

8 January 2018

The Director  
Operations 2  
Anti-Dumping Commission

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Dear Director,

***Dumping Investigation No. 384 concerning alloy round steel bar exported from China: Australian industry member response to submission of end-user, Donhad Pty Ltd***

OneSteel Manufacturing Pty Ltd, now trading as *Liberty OneSteel*, refers to the submission dated 22 December 2017 made on behalf of the end-user, Donhad Pty Ltd (**Donhad**).<sup>1</sup> References below to headings and sub-headings are as they appear in the submission.

**SUMMARY**

This submission recommends that the Commissioner either make available to Liberty OneSteel confidential disclosure of information led against it that relates to the applicant industry alone. Neither Donhad nor the Commissioner can reasonably claim any confidential interest or commercial sensitivity in providing this information to a counterpart of it, namely Liberty OneSteel. This requested disclosure is separate from any general disclosure on the statutory public record, and is deemed necessary to permit a proper and complete interrogation of its accuracy, relevance and completeness. To date, Donhad has used claims of confidentiality as a sword, not a shield, and it is Liberty OneSteel's concern that Donhad has led inaccurate, irrelevant and incomplete information to attack the industry applicant's claims of causation and materiality of injury. This submission points to a number of examples demonstrated most recently in Donhad's latest submission of 22 December 2017.

Unless Donhad makes available to Liberty OneSteel on a confidential basis, the unredacted claims (and supporting evidence) against it alone, the industry applicant calls upon the Commissioner to disregard Donhad's information as unreliable.

**SUBSTANTIVE OBSERVATIONS**

***"OneSteel's transparency concerns"***

Liberty OneSteel is gravely concerned that Donhad is making a number of false and misleading allegations against the industry applicant, and then redacting the purported evidence on the basis of confidentiality and commercial sensitivity. In this way, Liberty OneSteel is left to guess at the evidence purported led against it, with no guarantee that its rebuttal submissions are not at cross purposes.

With respect, Donhad is using the public record in a manner inconsistent with its purpose; that is as a means of denying Liberty OneSteel its right to due process and right to know and respond to the claims made against it. On

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<sup>1</sup> EPR Folio No. 384/058.

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several occasions throughout this investigation, Liberty OneSteel requested confidential disclosure of evidence led by Donhad, which by its nature (i.e., communications, correspondence, agreements, minutes, memoranda and reports between Donhad and the applicant industry) may be confidential in the general sense, but not as between Donhad and Liberty OneSteel. Therefore, Liberty OneSteel fails to see how Donhad can reasonably claim a confidential interest in this evidence to the extent that it purported relates to Liberty OneSteel and no other parties. Subsection 269ZJ(2) of the Act<sup>2</sup> does not provide the Commissioner and interested parties with a blanket right to deny all persons with the principles of natural justice and due process in the consideration of matters under Part XVB. Rather, s 269ZJ(2) relates to the making of a summary of information provided for use on the public record, where the information provided is “claimed to be confidential or to be information whose publication would adversely affect a person’s business or commercial interests”.<sup>3</sup> However, s 269ZJ only applies to protect information that may be confidential from general publication, it does not limit the Commissioner’s right to interrogate the information and to provide it to such parties as would not violate the principle that information so provided would “be confidential or ... information whose publication would adversely affect a person’s business or commercial interests in breach of its confidentiality”. By seeking to deny Liberty OneSteel the right to see and respond to the information submitted against it, Donhad is using s 269ZJ(2) not as a shield, but as a sword. As such, if the Commissioner is not to deny Liberty OneSteel the rules of natural justice in his conduct of this investigation, then, confidential and controlled disclosure of the Donhad information is either made to the industry applicant, or the Commissioner disregards the information as unreliable. Failure to do so, puts wither the Commissioner’s decision or the Parliamentary Secretary’s decision (as the case may be), at risk of challenge under several grounds of s 6 of the *Administrative Decisions (Judicial Review) Act 1977*.

### ***“Injury caused by quality issues...”***

The latest submission of Donhad continues to demonstrate the prejudice suffered by Liberty OneSteel unless the Commissioner intervenes to ensure that the accuracy of the claims are tested by way of the applicant industry exercising its right or reply. So for example, Donhad now makes a number of heavily redacted allegations concerning goods outside the scope of the investigation:

*Onesteel is aware of their inability to supply acceptable quality xxxxxxxx [product] alloy bar and hence their reason for limiting the scope of the investigation to goods not exceeding 98.5mm.*

This raises a fresh round of concern for the applicant industry, in particular, how many of Donhad’s falsely claimed quality issues relate to goods outside the scope of the investigation, i.e. goods above 98.5mm in diameter?

### ***“Injury caused by development of new grade”***

#### ***“(i) timeline”***

The following extract from the submission suggests how unreliable Donhad’s earlier submissions were on this issue.

*The development of Donhad’s “xxxxxxx” [grade] (known today as xxxxxxx) grade dates back to xxxxx. At that time, the grade was referred to as xxxxxxx as opposed to xxxxxxx.*

Liberty OneSteel fails to see how identification of the grade on a confidential disclosure basis to it alone, would not only afford the industry applicant due process and its right of reply, but would also assist the Commissioner assess

<sup>2</sup> References to statutory provisions are reference to provisions of the *Customs Act 1901*, unless otherwise specified.

<sup>3</sup> S 269ZJ(2)(

reliable information. As matters currently stand the accuracy of Donhad's information is untested and by its own admission, in a state of flux and revision.

**"2) decision to source the new grade"**

Donhad relies on heavy redactions of its information in order to prevent Liberty OneSteel from critically assessing the accuracy of the claims. As such they remain unchallenged and untested.

The facts remain that Donhad have purchased more of the goods that they say are in the new grade range following the investigation period than they did during the investigation period.

Secondly, if Donhad's decision to purchase from Chinese suppliers is based solely on strategic decisions or even quality, then why is it that they continue to use the dumped prices to cause price depression of the goods that they do purchase from Liberty OneSteel?

**"Broader injury claims by OneSteel"**

Liberty OneSteel is disappointed that the consultant acting for Donhad has sought to quote out of context the applicant industry's citation of binding legal authority on the assessment of injury to Liberty OneSteel and Milltech, irrespective of any assessment being completed for Moly-Cop (which the industry applicant submits has nevertheless occurred). For the avoidance of doubt, Liberty OneSteel repeats its submission on this point in its entirety:

*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,<sup>4</sup> 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 Australian market as a whole. It depends on the facts of the case and inevitably it is a question of*

<sup>4</sup> *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)

*degree that involves balancing all relevant considerations and integers before concluding whether or not the dumping constitutes material injury to the Australian industry.”<sup>5</sup> [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.<sup>6</sup>*

As such, the applicant industry’s submission differs markedly from the context in which Donhad misleadingly wishes to place it.

**CONCLUSION**

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)

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<sup>5</sup> *Re Portland Cement*, pp. 19 – 20.

<sup>6</sup> EPR Folio No. 384/053, pp. 18-19.