

# Metal One

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The Director  
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Dear Sir or Madam

## NON-CONFIDENTIAL – FOR PUBLIC RECORD

**Submission by Metal One Corporation  
Dumping investigation ADC 234 - Quenched and tempered steel plate exported from  
Finland, Japan and Sweden**

### 1. INTRODUCTION AND SUMMARY

This submission is made by Metal One Corporation (**Metal One**) in response to the Statement of Essential Facts (**SEF**) issued by the Anti-Dumping Commission (**Commission**) on 27 August 2014 in relation to investigation 234 – Quenched and Tempered Steel (**Q & T steel**) from Finland, Sweden and Japan.

Where appropriate, these submissions also make reference to the Preliminary Affirmative Determination report (**PAD**) issued by the Commission on 19 May 2014.

Metal One agrees with and adopts the submissions of ASM Corporation (**ASM**) in response to the SEF, dated 16 September 2014. Metal One does, however, wish to make additional submissions in relation to:

- (a) the Commission's finding that Metal One is an intermediary and not an exporter; and
- (b) the calculation of export prices and normal values for JFE Corporation (**JFE**).

### 2. METAL ONE SHOULD BE REGARDED AS AN EXPORTER

At section 6.3.1 of the SEF, the Commission concludes:

Depending on the facts, the Commission considers that only in rare circumstances would an intermediary be found to be the exporter. Typically this will occur where the manufacturer has no knowledge that the goods are destined for export to any country and the essential role of the intermediary is that of a distributor rather than a trader. In the absence of evidence to the contrary, the Commission does not consider Metal One Corporation and other traders listed above to be the exporters of the goods to Australia for the purposes of assessing dumping margins.

Metal One respectfully submits that the Commission's conclusion is erroneous. Metal One submits that:

- (a) it is an exporter for the purposes of sections 269TAB and 269TAC of the *Customs Act 1901* (Cth) (**Customs Act**);
- (b) purchases from Metal One by Metal One's Australian customers are arms' length transactions;
- (c) accordingly, the export prices and normal values should be determined for Metal One in accordance with sections 269TAB(1)(a) and 269TAC(1) respectively, with normal values adjusted in accordance with section 269TAC(8); and
- (d) the Commission has fallen into legal error by failing to investigate Metal One's assertion that it is an exporter.

## 2.1 Principles and factors relevant to whether a party is an exporter

The term "exporter" is not defined in the Customs Act. The meaning of the term has, however, been considered in a number of relevant Australian cases.

Detailed consideration was given to the meaning of "exporter" in the context of the anti-dumping provisions of the Customs Act in *Companhia Votorantim de Celulose e Papel v Anti-Dumping Authority and Others* (1996) 42 ALD 7 at 14 (which was the first instance decision of Justice Finn) (**Celpav**) and *Companhia Votorantim de Celulose e Papel v Anti-Dumping Authority and Others* (1996) 71 FCR 80 (the decision of the Full Court of the Federal Court on appeal, which upheld the decision of Justice Finn on all but one point) (**Celpav appeal**) (collectively, the **Celpav cases**).

In that case, the Australian importer (Edwards Dunlop Limited, **ED**) contracted with a Japanese company (DaiEi) for the purchase of paper made in Brazil by Celpav. DaiEi contracted with Celpav for the purchase and shipment of the paper. Celpav was responsible for shipping the goods on Cost-and-Freight (**CFR**) terms direct from Brazil to Australia. DaiEi paid Celpav sometime after the shipment left Brazil, and ED subsequently paid DaiEi the amount paid by DaiEi to Celpav plus a margin. Both Justice Finn at first instance,<sup>1</sup> and the Full Court on appeal (collectively, **the Celpav cases**), concluded that Celpav, not DaiEi, was the exporter.

Justice Lee relevantly held that:

"The mere fact of a sale and resale in an export context such as this is not of itself sufficient, in my view, to constitute the reseller an exporter as of course...

Similarly it is not necessary, in my view, that to be an exporter, an entity must have some direct physical involvement in the movement of the goods out of the country... Possessing and exercising a real, practical capacity to cause exportation may suffice in some circumstances..."<sup>2</sup>

[Nor is it] essential that, at the time the goods actually leave the territory or the country of origin, they need to be beneficially owned by the exporter..."<sup>3</sup>

The attribution or non-attribution of the label exporter to an intermediate party in the position of a company [turns]... upon a characterisation made of its role vis-a-vis both the Australian

<sup>1</sup> *Companhia Votorantim de Celulose e Papel v Anti-Dumping Authority and Others* (1996) 42 ALD 7 at 14 (**Celpav First Instance**)

<sup>2</sup> On this point, see also the comments of Lee J in *Pilkington (Australia) Ltd v Anti-Dumping Authority* (1995) 56 FCR 424 at 431-432: "There may be circumstances under which an entity that carries on business as a supplier of goods to an importer and, for that purpose, contracts for a manufacturer to export its goods direct to an Australian importer, is the relevant "exporter" for the purposes of s 269TAB(1)(a)."

<sup>3</sup> *Celpav First Instance*, at 14.

importer and the manufacturer in the latter's sale of, and the former's acquisition of, the goods in question."<sup>4</sup>

The Full Court concurred, stating:

"It is not the passing of property which identifies the exporter (although it may be critical to identification of the importer) but rather the identification of which party satisfies the requirements of truly being the exporter."<sup>5</sup>

The Commission's position, as stated in section 6.3.1 of the SEF, that "only in rare circumstances would an intermediary be found to be the exporter" and that this will typically only be the case where "the manufacturer has no knowledge that the goods are destined for export to any country and the essential role of the intermediary is that of a distributor rather than a trader" is not consistent with the Federal Court's approach.

Factors that may be relevant to whether a party is an exporter, and which were considered in the *Celpav* cases include:

- the contractual arrangements and positions of the parties;
- the level of autonomy exercised by the intermediary party in selecting the destination market for the goods;
- the supply chain arrangements and ownership of the goods;
- whether the intermediary is located in the country of export;
- the payment terms and assignment of credit risk (if any);

Additional factors that the Commission asserts are relevant (although Metal One says that they are by no means conclusive) include:

- whether the intermediary maintains stock holdings from which it exports; and
- the knowledge of the producer as to the ultimate destination of the goods.

## 2.2 **Application of principles and factors to Metal One's circumstances**

Metal One submits that, upon a proper characterisation of its role with respect to the Australian importer and the Japanese manufacturers from which it procures Q & T steel, Metal One is an exporter for the purposes of section 269TAB(1)(a).

### ***Contractual arrangements***

Metal One's contractual arrangements are relevant to the question of whether or not it is an exporter for the purpose of section 269TAB(1)(a).

In the *Celpav* cases, DaiEi was found to be a mere "facilitator" or "marketing vehicle" for the export of Celpav's goods to Australia, a market Celpav selected. At first instance, Justice Finn noted in support of this view that there was an exclusive arrangement between DaiEi and Celpav.

Metal One's circumstances and role are substantially different to this. Metal One is a trading company that purchases steel and other metal products from a variety of different

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<sup>4</sup> *Celpav First Instance* at 14.

<sup>5</sup> *Celpav* at 91.

mills and suppliers, and it sells that metal to customers all over the world.<sup>6</sup> This means that Metal One:

- (a) is the principal in all of its transactions with customers (that is, Metal One's customers deal only with Metal One, and not with the manufacturer); and
- (b) has no exclusive arrangement with any manufacturer. This fact is apparent from page 19 of Metal One's exporter questionnaire, which notes that Metal One purchases steel from both JFE Corporation and NSSMC for sale to Australian customers.

Accordingly, in point of difference with the circumstances in *Celpav*, Metal One is more than merely a commission or sales agent for a particular manufacturer. This fact weighs in favour of Metal One being considered to be an exporter.

### ***Selection of market***

As noted above, Metal One purchases various metal products, including Q & T steel, from various manufacturers, and sells them to a range of customers both within Japan, and to overseas customers, including customers in Australia.<sup>7</sup> Metal One freely selects the markets in which it does business, and indeed has invested very significant sums of money in Australian engineering and metal fabrication businesses. That is consistent with Metal One selecting the Australian market as a destination for the products it purchases in Japan.

### ***Supply chain and ownership of Q & T steel***

Metal One plays a significant supply chain role in the exportation of Q & T steel from Japan to Australia, which is consistent with it being considered an exporter.

Among other things, Metal One:

- (a) takes direct responsibility for [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [details of shipping arrangements]. Metal One submits that the Commission ought to place particular weight on this factor; and
- (b) takes ownership of the goods being exported for various durations in the course of the exportation process.

### ***Country of export***

Metal One purchases Q & T steel exclusively from Japanese manufacturers, and then exports that Q & T steel from Japan to Australia (and other countries). The "country of export" and the location from which Metal One does business are therefore the same. This is a fact that weighs in favour of Metal One being considered an exporter for the purpose of section 269TAB(1)(a). This stands in direct contrast to the position of DaiEI in the *Celpav* cases.

### ***Invoicing and credit risk***

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<sup>6</sup> See 'Sales to Third Countries' in Metal One's confidential exporter questionnaire spreadsheet.

<sup>7</sup> Ibid.



The process adopted by Metal One for ordering and paying for Q & T steel from manufacturers, invoicing its clients, and the party that bears the associated credit risk, is relevant to whether or not Metal One acts merely as a marketing vehicle or agent. For example, if Metal One were merely acting as an agent or marketing vehicle for its Australian customer, it might reasonably be expected that Metal One would place individual orders on behalf of its individual clients, and would accept very little credit risk (for example, by requiring payment up front or on short term accounts).

In fact, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[payment terms].

Metal One submits that this factor weighs in favour of it being considered an exporter for the purpose of section 269TAB(1).

#### ***Stock held as inventory***

In most cases, Metal One does not purchase Q & T steel from Japanese manufacturers until the customer has placed an order. However, it does, from time to time, maintain a small inventory of stock, dependent on customer orders, trading conditions, level of demand and expected levels of supply from manufacturers. Metal One does not engage in speculation trading in steel or any other metal.

Metal One submits that these arrangements are consistent with it being considered an exporter for the purpose of section 269TAB(1)(a).

Metal One notes the Commission's statement in the Manual that an exporter for the purpose of section 269TAB(1)(a) "may usually have its own inventory for all export sales". The Manual does not explain the relevance of inventory to whether a party is an exporter. Metal One notes that level of inventory is a factor that has not (to Metal One's knowledge) been considered or acknowledged as relevant by Australian courts.

Metal One also respectfully submits that it is unreasonable and unrealistic for the Commission to expect that an exporter would exclusively export Q & T steel from inventory, because Q & T steel is extremely heavy, bulky, and expensive, and is subject to significant fluctuations in both global commodity prices and customer requirements.

#### ***Knowledge of the manufacturer as to destination***

Metal One respectfully submits that whether "the manufacturer has no knowledge at all that the goods are destined for export to any country" is irrelevant to the question of whether the manufacturers, or Metal One, are exporters for the purpose of section 269TAB(1)(a). The real question (which was properly explained by the Federal Court in the Celpav cases) is whether or not the manufacturer selects the market into which the goods are sold. Metal One has addressed this question above.

#### ***Distinction between "distributors" and "traders"***

The Commission's consideration, in section 6.3.1, of an asserted distinction between "distributors", and "trader" is, in Metal One's submission, apt to cause confusion and lead to error. The real question for the Commission is whether, having regard to all of the circumstances (and in particular, the factors considered in the Celpav cases), the party's role is that of an exporter.

### 2.3 Arm's length transaction

Section 269TAB(1)(a) applies only to arms' length transactions. The concept of an arms' length transaction is defined in section 269TAA of the Customs Act. For completeness, Metal One notes that, for all of its transactions with its Australian customers:

- (a) the price is the only form of consideration paid;
- (b) the price is not influenced by the commercial relationship between Metal One, ASM and MAL; and
- (c) no reimbursement, be compensation or other benefit is paid or conferred on any of Metal One's customers in relation to the whole or any part of the price paid for Q & T steel.

### 2.4 Conclusion on identity as an exporter

Metal One submits that, for the above reasons, the Commission should consider Metal One to be an exporter, and should determine an export price and normal value for Metal One in accordance with sections 269TAB(1)(a) and 269TAC(1), with appropriate adjustments made under section 269TAC(8).

### 2.5 The Commission's reasoning

The Commission's conclusion that Metal One is not an exporter is purportedly based on a lack of evidence. This is evident from the Commission's statement in the SEF:

In the absence of evidence to the contrary, the Commission does not consider Metal One Corporation and other traders listed above to be the exporters of the goods to Australia for the purposes of assessing dumping margins.

This reasoning process starts from the flawed basis that Metal One has some form of legal onus to prove that it is an exporter. It has no such onus. The only applicable onus is on the Minister to be satisfied of the matters required by the Act.

In any event, the Commission does have evidence indicating prima facie to the contrary. That evidence is in the form of the records of the various shipments during the investigation period, the response of Metal One to the exporter questionnaire and the submissions of ASM. Having received that evidence and those submissions, it is incumbent on the Commission properly to consider and investigate them, for instance by conducting an exporter verification visit to Metal One.

To the best of Metal One's knowledge, the Commission has no evidence at all to contradict the prima facie evidence and submissions to the effect that Metal One is an exporter.

In the absence of contradictory evidence, and in the absence of having conducted a verification visit to give a proper basis to set aside the prima facie evidence and submissions put in favour of Metal One being considered to be an exporter, the only available conclusion for the Minister is that Metal One is an exporter.

To conclude otherwise is legally and factually flawed.

## 3. DETERMINATION OF EXPORT PRICES AND NORMAL VALUES FOR JFE CORPORATION

Metal One purchases Q & T steel from both NSSMC and JFE.

The dumping margins found for JFE throughout the Commission's investigation are as follows:

<b>Party</b>	<b>PAD Dumping Margin</b>	<b>Verification Visit Dumping Margin</b>	<b>SEF Dumping Margin</b>
JFE	18.0%	27.0%	27.0%

The increase in dumping margin can only have occurred if:

- (a) the normal value determined for JFE in the SEF was higher than the normal value for NSSMC in the PAD because positive adjustments were applied, or negative adjustments were removed, or different domestic selling prices were found; and/or
- (b) the export price determined for NSSMC in the SEF was lower than the export price determined in the PAD because lower export prices were found or costs after the date of export were deducted from the export price.

The Commission has not explained the increase in JFE's dumping margin in the SEF, and the verification visit report prepared for JFE similarly does not appear to give any reasons for the increase.

The resolution of this issue is important because of its relevance to the application of the lesser duty rule. The dumping margin of 18% stated in the PAD is substantially lower than the 24.5% NIP-based ad valorem dumping duty determined in the SEF, accordingly the Commission's finding of a higher dumping margin in the SEF will significantly increase the dumping duty payable by Metal One's customers. For that reason, it is essential that the Commission's calculations of export prices and normal values are properly justified, transparent and defensible.

Metal One submits that the failure of the Commission to provide an explanation for the significant increase in dumping margins has denied Metal One and other interested parties a fair opportunity to respond to the Commission's adverse findings. In the circumstances, Metal One respectfully submits that the most appropriate course would be for the Commission either:

- (c) to recommend to the Minister that he find a dumping margin for JFE of no more than 18.0%, in accordance with the finding contained in the PAD; or
- (d) to revoke the SEF and to issue an amended SEF that properly explains the reason for the increase and provides the parties with a fair opportunity to make submissions in response.

For completeness, Metal One notes that in the event a lower dumping margin were determined by the Minister for JFE, a consequential reduction may be required to the dumping margin found for NSSMC (which was based upon JFE's export and normal value data).



METAL ONE CORPORATION

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