

24 November 2017

The Director
Operations 2
Anti-Dumping Commission

EMAIL operations2@adcommission.gov.au

Dear Director,

Dumping Investigation No. 384 concerning alloy round steel bar exported from China: Submission of an Australian industry member to Statement of Essential Facts No. 384 (SEF No. 384)

OneSteel Manufacturing Pty Ltd, now trading as *Liberty OneSteel*,¹ refers to SEF No. 384² placed by the Commissioner on the electronic public record on 27 October 2017.

The Commission's SEF has preliminarily found:

- The vast majority of imports of the GUC were from China, the named country in the investigation.
- A market situation for the GUC exists in China.
- Dumping by the two major Chinese exporters of 35.5% and 11.3%.
- That the dumped Chinese goods caused injury to Liberty OneSteel and Milltech through price depression and suppression.
- That Liberty OneSteel sold ██████ to the grinding media market where the dumping was the greatest.
- That Liberty OneSteel and Milltech suffered material injury.

Despite these findings, the Commissioner is recommending termination on the basis that the material injury was caused by "other factors".

However, the substance of the "other factors" relate to volume, not price and have remained undisclosed to the applicant up until the publication of the SEF, thereby denying Liberty OneSteel procedural fairness and the opportunity to challenge the Commission's erroneous assumptions.

SUMMARY

Certain findings and conclusions of the Commissioner contained in SEF No. 384 are unsound and should be overturned. Specifically, the Commissioner has:

¹ On 1 September 2017, GFG Alliance acquired the former Arrium Steel businesses, including OneSteel Manufacturing Pty Ltd. To reflect this change, the former 'OneSteel' businesses are re-branded as 'Liberty OneSteel'.

² EPR Folio No. 384/047

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- failed to apply a competitive market cost benchmark for steel billet, free of the China-related distortions and comparability shortcomings of export price data;
- failed to properly apply the *Ministerial Direction on Material Injury* and find that the industry has suffered material price effects injury;
- had regard to irrelevant considerations when considering the impact of “other factors” and applied a ‘sole-cause’ test of causation;
- misinterpreted the “normal ebb and flow of business” standard used in the *Ministerial Direction* in a manner inconsistent with the decision in *Re ICI Australia Operations v Fraser*;
- erred in his interpretation of the requirement that ‘injury be material to the industry as a whole’ in a manner inconsistent with the decision in *Re Portland Cement v Minister for Small Business and Customs*; and
- determined a non-injurious price based on inductive reasoning and founded on mere assertion and not positive facts.

References to headings and sub-headings correspond with those contained in SEF No. 384.

SUBSTANTIVE ISSUES OF OBJECTION

6.6 Benchmarks for competitive market costs for alloy round bar

Liberty OneSteel observes the comment of the Commissioner concerning the use of comparable cost benchmarks based on domestic-based prices which are capable of adaption from *Dumping Investigation Nos. 416 and 418*.

The Commissioner dismisses this approach on the basis that there was only overlap between the investigation periods of the proposed benchmark investigations and the current investigation of six-months. The Commissioner considered that it was incumbent upon the industry applicant to also “*establish a reasonable method by which to extrapolate the data for the remaining 6 months of the investigation period. This is especially important given the fluctuations in steel prices from quarter to quarter*”.³

In the past, the Commission has indexed a previously benchmarked price in order to extrapolate future price movements. For example, following the finding of a market situation with respect to hollow structural sections of steel (HSS) in *Investigation No. 177*, the Commission indexed the benchmark price established in the original investigation through to the end of the review period in *Review No. 267* by utilising several independent and reputable sources of price information. A comparison showed the hot rolled coil price movements from the original investigation period to the review period exhibited a significant correlation to the movement in the ascertained normal value there found.⁴

Applied here, the applicant industry submits that one option is for the Commission to apply scrap price movements from the first quarter of the commencement of the original investigation periods applicable to *Investigation Nos.*

³ SEF No. 384, p. 30 at [6.6.4]

⁴ Report No. 267, p. 14.

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416 and 418 (i.e. 1 April to 30 June 2016) as the base for the index and then adjust the benchmark costs by the average quarterly movements in the scrap price for previous quarters for the term of the investigation period applicable to Investigation No. 384 (i.e. 1 October to 31 December 2015, and 1 January to 31 March 2016), below:

Quarter	Average scrap price (US\$/t)*	Index
1 April to 30 June 2016	█	100
1 January to 31 March 2016	█	74
1 October to 31 December 2015	█	69

*Source: [CONFIDENTIAL ATTACHMENT 6.6.4](#)

As presented to the Commission prior to the exporter visits, the Suzhou Suxin steelmaking production process involves a raw material mix of Blast Furnace liquid iron and Scrap (approximately █) into an Electric Arc Furnace. Scrap forms a significant cost component of the largest volume alloy round bar exporter's CTMS and as such provides a reasonable option for indexation across the investigation period.

8.5.3 The Commission's assessment - price effects

The Commissioner makes a number of important assessments concerning the price effects of the dumped goods on the industry that survive irrespective of the Commission's conclusions concerning the impact of 'other factors' (challenged below) on the causes of injury to the industry. This is because the 'other factors' that the Commissioner points to only go to the causes of volume effects. In other words, these 'other factors' do not invalidate the causation between price effects injury and the dumped imports, i.e. the existence of price depression, price suppression, lost profit and profitability. At best, the 'other factors' only displace claims of volume injury, but do not excuse the Commissioner from assessing the materiality of price effects injury on those volumes actually sold during the investigation period.

Therefore, the Commissioner's assessment of price effects injury experienced by the Australian industry remains relevant,⁵ as do the following assessments of causes of price effects injury in the form of price undercutting:

- *"OneSteel has presented evidence of several occasions during the investigation period (and just prior) when it was forced to consider lowering prices due to the prices of imported alloy round bar from China. The undercutting in these examples range from 1 per cent up to approximately 6 per cent";*
- *"[when] using the prices from the price model they [OneSteel] generally sought to utilise... the levels of undercutting would be greater";*
- *"On a weighted average over the course of the investigation period, the imported alloy round bar had undercut OneSteel by approximately 7 per cent"; and*
- *"The dumping margins set out in chapter 6 above are 35.3 per cent for Suzhou, 11.3 per cent for Daye and 58.6 per cent for uncooperative and all other exporters. The Commission considers the magnitude of the*

⁵ SEF No. 384, p. 36.

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dumping has provided the importers of the dumped goods with the ability to offer the goods to customers in Australia at prices significantly lower than would otherwise have been the case”⁶

The Commissioner unequivocally states the evidence examined to conclude that the dumped imports had caused the industry to suffer price depression and price suppression:

“on numerous occasions during the investigation period it had sought to increase certain prices, which had been refused by its customers due to the imported alloy round bar being offered at a cheaper price. On the information available, the Commission accepts that dumped imports had caused injury to OneSteel in the form of price depression and price suppression.”⁷

However, the Commissioner then makes the error of attempting to discount evidence of the cause of price effect injury by reference to ‘other factors’ that are by their nature only relevant to the volume effects of the dumped imports. In relation to ‘other factors’ possibly attributable to the significant price undercutting outcomes, the Commissioner refers to *“examples of where the customer had referred to the volumes that were being provided, and that this had an impact on the price fluctuations”*.⁸ There are several problems with the Commissioner’s causative reasoning here. Firstly, and inexplicably, the Commissioner appears to be asserting that the impact of dumped import price offers on the Australian industry’s price offers were completely displaced by the impact of other non-price conditions, such as volume. If so, the Commissioner has made it impossible to ever again compare price offers between import and domestic sources to determine the impact of price, unless all terms and conditions of sale are completely comparable as in the case of tender contracts. Clearly this is an untenable outcome, and for this reason, the *Ministerial Direction* states that *“dumping... need not be the sole cause of injury to the industry”*,⁹ and provides the following direction:

“Whether dumping or subsidisation is the sole cause of injury or whether there are other contributing factors, I direct that the injury caused by dumping or subsidisation must be material in degree”¹⁰

The Commissioner points only to *“examples where the customer had referred to the volumes that were being provided”* and appears to suggest that this was the sole determinant of price. This is again an untenable proposition, because if volume alone determined injury, then the Australian industry would not have needed to compete on price, and could have insisted on adherence to their agreed price regime. However, the Commissioner clearly concluded in his price undercutting analysis that this did not occur:

“The undercutting in these examples range from 1 per cent up to approximately 6 per cent, noting that this is on the price quoted by OneSteel and not using the prices from the price model they generally sought to utilise. When considering the price model, the levels of undercutting would be greater.”¹¹ [emphasis added]

⁶ SEF No. 384, p.47.

⁷ SEF No. 384, p. 50.

⁸ SEF No. 384, p. 50

⁹ Ministerial Direction, p. 2.

¹⁰ Ministerial Direction, p. 2.

¹¹ SEF No. 384, p. 50

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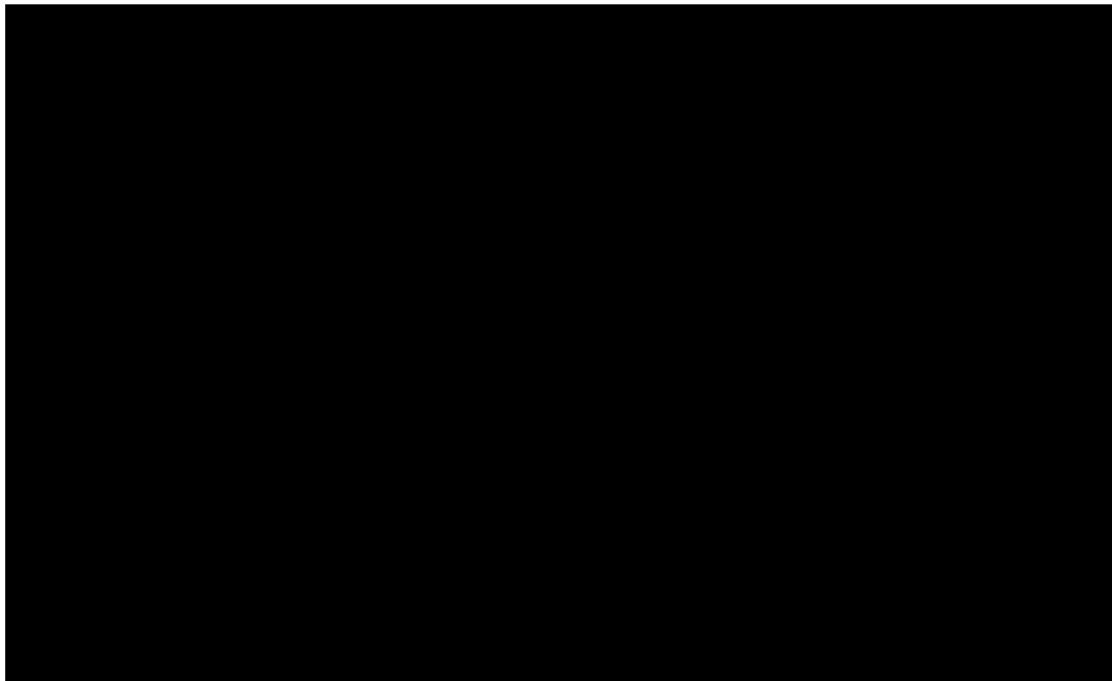
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The existence of erosion of value, irrespective of volume demonstrates that the primary and material cause of injury to industry was the price of dumped imports. It is possible that 'volume conditions' may have had an impact, but in accordance with the *Ministerial Direction*, it cannot be plausibly concluded that they were the sole cause of injury.

Finally, there is no evidence that any attempt by industry to negotiate minimum volume conditions were successful. The closest that the parties came to possibly negotiating a minimum order quantity was in a set of draft terms for supply setting a "Minimum [REDACTED] t per month and minimum [REDACTED] t per quarter".¹² However, as the chart below demonstrates the applicant industry always supplied to Donhad less than this minimum monthly order quantity. In other words, there was no reliance on this so-called 'value proposition' either by the applicant industry or its customer, and that sales volume was entirely negotiated on price.

[CONFIDENTIAL ATTACHMENT: *The graph below is considered confidential in its entirety*]



Source: CONFIDENTIAL ATTACHMENT 8.5.3.1

8.7 Injury caused by factors other than dumping

The Commissioner has erred in concluding that a number of potential factors other than dumping were either responsible or solely responsible for the injury to the industry. Liberty OneSteel responds to the errors inherent in the Commissioner's analysis concerning the impact of:

¹² CONFIDENTIAL ATTACHMENT 8.5.3

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- “quality issues”;
- “value proposition”; and
- “development of ‘New Grade’”.

At best, two of these factors, if found to exist, may be said to be attributable to volume injury, specifically, the “quality issues” and “development of ‘New Grade’” factors. In other words, if accepted, the Commissioner may be within his right to decide that the significant cause of sales volume loss, lost sales and lost market share, were caused by these ‘factors other than dumping’. However, this outcome does not preclude the Commissioner from considering the price effects and other non-volume based injury suffered by the industry to the [REDACTED] tonnes of alloy round bar sold to Donhad during the investigation period, and the further [REDACTED] tonnes sold to Donhad since the end of the investigation period.¹³

In terms of the impact of the “value proposition”, Liberty OneSteel explains below that as a matter of evidence, the Commissioner has erroneously concluded that it constituted an ‘all or nothing’ proposition:

“OneSteel required minimum volume thresholds to be met, with no room for negotiation”¹⁴

This is a complete misinterpretation of the evidence presented to Commission staff at industry verification, that support the contrary conclusion that Donhad consistently ordered, and the industry supplied, sales volumes below any theoretical or contractual “minimum volume thresholds”. The evidence is reproduced below in the response to section 8.7.7. That evidence serves to demonstrate that in order to achieve sales of the like goods to Donhad, the industry member negotiated terms on the basis of price in response to price offers of the dumped imports. In fact, the evidence below demonstrates that across the investigation period, the industry member consistently failed to achieve any contractual minimum volume thresholds with the customer.

Further, as a matter of law, even if dumping is not the sole cause injury, and the “value proposition” is an ‘other’ contributing factor, then the injury caused by dumping “must be material in degree”.¹⁵ Here, the price effects of dumping must be considered. If the full rate of dumping is taken to equate to the full impact of its consequential price effects of injury on the industry, then the value lost to the industry applicant on the volume actually sold to Donhad (i.e. ignoring any volume effects) is \$ [REDACTED] over total net sales value of \$ [REDACTED], otherwise representing 26% of the net sales value. This is a material loss of value, calculated as follows:

¹³ CONFIDENTIAL ATTACHMENT 8.7

¹⁴ SEF No. 384, p. 58

¹⁵ Ministerial Direction, p. 2.

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Month	OneSteel FIS Price to Donhad (Net, AU\$/t)	OneSteel Sales Volume to Donhad (Net, t)	OneSteel FIS Sales Value to Donhad (Net, AU\$)	Suzhou Suxin FOB Export Price (AU\$/t)*	Undumped FOB Export Price (AU\$/t)#	Suzhou Suxin Dumping Margin (AU\$/t)	Injury Value for sales to Donhad (AU\$)
2015/Oct							
2015/Nov							
2015/Dec							
2016/Jan							
2016/Feb							
2016/Mar							
2016/Apr							
2016/May							
2016/June							
2016/Jul							
2016/Aug							
2016/Sep							
Investigation Period						Injury Margin	26%

FOB export price plus 35.3%, Dumping Margin

Source: [CONFIDENTIAL ATTACHMENT 8.7.1](#)

8.7.6 Quality Issues

Liberty OneSteel was denied procedural fairness and natural justice with respect to Donhad’s claims of quality issues. SEF No. 384 refers to a “*submission date 6 February 2017*” in which “*Donhad raised the point*” of “*factors other than the subject imports*” contributing “*to the injury being claimed by OneSteel*”.¹⁶ This submission was so unclear as to the nature of the ‘other factors’, that Liberty OneSteel formally requested “*confidential disclosure*” of the claims “*in order to respond to [the] allegations*.”¹⁷ Not only was this request ignored, but the Commission then “*met with representatives of Donhad to discuss these claims*”.¹⁸ Liberty OneSteel assumes that the record of the meeting forms EPR Folio No. 384/018 (4 May 2017). It appears that at that point “*Donhad provided a presentation to the Commission [Confidential Attachment 10 – Donhad Presentation]*”.¹⁹ The Commission does not disclose the substance of the claims, but rather circuitously, “*Donhad provided the Commission with confidential attachments, where possible, in support of its claims*”.²⁰ Elsewhere, in the *Meeting Minute*, the Commission referred to the “*points discussed*” as relating to “*business operations*”, “*composition of Australian industry*”, “*technical specifications*”, “*market structure*” and “*supply arrangements*”. There was nothing disclosed in the course of the investigation that permitted Liberty OneSteel the opportunity to form a reasonable understanding of the substance of the ‘other factor’ claims. To the extent that the Commission has taken into account oral information from Donhad in its meeting of 5 April 2017; and that the summary of the information supplied placed on the public record does not contain sufficient detail to allow a reasonable understanding of the substance of the information; then the Commissioner is in breach of s 269ZJ(4), and must not take that information into account.

¹⁶ SEF No. 384, p. 54. It is assumed that the submission referred is a reference to EPR Folio No. 384/006.

¹⁷ EPR Folio No.384/012.

¹⁸ SEF No. 384, p. 54.

¹⁹ SEF No. 384, p. 54.

²⁰ EPR Folio No. 384/018.

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Notwithstanding the Commissioner's breach - to the extent that he discloses his reliance on this information supplied by Donhad in SEF No. 384,²¹ Liberty OneSteel observes a number of factual errors either in the information supplied by Donhad, or the Commissioner's interpretation of it. As such, Liberty OneSteel attempts to respond to its best available understanding of the claims:

i. Vacuum degassing claims

Although Liberty OneSteel does not operate a vacuum degassing plant as part of its operations, it does utilise an alternative hydrogen diffusion process for special quality billet. This process has been tested and is proven to lower hydrogen (a dissolved gas in the liquid steel) in the finished billets and bars.

Importantly, the Commissioner appears to have placed significant emphasis on the low probability of 'imperfection':

"The presence of these gases in the steel can lead to imperfections" [emphasis added]

With respect, "can" does not mean "will". The integrity of the steel is not simply a function of the dissolved gases in the liquid steel. Rather the integrity of steel is a function of the combination of the steel making process (including dissolved gases) and any subsequent steelmaking, casting, rolling and downstream processing steps.

It is important to note:

1. [REDACTED] [commercial in-confidence]; and
2. Engineering, automotive spring and high carbon wire steels that have long been manufactured by Liberty OneSteel and applied in end-uses requiring low levels of "imperfections" are manufactured by the same process path as grinding media steels with very low levels of quality concerns in spite their more exacting tolerances.

In other words, Donhad is exaggerating the role of vacuum degassing in its decision making to purchase dumped (35.3%) imports from China. In practice, this issue did not prevent Donhad from purchasing [REDACTED] tonnes of the goods from Liberty OneSteel during the investigation period, and [REDACTED] [a greater number] tonnes since the end of the investigation period. Clearly, this claim is misleading, and the Commissioner must discount it as a viable 'factor other than dumping'.

ii. Reduction ratio issue

Whilst in agreement that control of grain size is an important aspect when considering the mechanical properties of steel, the Commission's statement that *"the higher the reduction ratio, the finer the grain size in the final alloy round*

²¹ The Commissioner's claims as to the "points that Donhad raised" are contained in (i) to (vi), SEF No. 384, pp. 54 – 56.

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bar product, leading to greater strength in the bar”,²² is a simplistic and technically flawed view of steel, steel manufacturing and the control of a steel properties.

The dominant effect, in improving steel properties through increased reduction ratios are through a process of structural homogenization by refinement of the coarse ‘as-cast’ structure, and the welding and closing up of microscopic flaws present in all ‘as-cast steel’ structures, i.e. steel slabs, blooms and billets. It is through this, that improvements in the fatigue and toughness performance of ‘as-cast’ steel can be realized.

The control of grain size in steel is a far more complex topic than the simplistic view of reduction ratios driving grain refinement. Whilst reduction ratio is an aspect to be taken into account when considering grain refinement, it must be considered in combination with processing temperature, steel chemistry (particularly the presence of grain refining elements such as, Al, Ti, Nb), the rate and amount of reduction through each processing step including the temperature at which this occurs and the time between each of these steps. All processing steps, including those following the rolling of billets, slabs, blooms into bars must be considered.

Again, either Donhad has exaggerated the impact of reduction ratio issues, or the Commissioner has allowed himself to accept a technically incorrect proposition which ostensibly purports to displace the causative impact of dumped (35.3%) imports from China. In practice, this issue did not prevent Donhad from purchasing [REDACTED] tonnes of the goods from Liberty OneSteel during the investigation period, and [REDACTED] [a greater number] tonnes since the end of the investigation period. Again, this claim is misleading, and the Commissioner must discount it as a viable ‘factor other than dumping’.

iii. *In-line ultrasonic testing claims*

In-line ultrasonic testing is no guarantee of steel integrity. Liberty OneSteel questions whether the Commission performed any meaningful validation of this claim. For example, it should have questioned what qualification/accreditation of the testing process is provided that gives Donhad any confidence in the result generated.

It should also be questioned what the scrap rate is for grinding media bars through this process – if the scrap rate is zero, then this process is not adding any value. And given that grinding bar is not intended for aerospace or automotive applications, an assessment of the steel manufacturing process and its control should provide the necessary confidence concerning the suitability of these steels for grinding media bars. Furthermore, the claim that a “specification sheet” has been provided, is meaningless, unless a ‘certificate of material conformity’ to the specification sheet is generated, if not the testing claims are potentially non-existent.

In any event, for products with ‘lower reduction ratios’ where some remnant ‘as-cast structure’ is prevalent, the value of the test is questionable as false positives are often generated.

[REDACTED]
in-line ultrasonic testing process, so this test, assuming it is in fact performed by the Chinese suppliers of the dumped goods is by no means benchmark practice. [commercial in-confidence]

²² SEF No.384, p.55

This is yet another example of Donhad exaggerating the role of a process in its decision making to purchase dumped (35.3%) imports from China. In practice, this issue did not prevent Donhad from purchasing █████ tonnes of the goods from Liberty OneSteel during the investigation period, and █████ [a greater number] tonnes since the end of the investigation period. Clearly, this claim is misleading, and the Commissioner must discount it as a viable ‘factor other than dumping’.

iv. Induction heating process issues

Operational factors with induction heating operations known to Donhad can cause stresses when they reheat grinding bars via an induction heating process. Setup protocols may need to be optimized for various steel suppliers, and as such this issue is not limited to Liberty OneSteel supply alone.

8.7.7 Value Proposition

Apart from Donhad’s mere assertion that “it does not need to commit to volume hurdles” when “purchasing the imported product from Stemcor”,²³ there is no evidence either that the Commission tested this claim, or more importantly, that in a practical sense, volumes less than those purchased from Liberty OneSteel, were in fact placed with the importer, Stemcor, across the entire investigation period. If there is no evidence that Donhad placed, and Stemcor accepted, consistently smaller orders than those placed on OneSteel, then again this is a further example of Donhad exaggerating the impact of a factor other than price causing the customer to consider other sources of supply.

Liberty OneSteel considers that there is nothing unreasonable or uncommercial about a steelmaker requiring a minimum order volume when making specialised single customer steel grades. This would be true for any rational steelmaker operating in a sustainable steel environment/market, and is a requirement simply due to the logistical and economic constraints placed on steelmakers when making these high quality special steels with a specialised chemistry (often customised to individual customer requirements) through a continuous casting process. The process of manufacturing these grades requires special one grade setups (or campaigns) for each individual special grade made and is balanced to offset the costs of steel losses versus the costs of each single heat setup. Typically, this requires runs of █████ heats (█████ tonnes) being cast in a sequence and is dependent on the steel chemistry and the reactions between it and the refractory consumables. Shorter runs are uneconomical as the costs of the ‘turnaround’ (the time taken to change equipment over and lost production resulting) and the cost of the equipment/consumables outweigh any benefit of the shorter run.

It is possible to mix different grade chemistries with careful control of the steelmaking and casting parameters, but this results in significant steel losses with every grade change due to ‘mixing zones’ of variable steel chemistry, the amount of this mixing zone material is dependent on the volume of the steel in the tundish (being the device that feeds and distributes the liquid steel from the ladle into the casting machine moulds) at the time one batch of steel stops casting and another batch of another grade starts casting. These mixing zone billets/slabs/blooms are identified and isolated, the boundaries of the “changeover” tested to ensure the mixing zone is encapsulated, and the isolated mixing zone billets/slabs/blooms later scrapped as their chemistry does not meet either the preceding or subsequent grade chemistry.

²³ SEF No. 384, p. 58.

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Transitions between grades are usually only conducted with similar grade chemistries. The steel quality risks, the logistics required to manage grade changes in a continuous casting process, along with the associated costs from steel losses due to grade transitions usually mean small runs of individual grades are avoided when making special steel grades.

It is hard to imagine that supply of a special customer specific grade from China would be any different.

Overall, even if Donhad is able to establish that it consistently purchased small quantities of the dumped goods from its importer when compared to the volume purchases placed with Liberty OneSteel, across the investigation period, then again, it is submitted that Donhad has sought to exaggerate the impact of this non-price 'condition' of sale on its decision to purchase significantly dumped (35.3%) imports from China and that in spite of this "volume hurdle" purchased [redacted] tonnes of the goods from Liberty OneSteel during the investigation period, and [redacted] [a greater number] tonnes since the end of the investigation period.

8.7.8 Development of New Grade

Donhad claims, and the Commissioner appears to accept that "over the past three to four years it has" been "developing a new grade of grinding ball" and that it "had engaged with OneSteel to supply a trial quantity for this particular grade", and that "OneSteel was not able to meet the specifications that Donhad requested, and suggesting amendments to the chemical composition" and that "Donhad [not being] agreeable to these amendments" decided to source alloy round bar from China.²⁴

Again, without providing confidential disclosure of the claims made against it, Liberty OneSteel is left to guess the substance of the claim. Liberty OneSteel believes that the alleged new grade referenced by Donhad and the Commissioner is in fact grade [redacted]. If Liberty OneSteel has correctly guessed the grade, then we are concerned that the Commissioner stands to make a significant error of law in his application of possible facts arising outside (post) the investigation period, to his causation analysis during the investigation period.

As a matter of record and fact, Donhad first approached Liberty OneSteel regarding the new grade in a meeting at Donhad's office in Perth on 16 March 2017 (the investigation period ended six months prior on 30 September 2016). Specifically Donhad said that:

- the product is [redacted] % Carbon "[redacted]";
- Donhad had developed it with their overseas suppliers and were now interested in seeing if OneSteel could manufacture the grade;
- the finished product (grinding balls) would be rolled from [redacted], [redacted] and [redacted] mm bar;
- Donhad then supplied the specification of the grade (chemical composition only) on 17 March 2017;
- on 23 March 2017 OneSteel responded to Donhad with some suggested amendments. On the same day Donhad responded saying that they could not accept the amendments we suggested specifically relating to carbon (C) and chromium (Cr);
- then on 3 April 2017, unprompted by OneSteel, Donhad approached OneSteel with a revised specification, and asked "Would it be possible to meet this spec";

²⁴ SEF No. 384, pp. 58 -59.

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- on 7 April 2017, OneSteel confirmed to Donhad:

"I have confirmation from Whyalla that they are OK with these two specs" [Noting that the specification is in fact two slightly different grades, one for ■ and ■ mm and one for ■ mm bar];

- Donhad subsequently sent OneSteel a trial charter (18 April 2017) to which OneSteel responded with questions (10 August 2017); and
- There has been no further work on agreeing to the charter or to run trials.

Evidence of the above is contained in CONFIDENTIAL ATTACHMENT 8.7.8.

There are three elements to the Commissioner's reason for concluding that "the loss of sales volume experienced by OneSteel, in relation to these grades,²⁵ has not been caused by dumped goods but rather by an inability to supply the new product"²⁶ that place the conclusion in error:

- Firstly, the Commissioner appears to be suggesting an exception to his conclusion that *"the locally produced alloy round bar to be like to the imported alloy round bar"*.²⁷ An exception to the like goods conclusion cannot be seriously countenanced. The conclusion that better aligns with the chronology of facts is that up until the initiation of *Dumping Investigation No. 384*, Donhad treated all domestically produced and imported grades as alike. That following the initiation of the Dumping Investigation, and most likely on the advice of its consultant, Donhad sought to distinguish the imported alloy round bar from the locally produced bar, resulting in an exaggeration of the mutually exclusive nature of the so-called "new grade". The fact that Donhad did not disclose to OneSteel the existence of the "new grade" prior to the initiation of *Dumping Investigation No. 384*, suggests that Donhad did not see the "new grade" as so capable of differentiation; and
- Secondly, even if one were to accept the "new grade" theory as espoused by Donhad, then for the Commissioner to conclude that OneSteel's "inability to supply", implicitly the 'sole' cause of injury "in relation to these grades", requires the Commissioner to (a) attribute conditions in the market from outside the investigation period (i.e. since 16 March 2017) to causation analysis necessarily applied at least six months earlier – when there is no evidence that it was even a viable condition in the market during the investigation period.
- Finally, for the Commissioner to conclude that:

"approximately 30 per cent of the lost sales volume experienced by OneSteel was in relation to the grade that Donhad is now replacing with its new product",

suggests that the "new grade" was the 'sole' cause of injury. Anything less than a finding that the "new grade" was the sole cause of injury would place the Commissioner in breach of the *Ministerial Direction on Material Injury*, which provides the following direction to the Commissioner:

²⁵ Is the Commissioner suggesting here that there was more than one new grade?

²⁶ SEF No. 384, p. 59.

²⁷ SEF No. 384, p. 15.

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*“In the past some uncertainty has arisen over establishing the requirements for material injury where other factors may be contributing to injury suffered by the industry. Injury caused by other factors must not be attributed to dumping or subsidisation. **However, I direct that dumping or subsidisation need not be the sole cause of injury to the industry.**”²⁸ [emphasis added]*

In other words, dumping need not be the sole cause of injury to the industry, but “other factors” must be the sole cause, if injury is not to be attributed to the dumping, where found. Applied here, the exporter responsible for this so-called “new grade” was found to have dumped during the investigation period by 35.3%. So what evidence, would the Commissioner need to find to substantiate the implicit conclusion that the “new grade” was the ‘sole’ cause of injury, in order to make a recommendation consistent with the *Ministerial Direction*? Presumably, evidence that sales of the grade produced by Liberty OneSteel ceased following the introduction of the “new grade”, that was held by Donhad to be incapable of substitution, and supporting the Commission’s conclusion that the injury “experienced by OneSteel, in relation to these grades has not been caused by dumped goods but rather by an inability to supply the new product”. The opposite is in fact true. Donhad disclosed that the Liberty OneSteel grade that was replaced by the “new grade” (██████) was grade ██████. Figure 8.7.8.1 (below) demonstrates that rather than monthly sales volumes of grade ██████ ceasing following the introduction of the dumped grade 51105, it in fact continued and in some months (contingent on price) exceeded monthly volumes observed during the investigation period.

[CONFIDENTIAL ATTACHMENT: *The graph below is considered confidential in its entirety*]

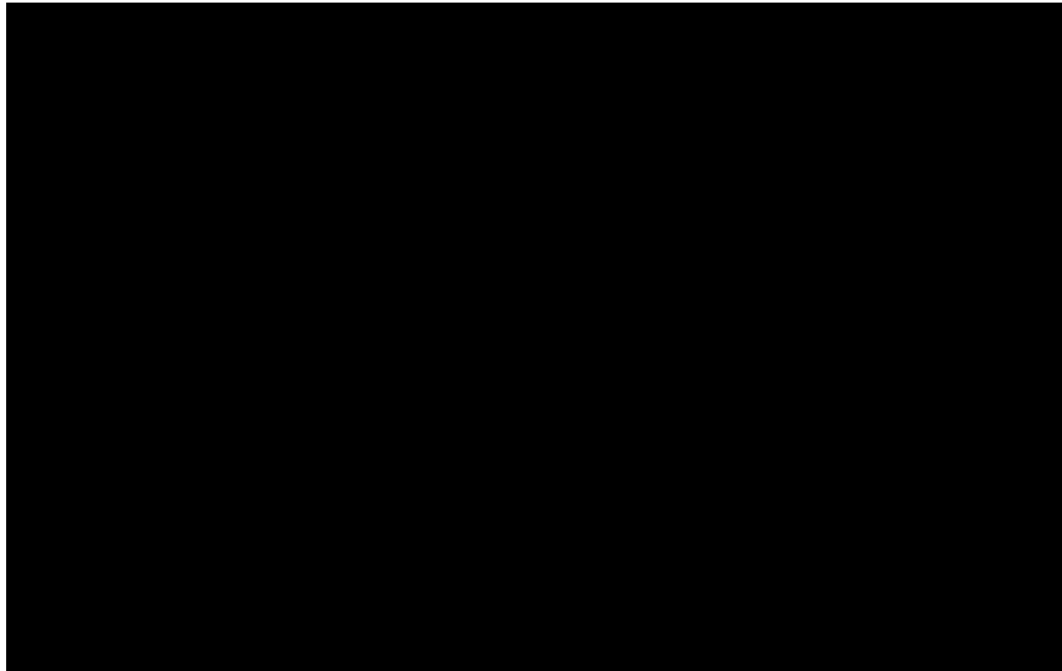


Figure 8.7.8.1: Net sales volume of grade ██████ sold to Donhad since 1 July 2010

²⁸ Ministerial Direction on Material Injury (27 April 2012), p. 2.

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Source: CONFIDENTIAL ATTACHMENT 8.7.8.1

Even if, the Commissioner is; under the terms of the Ministerial Direction; able to accept that it is not necessary to observe a complete cessation of sales volume of grade [REDACTED] at the point of substitution with the “new grade”, as Donhad appears to encourage: “Donhad explained that as it transitions its customers to the new grade, there will inevitably be a reduction in OneSteel’s sales of the existing grade”,²⁹ the evidence nevertheless suggests the opposite to be true – monthly sales volumes have increased.

Therefore, it remains for the Commissioner to assess what factors are at play. Liberty OneSteel submits that it has, in spite of these “new grade” claims, continued to supply grade [REDACTED] to Donhad by responding to price offers for the dumped imports, in other words it has suffered price injury in order to preserve volume. Figure 8.7.8.2 (below) demonstrates the impact of dumped import prices on Liberty OneSteel net prices for grade [REDACTED], and the effect of price depression on monthly sales volume. The correlation between price movements for the industry applicant and the Chinese exporter is very strong, so too the correlation between the volume and price undercutting by the Chinese exporter, where periods of significant price undercutting by the Chinese exporter correlate with significant increases in export volumes, and significant decreases in sales volumes for the applicant industry. It is noted that the Chinese price data is based on FOB terms (c.f. FIS terms for the Australian industry sales), but the contention of the industry applicant is that the degree of price undercutting is so extreme that it supports the correlation evident.

²⁹ SEF No. 384, p. 59.

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[CONFIDENTIAL ATTACHMENT: *The graph below is considered confidential in its entirety*]

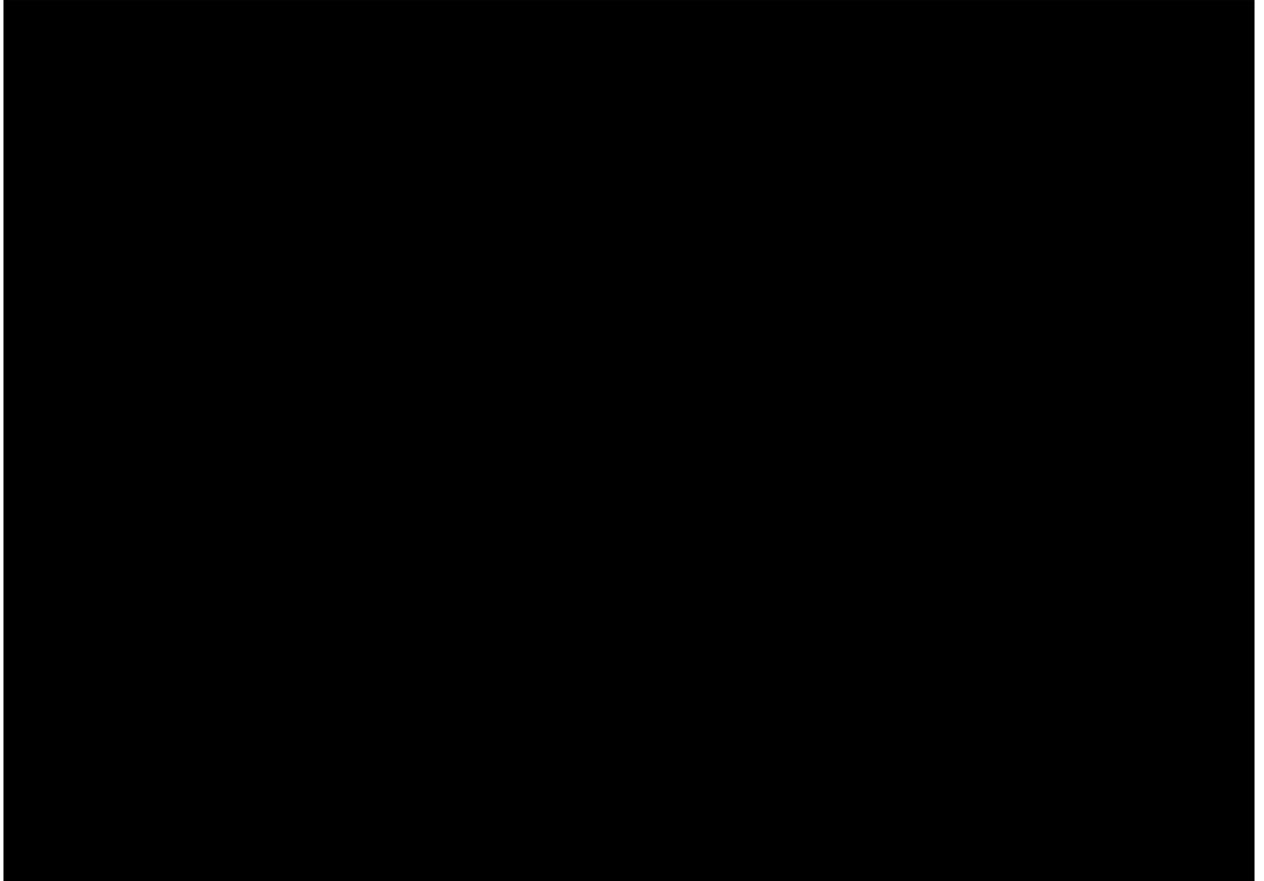


Figure 8.7.8.2 (Source: CONFIDENTIAL ATTACHMENT 8.7.8.2)

8.8 Findings

In addition to the above “other factors” identified by the Commission, the Commissioner also appears to reach a number of further conclusions:

- ***“although the Commissioner established price undercutting for two quarters during the investigation period, when comparing OneSteel’s selling prices into the grinding media market with the relevant selling price of the imported product from China for the entire investigation period, the Commissioner does not consider the injury caused by undercutting to be more than the ebb and flow of business”***

The meaning of “normal ebb and flow of business” as used in the *Ministerial Direction* was considered in *Re ICI Australia Operations v Fraser*,³⁰ where the Full Court observed:

³⁰ *ICI Australia Operations Pty Ltd v Donald Fraser, the Anti-Dumping Authority and the Minister of State for Small Business and Customs* FCAFC 564 (20 Mar 1992)

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“In the context of the legislation “material injury” is injury which is not immaterial, insubstantial or insignificant. In the practical application of that notion material injury will in most though not necessarily in all cases be injury which is greater than that likely to occur in the normal ebb and flow of business uninfluenced by dumping...”³¹

In other words, the Commissioner can only assess “ebb and flow of business” in the context of economic conditions “uninfluenced by dumping”. Applied here, it is this second element that the Commissioner cannot satisfy given the evidence. For example, the Commissioner has clearly found evidence of the influence of dumping on the industry:

- *“The undercutting in these examples range from 1 per cent up to approximately 6 per cent, noting that this is on the price quoted by OneSteel and not using the prices from the price model they generally sought to utilise. When considering the price model, the levels of undercutting would be greater.”³² [emphasis added]*
- *“the evidence provided by OneSteel indicates that on numerous occasions during the investigation period it had sought to increase certain prices, which had been refused by its customers due to the imported alloy round bar being offered at a cheaper price. On the information available, the Commission accepts that dumped imports had caused injury to OneSteel in the form of price depression and price suppression.”³³*
- *“The dumping margins set out in chapter 6 above are 35.3 per cent for Suzhou, 11.3 per cent for Daye and 58.6 per cent for uncooperative and all other exporters. The Commission considers the magnitude of the dumping has provided the importers of the dumped goods with the ability to offer the goods to customers in Australia at prices significantly lower than would otherwise have been the case.”³⁴*

Therefore, it is not open to the Commissioner to conclude that the industry applicant’s prices to Donhad were not influenced by the price offers of the dumped imports. Further evidence of this is contained in Liberty OneSteel’s application to the Commission, which demonstrates the impact of the dumped offers on the net price of the like goods to Donhad (Figure A-9.5.2.2, reproduced below):

³¹ *Re ICI Australia Operations v Fraser*, p. 28.

³² SEF No. 384, p. 50.

³³ SEF No. 384, p. 50.

³⁴ SEF No. 384, p. 47.

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Reproduced: **Figure A-9.5.2.2** Movements in the unit [redacted] based price for bar for [redacted] (AUD/MT) (source: CONFIDENTIAL ATTACHMENT A-9.5.2.1.1) compared to movements in the actual net price to the customer and sales volume for alloy round bar [redacted] across the proposed investigation period (source: appendix A4)

The above chart demonstrates that instead of following the contractual price model, the applicant industry reduced price (price depression) in order to compete with dumped import price offers in order to achieve sales volume. Clearly, the dumped price offers influenced the industry’s prices to the customer – if they did not, then the applicant industry would expect the contractual “price model” to determine price offers to their customer.

- ***“as a result [of lost volume attributable to factors other than dumping], the Commission is satisfied that dumping has caused negligible injury to OneSteel and Milltech”***

The Commissioner has erred in finding that the lost volume attributable to factors other than dumping; a conclusion which industry finds untenable; makes the other forms of injury suffered by industry, such as price depression and price suppression, “negligible” for that reason.

As indicated above, the applicant industry sold ██████ tonnes of the goods to Donhad during the investigation period, and a further ██████ [a greater number] tonnes since the end of the investigation period. Although the Commissioner has concluded that the applicant industry has experienced injury in the form of price depression and price suppression caused by the dumped imports, he has failed to assess the materiality of the significant dumping margins on the volumes of goods actually sold to the customer during the investigation period and since 1 October 2016.

The industry assesses the degree of price depression as material, and the industry applicant has lost 26% of its net sales value in lost value and margin.³⁵ This value cannot be considered immaterial or insubstantial by the Commissioner, irrespective of whatever his final view is concerning claims of lost sales volume.

- ***“in the event that the dumping had caused material injury to OneSteel and Milltech, the Commissioner is satisfied that this injury, when considered in the context of the Australian industry as a whole (that is, inclusive of Moly-Cop), is not material”***

The Commissioner has erred in his interpretation of the requirement that ‘injury be material to the industry as a whole’, by ignoring the existence of material injury to the applicant industry and Milltech. This is in direct contradiction to the guidance provided by Lockhart J in *Re Portland Cement v Minister for Small Business and Customs*,³⁶ who on the question of how to deal with the expression “Australian industry”, decided in relevant part:

“The determination whether material injury to an Australian industry producing like goods has been, or is being caused, or is threatened, is not an exercise of counting heads of markets, production or distribution centres or things of this kind. It is essentially a practical exercise designed to achieve the objective of determining whether, when viewed as a whole, the relevant Australian industry is suffering material injury from the dumping of goods.

“The present case raises the difficulties nicely. There is no dispute about the relevant market being the market in Western Australian for clinker. To say that the clinker industry must be regarded throughout Australia as a whole does not mean that the threat caused by dumping only in Western Australia and which may injure only the players in the market in Western Australia, cannot constitute material injury to the Australian clinker industry as a whole. Plainly it may where, for example, the continuance of the dumping may annihilate the West Australian industry. I find no difficulty with the proposition that an injury of this kind may constitute material injury to the

³⁵ CONFIDENTIAL ATTACHMENT 8.7.1

³⁶ *Swan Portland Cement Limited and Cockburn Cement Limited v the Minister of Small Business and Customs and the Anti-Dumping Authority* [1991] FCA 49; 28 FCR 135 (26 February 1991)

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*Australian market as a whole. 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.*³⁷ [emphasis added]

Applied here, it is not open for the Commissioner to discount the material injury suffered by the applicant industry and Milltech because he has not, or cannot form a view with respect to whether or not Moly-Cop has experienced material injury in its own right.

Liberty OneSteel has previously submitted that the Commissioner does in fact have sufficient evidence before him concerning the nature of Moly-Cop's production, the majority of which is manufactured for their own use in the production of grinding balls. Moly-Cop does produce and sell into the alloy round bar market a volume of approximately [REDACTED] tonnes.³⁸ This volume was disclosed to the Commissioner at the time of lodging its application. Even if the Commissioner does not know what prices Moly-Cop sells these goods into the Australian domestic market, the Commissioner is in error to conclude that the price injury suffered by the applicant industry is not material. Again, this view is supported by the decision of Lockhart J.:

*"Secondly, while it is true that the concept of 'price' is important to the anti-dumping legislation, it is not accurate to say that, if you construe 'Australian industry' as I have, then a price for the entire Australian industry must be found. I agree that it would be false to use a constructed average price. What must be considered is not a price but the prices of the goods in the markets that are within the Australian industry.*³⁹ [emphasis added]

In other words, the Commissioner must assess the materiality of the price effects injury by reference to the prices of the applicant industry and Milltech, and if known, the price effects injury to Moly-Cop in relation to their sales of alloy round bar (specifically grinding bar). It is even conceivable that a finding of no price effects injury suffered by Moly-Cop in the grinding rod market does not detract for the price effects injury otherwise found to have been suffered by the applicant industry in the grinding bar market that exists between itself and Donhad. This position is supported by the decision of Lockhart J.:

"Price' is an economic concept that is referable to a market, not an industry. The market forces of supply and demand set a 'price' for goods. Therefore to find the price it is necessary to look at the market or markets that comprise the 'Australian industry'. As a result the Minister may have to consider different prices for s. 269TAE(1)(e)(i) and different answers to the 'differences between' (i) and (ii) of s. 269TAE(1)(e). This is not inconsistent with the Customs Act.

...

³⁷ *Re Portland Cement*, pp. 19 – 20.

³⁸ Refer Appendix A1, *Application for the publication of a dumping duty notice, Alloy Round Bar exported from China*

³⁹ *Re Portland Cement* at p. 22.

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“The ‘price’ in s. 269TAE(1)(e) can easily be read (and often will be read) as ‘prices’. Of course this may lead the Minister to determine that one market within the industry is being injured while others are not being injured, due to different pricing structures. The present case is an example of that difference of injury but as I have said, such a situation may still lead, in certain cases, to a determination by the Minister that the Australian industry is being materially injured.”⁴⁰

However, in this case, Moly-Cop’s “captive” production of the like goods manufactured for their own use in the production of grinding balls, does not interact in the market or markets that comprise the “Australian industry”, and as such, cannot be said to compound or detract from a finding of material injury to any one or more members of the Australian industry.

9. Non-injurious price

Liberty OneSteel does not support the dilution of dumping duties by reference to an artificially derived method of what a “non-injurious market” is, theoretically meant to resemble.

A reduction in the dumping duty rates by any amount less than the full rate of dumping continues to impact both the Australian industry and legitimate exporters of un-dumped goods.

By permitting exporters of dumped goods to continue to supply into the Australian market at less than un-dumped values, there continues to be a challenge to the sustainability of legitimate imports and the domestic Australian industry.

The Commission has preliminarily assessed:

“The Commission has determined a NIP by first calculating an unsuppressed selling price (USP) taking the selling prices of the Australian Industry members for the period from 1 October 2013 to 30 September 2013”.⁴¹

The Commission’s reasoning for reaching this determination is confounding, particularly from a statutory body charged to perform an investigative function:

“The Commission has not found evidence that selling prices of alloy round bar for the period from 1 October 2012 to 30 September 2013 were affected by dumping”.⁴²

There is no record of the Commission looking for evidence of dumping in the period from 1 October 2012 to 30 September 2013 which preceded the investigation period (1 October 2015 to 30 September 2015) by three years. As such, the Commission is relying on mere assertion, instead of positive, verified facts. This is an entirely unsound approach proposed by the Commissioner.

The Commission further states:

⁴⁰ *Re Portland Cement*, pp. 22-23.

⁴¹ SEF No. 384, p. 60.

⁴² SEF No. 384, p. 60.

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...“nor has evidence of this been presented to the Commission”⁴³

This is utterly extraordinary inductive reasoning. Is the Commissioner now proposing that applicant industries provide *prima facie* evidence of dumping and causal link across the typical, four year injury analysis period?

The facts before the Commissioner are:

- Liberty OneSteel and Milltech have suffered material injury throughout the entire injury period.
- Chinese exports have accounted for between 40%-70% of the total market for the last 4 years.
- The Commission has found that for Chinese alloy round bar a particular market situation exists.

In these circumstances, subsection 8(5BAAA) (a) of the *Dumping Duty Act* should be applied and the Commissioner should recommend to the Parliamentary Secretary that it is not desirable to fix a lesser rate of interim dumping duty under subsection 8(5BA) of the *Dumping Duty Act*.

CONCLUSION

Therefore, by reason of the numerous substantive errors contained in SEF No. 384, the Commissioner’s proposal to terminate the whole of the investigation is not the correct or preferable decision and must not be made.

Should the Commission seek to discuss any aspect of this submission, please do not hesitate to contact the applicant Australian industry member.

FOR AND ON BEHALF OF THE AUSTRALIAN INDUSTRY APPLICANT

ONESTEEL MANUFACTURING PTY LTD (trading as LIBERTY ONESTEEL)

⁴³ SEF No. 384, p. 60.

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