G.James and INEX. The counterfactual selling price was expressed as a mark-up over the prices for a volume of sales that these 3 entities had achieved when in competition with dumped imports.[29]

55 Relying on the sales volumes actually achieved by Capral, G.James and INEX during the investigation period, and applying the counterfactual price mark up, the Commission assessed economic measures such as sales revenue forgone, profit and profitability. The Commission observed that the revenue forgone due to dumping was at least AUD$[X] in relation to mill finish like goods[30] and AUD$[X] in relation to surface finished like goods.[31]

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[25] Confidential Attachments 24.2 and 24.3 in REP 540 and Confidential Attachments 29.2 and 29.3 in REP 541 refer.
[26] Table 17 in Confidential Attachment 26 to REP 540 and Table 27 and 28 in Confidential Attachment 23 to REP 541.
[27] Section 8.7 in REP 540 (p.102) and REP 541 (p.105) refers.
[28] Section 8.7 'Price Effects' in REP 540 (p.102) and REP 541 (p.105) refers.
[29] Section 8.11 'Materiality of injury caused by dumping' in REP 540 (p.114) and REP 541 (p.116) refers.
[30] Table 8 at worksheet 'REP 540' in Confidential Attachment 28 to REP 540 refers.
[31] Table 9 at worksheet 'REP 541' in Confidential Attachment 34 to REP 541 refers.

56 Alternatively, the Commission considered the economic condition of the Australian industry, if the offer of undumped goods from Malaysia were not taken up by Australian customers. The outcome being that the Australian industry would have supplied the customers of dumped goods in volumes that were observed at the distribution level of trade. The effect of this outcome would have led to an improved economic condition of the Australian industry.[32]

57 In conclusion, based on the examination of the economic condition of Capral, G.James and INEX,[33] the Commission found that:

- the dumping of the goods by certain exporters from Malaysia had caused injury to each;
- the injury was caused to those members who account for 70% of the whole Australian industry by volume of production; and
- the injury was identified in relation to several economic criteria, not solely price injury.

58 The injury caused by the dumping was found to be material.[34]

[32] Section 8.11 'Materiality of injury caused by dumping' in REP 540 (p.114) and REP 541 (p.117) refers.
[33] The Australian industry here meaning those members assessed on the basis of volumes of production of the relevant like goods, accounting for 70% of the industry's entire production.
[34] Section 8.12 'Conclusion' in REP 540 and REP 541 refers.