

**RioTinto**

**Application for a dumping duty notice in relation to certain railway wheels exported to Australia from the People's Republic of China and France**

**and**

**Application for a countervailing duty notice in relation to certain railway wheels exported to Australia from the People's Republic of China**

Further Submission of Rio Tinto Limited

5 September 2018

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# 1. Introduction

On 5 June 2018, Rio Tinto lodged a submission with the ADC in relation to the Investigation (**Initial Submission**).

On 11 June 2018, Rio Tinto lodged a supplementary submission in response to the ADC's request to provide further information in relation to Rio Tinto's 2017 tender process for the procurement of the Goods (**Supplementary Submission**).

On 10 July 2018, the Applicant responded to Rio Tinto's Initial Submission (**Applicant's Reply**).

On 27 July 2018, the ADC published Anti-Dumping Notice No. 2018/121 on the Public Record which specified that an extension of time had been granted by the Commissioner to the date for publishing the Statement of Essential Facts (**SEF**) due to 'the specific nature of the goods, the particular market situation claims, the need to assess subsidisation claims and complexities associated with the verification work'.<sup>1</sup> The SEF will now be placed on the Public Record no later than 20 September 2018.

In these circumstances, Rio Tinto now makes these brief further submissions (**Further Submission**) which:

- (a) respond to various submissions made in the Applicant's Reply;
- (b) address the issue of comparative advantage on the assumption that the ADC considers it appropriate to use third country price information as a benchmark in determining the exporter's costs of production or manufacture under s269TAC(2)(c)(i) of the Act; and
- (c) request that the ADC revoke its decision in the PAD to require and take securities in relation to exports of the Goods from China and France while the Investigation continues.

Unless otherwise stated, all capitalised terms used in this Further Submission have the same meaning and definition given to those terms in the Initial Submission. Moreover, this Further Submission is intended to be read in conjunction with the Initial Submission and Supplementary Submission, as if those submissions are a single integrated document.

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<sup>1</sup> Anti-Dumping Notice No. 2018/121, p 2.

## 2. Executive Summary

By way of executive summary, and in addition to the submissions made by Rio Tinto in the Initial Submission and the Supplementary Submission, Rio Tinto makes the following submissions in this Further Submission:

- (a) The non-price issues affecting the Applicant's Goods, as outlined in Rio Tinto's Initial Submission, were legitimate factors that contributed significantly to Rio Tinto's decision to purchase from an alternative supplier. These issues were relevant to the ultimate tender outcome and remain relevant to Rio Tinto's ongoing procurement decision-making. The issues were therefore material causes of injury to the Australian industry not related to dumping or subsidisation.
- (b) If it is determined that Masteel's steel material input costs for billet (or any other input in the production or manufacture of the Goods) do not reflect competitive market costs, the ADC ought to seek sufficient information from Valdunes and Masteel regarding their comparative advantages and disadvantages to enable it to make corresponding adjustments to constructed normal value to take those differences into account.
- (c) No material injury has been identified by the ADC which could enliven the power in s269TD(4)(b) of the Act for the Commissioner to require and take securities under s42 of the Act, and so the ADC ought to provide adequate reasons on the precise injury that the taking of securities in the PAD prevents, and how the taking of securities is 'necessary' to prevent that injury. If the ADC is unable to do this, the Commissioner should withdraw the decision to take securities under s42 of the Act.

### 3. The Applicant's Reply

#### 3.1 Rim shattering events

The Applicant asserts that it 'actively responded to the wheel fatigue incident identified in 2016'.<sup>2</sup> This is presumably in reply to section 4.5(d)(iii) of Rio Tinto's Initial Submission which details a number of shattered rim events experienced by Rio Tinto in the course of using the Applicant's Goods and explains the ongoing risk these incidents pose to Rio Tinto's wheel fleet.<sup>3</sup>

The Applicant acknowledges that safety is a serious consideration for Rio Tinto but generally attributes the wheel fatigue 'incident' to operational factors for which Rio Tinto allegedly bears responsibility.<sup>4</sup> It suggests that such factors include the loading and transportation of iron ore carriages. Since the Applicant expressly mentions operational factors, but omits any concession that the Goods are defective in some important respect, the implication to be drawn from the assertion is that the rim shattering events have been caused by Rio Tinto's actions.

Rio Tinto rejects this blanket assertion and makes the following observations in support of its initial submission that the shattered wheel rim events were contributed to, in a material way, by the quality (or lack thereof) of the Applicant's Goods and that this was a relevant factor in Rio Tinto's decision to seek an alternative source of supply. The ongoing quality issues have therefore caused or contributed to the alleged material injury suffered by Australian industry:

- (a) First, the Public Record should be corrected. In its Reply, the Applicant 'notes RTIO's submission that no further wheel failures have occurred since 2016'. Rio Tinto has made no such submission. **Confidential Annexure 'H'** to the Initial Submission contained a 'Review of reports on ore wagon wheel rim cracking' prepared by Marais Consulting Engineers on 10 July 2017 (**Marais Report**). The Applicant has seen a near-final version of the Marais Report. Annexure B to that document demonstrates that there were [REDACTED] rim shattering events in [REDACTED] and a further [REDACTED] events as at the date of the Marais Report [describes confidential business information contained within Marais Report]. There have been [REDACTED] [describes confidential business information] rim shattering events in total in relation to the Applicant's Goods. If the rim shattering phenomena were an isolated event, Rio Tinto may not have reconsidered the sourcing for its supply of the Goods as a matter of urgency. Unfortunately, it was not an isolated event.
- (b) Secondly, the Applicant refers to communications it had with Rio Tinto in late August 2016 in which it outlined operational factors which it considers caused the wheel failures. It then asserts that these failures 'were prevalent due to the backlog of maintenance, budget and operational pressures further reducing maintenance schedule adherence' on the part of Rio Tinto. Rio Tinto rejects this assertion. The Applicant's communications followed the completion of an independent investigation into [REDACTED] [describes confidential business information] cracked wheels supplied by the Applicant which was undertaken by ALS Industrial in August 2016 (two further reports were concluded in November 2016 and January 2017, and the three reports appear as **Confidential Annexure 'K'** to this Further Submission) The Applicant has seen at least the first ALS report. It is true that

<sup>2</sup> Applicant's Reply, p 2.

<sup>3</sup> Initial Submission, Public Record version, p 31.

<sup>4</sup> Applicant's Reply, p 2.

the reports recommended [REDACTED]  
[REDACTED]<sup>5</sup> [describes confidential operational recommendation]. Naturally, Rio Tinto investigated this further and implemented a strategy to mitigate the risk of operational factors contributing to the shattered rim events,<sup>6</sup> outlined further in section 3.1(c) below.

Rio Tinto acknowledges that all three ALS reports remarked that the tested wheels [REDACTED] and that the [REDACTED]  
[REDACTED]<sup>8</sup> [confidential assessment of the Applicant's Goods] They were considered to be [REDACTED]  
[REDACTED] [confidential assessment of the Applicant's Goods]. However, the reports also concluded that the exposed fractures 'likely initiated at a non-metallic inclusion and is commonly referred to as a type of 'deep shelling''.<sup>9</sup> The report of 8 August 2016 specifically concludes:

[REDACTED]  
[REDACTED]<sup>0</sup> [confidential assessment of the Applicant's Goods]

After taking the risk mitigation steps outlined in Confidential Annexure 'H' of the Initial Submission, Rio Tinto then engaged Marais Consulting Engineers to complete further analysis on the shattered rim events, which led to the preparation of the Marais Report. The findings in the Marais Report confirmed that non-metallic inclusions and subsurface defects in the Applicant's Goods contributed to most of the failures identified. In particular, the report found as follows:

[REDACTED]  
[REDACTED]<sup>11</sup> [confidential assessment of Applicant's Goods]

It was suggested at p20 of the Marais Report that this could be due to the manufacturing process for the Goods:

[REDACTED]

<sup>5</sup> See Report of 8 August, 2016, p 6.

<sup>6</sup> These measures are set out in the PowerPoint presentation entitled 'Shattered Rims Recommendation' contained in **Confidential Annexure H** to Rio Tinto's Initial Submission.

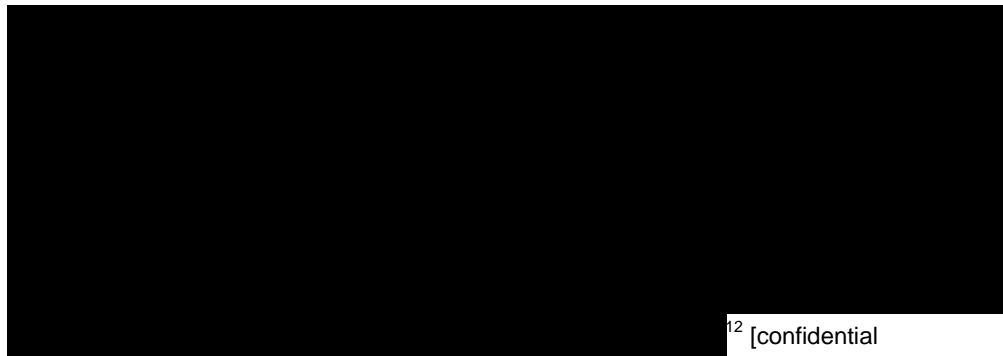
<sup>7</sup> See Report of 8 August 2016, p 5.

<sup>8</sup> See *ibid*, p 6.

<sup>9</sup> See *ibid*, p 5.

<sup>10</sup> *Ibid*, p 6.

<sup>11</sup> Marais Report, p16.



<sup>12</sup> [confidential]

assessment of the Applicant's Goods]

Previous submissions provided by BHP during this Investigation explain that using scrap steel in an ingot casting process, as the Applicant does to produce its Goods, will always be inferior to the continuous casting process using iron ore feedstock, as used by Masteel to produce its Goods.<sup>13</sup> Rio Tinto agrees with this view.

Further, after reviewing the Marais Report, Rio Tinto requested evidence from the Applicant that it now meets the latest microcleanliness standards in manufacturing the Goods, as per AAR M-107/M-208 requirements (which appears as **Public Annexure 'C'** of this Further Submission).<sup>14</sup> As at the date of this Further Submission, Rio Tinto has not received any evidence that the Applicant meets these requirements. Rio Tinto submits that it relied on the analysis contained within the Marais Report to inform its decision to move away from the Applicant as its preferred supplier.

- (c) Thirdly, in order to mitigate the risk posed by the identified defects in the Applicant's Goods, Rio Tinto was required to remove a large number of wheels from service, at a material cost to its business, and now continues to remove 'at risk' wheel sets annually.<sup>15</sup> Rio Tinto implemented these risk mitigation measures in response to the recommendations of an internal review into the rim shattering events.<sup>16</sup> Since [redacted] [confidential business information], these have involved removing [redacted] [confidential business information] wheels per annum at an ongoing and substantial cost to the business, and continuous monitoring of wheels via [redacted] [confidential business information]. This too was a material factor in Rio Tinto's decision to source future supply of the Goods from an alternative supplier.
- (d) Fourthly, the fact remains that no rim shattering events have affected Masteel's Goods of a similar service life used on Rio Tinto's rail network. This is supported by data collected by Rio Tinto in July 2018, as contained in **Confidential Annexure 'L'**.<sup>17</sup> The Masteel wheels tested were of a service life between [redacted] years [confidential business information], and had shown no cracks. The cracked wheels of the Applicant had been in service between [redacted] [confidential business information] years. Contrary to the Applicant's characterisation of the standard grade material of Masteel's Goods, Rio Tinto,

<sup>12</sup> Ibid, p 20.

<sup>13</sup> Submission 032 of the ADC's Public Record, p4; Submission 034 of the ADC's Public Record, p3.

<sup>14</sup> This correspondence is contained in Confidential Annexure 'H' to the Initial Submission.

<sup>15</sup> Initial Submission, Public Record version, p 30.

<sup>16</sup> See n 5 above.

<sup>17</sup> The ADC should note that Masteel's Goods are denoted [redacted] [confidential business information]

as an actual end-user of Masteel's Goods, has been satisfied with their performance. Rio Tinto has maintained an identical operational and maintenance regime between the Applicant's and Masteel's Goods, yet Rio Tinto has not been required to replace any Masteel wheel sets due to subsurface defects.

Therefore, although the non-metallic inclusions were not [REDACTED] and the wheels were overall of a [REDACTED] [confidential assessments of the Applicant's Goods contained within the Report of 8 August 2016 within Confidential Annexure 'K'], Rio Tinto still considers that non-metallic inclusions in wheels supplied by the Applicant contributed to the rim shattering events. Masteel's Goods have not experienced any rim shattering events, and Rio Tinto considers that this is because the quality of those Goods is superior in this respect, and of an above satisfactory standard. To this extent, Rio Tinto considers non-metallic inclusions to be defects in the Goods supplied by the Applicant as a result of its manufacturing process. Rio Tinto therefore considers that Masteel's Goods, which are less prone to rim shattering events, are more suitable for the purposes of Rio Tinto's operations. Ultimately, the above observations demonstrate that the Applicant has inaccurately described the rim shattering events and fails to acknowledge real issues with the quality of its own Goods.

### 3.2 Wheel lifespan and general wear

The Applicant claims that Goods sourced from Masteel of a similar age to the Applicant's Goods are likely to experience reduced life due to their wear profile.<sup>18</sup> On the contrary, wheel wear comparison testing carried out by Rio Tinto demonstrated that Masteel's improved alloy wheels showed the lowest wear rate of the Goods tested.

The Applicant also makes the following remark with respect to wheel wear at p5 of the Applicant's Reply:

Should RTIO's assertions be correct that Masteel supplies 'improved alloy wheels [that] have a slower rate of wheel wear than the applicants [sic] goods', it would be expected that there would be no need for Masteel to supply quality wheels at dumped or subsidised prices.

The ADC should not accept this reasoning. It is a *non sequitur*. A finding of dumping or subsidisation is a legal conclusion based on objective statutory criteria with a conspicuous absence of any fault element requirement. There is no evidence that Masteel has any 'need' to supply its wheels at dumped or subsidised prices or intended to do so during the Investigation Period. However, it does enjoy economies of scale and other operational advantages as explained in extensive detail in Rio Tinto's Initial Submission. It is for those reasons that it is able to offer a more competitive market price than the Applicant.

In this Investigation, Rio Tinto submits that its own comparison testing places Masteel as a premium supplier of the Goods and that Masteel produces Goods of a superior quality to those manufactured by the Applicant. This has been a significant consideration for Rio Tinto in its past procurement decisions, and continues to be a relevant factor in the present and beyond.

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<sup>18</sup> Ibid.



### 3.3 Wheel packaging safety and efficiency concerns

The Applicant refutes the contention that issues with its packaging of the Goods have caused injury to the Australian industry.<sup>19</sup> However, the Applicant cannot refute Rio Tinto's evidence that Masteel's packaging solution is a safer offering or that safety is a paramount principle guiding Rio Tinto's purchasing behaviour and business, both in Australia and internationally.<sup>20</sup> It also cannot refute that safety incidents have occurred at Rio Tinto's premises during the un-packaging of the Applicant's Goods.<sup>21</sup> Rio Tinto submits that the Applicant's packaging design, in particular its strapping solution, contributed to these incidents in a material way. These packaging and safety issues contributed to Rio Tinto's decision to seek an alternative source of supply, with the result that these issues have materially contributed to any injury allegedly suffered by Australian industry.

Further, in the Applicant's Reply it is noted that Rio Tinto first raised packaging issues with the Applicant in December 2017 [redacted] [confidential business information about contractual dates] after the parties amended the Comsteel Contract. However, the first safety incident involving the Applicant's Goods occurred in [redacted] [confidential business information about contractual dates] before those amendments took effect. Moreover, the further incident which occurred in [redacted] [confidential business information] also contributed to Rio Tinto's decision to source Goods from alternative suppliers to the Applicant. In any event, the outcome is that the Applicant, as it has itself submitted, advised Rio Tinto that it was not economic for the Applicant to bear the additional cost for alternative packaging options.<sup>22</sup> As a result, and as previously submitted in Rio Tinto's Initial Submission, Masteel's Goods are considered to be superior in this respect, from both a commercial and safety perspective.<sup>23</sup>

The Applicant also claims that 'packaging is not considered to be an intrinsic performance criteria for "the goods" under investigations [sic]'. Rio Tinto submits that this is misconceived. In Rio Tinto's Initial Submission, issues with the Applicant's packaging were raised in the context of an analysis of causation for alleged injury suffered during the Injury Analysis Period; not as part of a 'like goods' analysis.<sup>24</sup> Rio Tinto accepts it is an end user of 'like goods' to those under consideration in this Investigation. What was being discussed in that section of Rio Tinto's Initial Submission were factors other than alleged dumping and subsidisation that have caused end users – Rio Tinto being an example – to award supply contracts to alternative suppliers. Rio Tinto submits that unsatisfactory packaging was a significant example of such a factor.

### 3.4 Clarification of Initial Submission statement

Rio Tinto seeks to correct the Public Record in one other respect. In the Applicant's Reply, it is implied that Rio Tinto claimed in its Initial Submission that the Applicant has a 'limited capacity' to supply Goods to the entire Australian market.<sup>25</sup> Rio Tinto does not make such a claim. In its Initial Submission, Rio Tinto stated that the Applicant's plant is 'currently limited to 40,000 wheel sets per annum'.<sup>26</sup> It is not a submission that the Applicant has 'limited capacity'. Rio Tinto's

<sup>19</sup> Applicant's Reply, p 3.

<sup>20</sup> Initial Submission, Public Record version, pp 26-27.

<sup>21</sup> Evidence contained in Confidential Annexure 'E' to the Initial Submission.

<sup>22</sup> Applicant's Reply, p 3.

<sup>23</sup> Initial Submission, Public Record version, p 27.

<sup>24</sup> Applicant's Reply, p 3.

<sup>25</sup> Applicant's Reply, p 4.

<sup>26</sup> Initial Submission, Public Record version, p 18.

statement was made instead to show the comparative benefits of economies of scale available to Masteel, as the owner of the world's largest railway wheel production line, and as a business with superior plant capacity.

### 3.5 Conclusion

The Applicant submits that '[t]he matters raised by RTIO concerning fatigue and packaging associated with the like goods, whilst important from a customer safety perspective, are not integral to the performance of the goods the subject of investigation.'<sup>27</sup>

Rio Tinto has three observations to make in response to this submission:

- (a) This statement shows a significant misunderstanding of Rio Tinto's core preference to prioritise workplace health and safety such that it is indeed integral to Rio Tinto's evaluation of the performance of the Goods.
- (b) As submitted by Rio Tinto in its Initial Submission, shattered rim events, wheel wear considerations, and packaging are important to Rio Tinto not only from a safety perspective (because of derailments, loading injuries, etc), but also from an efficiency perspective.<sup>28</sup> Defective wheels cost time and money to repair or replace, and inefficient packaging similarly costs time and money when compared to Masteel's more efficient packaging offering.
- (c) Rio Tinto notes that BHP has also submitted and detailed quality issues it has had with the Applicant's Goods.<sup>29</sup> Rio Tinto submits that this supports the proposition that quality issues have been, and continue to be, a legitimate criterion by which Australian end-users evaluate the performance of the Goods, and so these issues are an alternative cause of any injury to the Australian industry, unrelated to dumping or subsidisation.

Rio Tinto submits that these considerations were relevant to the ultimate tender outcome, and thus were legitimate alternative causes of injury to the Australian industry not related to dumping or subsidisation.

Rio Tinto does not generally dispute the Applicant's reference to its 'long-established position as a reputable supplier of quality railway wheels'.<sup>30</sup> However, Rio Tinto does submit that, in its most recent tender process and since that time, the specific issues with the Applicant's Goods outlined in Rio Tinto's submissions were legitimate factors that contributed significantly to its decision to purchase from an alternative supplier.

By way of conclusion, nothing in this Further Submission should be interpreted as a concession that Rio Tinto agrees with any other submission in the sections of the Applicant's Reply headed: 'introduction', 'export price', 'normal value', 'material injury and causation' or 'closing remarks'. Rio Tinto may address the arguments in these sections in more detail later in the Investigation.

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<sup>27</sup> Applicant's Reply, p 3.

<sup>28</sup> Initial Submission, Public Record version, pp 26-30.

<sup>29</sup> See Submissions 032 and 033 of the ADC's Public Record.

<sup>30</sup> Applicant's Reply, p 4.

## 4. Adjustments for comparative advantage

Rio Tinto submits that the ADC ought to make adjustments to account for Masteel's comparative advantages if it is to use third country price information as a benchmark in determining the exporter's costs of production or manufacture for the purposes of constructed normal value under s269TAC(2)(c)(i) of the Act.

In the PAD, the ADC concluded that in order to determine the exporter's costs of production or manufacture for the purposes of constructed normal value under s269TAC(2)(c)(i), it was appropriate to replace Masteel's steel material input costs for billet with the costs incurred by the French railway wheel producer, Valdunes.<sup>31</sup> The ADC took this view because it preliminarily determined that Masteel's steel material input costs did not reflect competitive market costs, and that Valdunes' costs were available to the ADC at that stage of the Investigation.

Although the ADC considered whether it was appropriate to adjust Valdunes' steel input costs to take into account the comparative differences between the positions of producers in China and France, the ADC considered that it did not have sufficient information to make such an adjustment at that stage of the Investigation, and would give further consideration to this issue following its verification visits with the exporters.<sup>32</sup>

Rio Tinto submits that, if the ADC determines that Masteel's steel material input costs for billet do not reflect competitive market costs, the ADC ought to seek sufficient information from Valdunes and Masteel regarding their comparative advantages and disadvantages and make corresponding adjustments to constructed normal value to take those differences into account. Examples of such comparative advantages that Chinese exporters of the Goods might benefit from have already been raised and extensively covered by Rio Tinto in its Initial Submission<sup>33</sup>, and by China's Chamber of Commerce for Import and Export of Machinery and Electronic Products (**CCCME**).<sup>34</sup>

Rio Tinto submits that for the ADC not to seek sufficient information that would allow it to make adjustments, and not to attempt to make adjustments to constructed normal value for the comparative advantages identified either in the written submissions of interested parties or as a result of the ADC's own inquiries would, in these circumstances, be a failure to take into account a mandatory relevant consideration under s269TAC(2)(c)(i) of the Act,<sup>35</sup> or alternatively, would be a denial of procedural fairness or failure to exercise jurisdiction.<sup>36</sup>

Rio Tinto submits further that in light of the extension of time which has been granted in this Investigation to the deadline for the SEF, there is now ample time for the ADC to attempt these

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<sup>31</sup> PAD, p 8.

<sup>32</sup> Ibid, p 9.

<sup>33</sup> Initial Submission, pp 20, 31-36.

<sup>34</sup> Submission 027 of the ADC's Public Record, pp 16-18.

<sup>35</sup> *Steelforce* at [118] per Perram J; *Changshu Longte Grinding Ball Co., Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science (No 2)* [2018] FCA 1135 at [86] per Griffiths J.

<sup>36</sup> *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 17-18 [55] (per Black CJ, French and Selway JJ).

adjustments if it determines that using third country price information is necessary in the circumstances.

## 5. The ADC's imposition of securities

### 5.1 The ADC's decision in the PAD

In the PAD, the Commissioner stated:

Under subsection 269TD(4)(b), I am satisfied that it is necessary to require and take securities in relation to exports of the goods to Australia from China and France to prevent material injury to the Australian industry occurring while the investigation continues.<sup>37</sup>

As a result, after 19 June 2018, securities are required and taken under s42 of the Act in respect of interim dumping duties that may become payable in respect of the Goods exported from China and France. For Goods exported from China, the interim duty payable is calculated using a dumping margin of 17%. For Goods exported from France, the interim duty payable is calculated using a dumping margin of 28.2%.<sup>38</sup>

### 5.2 Submissions of interested parties and responses

In its letter to the ADC following the publication of the PAD, Masteel questioned what the 'injury' is that the ADC requirement to take securities actually prevents.<sup>39</sup> Masteel further submitted that each of the end-users in Australia to whom it supplies are a party to supply contracts with Masteel, so that the taking of securities will not result in lost sales volumes being returned to the Australian industry, and will not reduce or prevent any injury to Australian industry while the investigation continues. Masteel correctly stated that '[t]he supply of goods over the term of a contract does not "continue" to cause further injury during the investigation'.<sup>40</sup> The result of the taking of securities is therefore merely an impost on the Australian end-user and its customers.<sup>41</sup>

The Commissioner responded to Masteel by stating:

I do not accept your submission that the imposition of securities is not justified on the basis that any injury that might occur has already occurred [...] In my view, the commercial arrangements present in the Australian market for railway wheels do not preclude the prospect of the securities being effective in preventing injury to the Australian industry producing like goods.<sup>42</sup>

With respect, no reasoning is provided in support of this view. It is conclusory.

In response to this, the CCCME asked the ADC to elaborate on this statement. Specifically, the CCCME asked 'what injury would or could be prevented by the imposition of securities while the investigation continues' and 'how does a documentary security prevent [such] injury'?<sup>43</sup>

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<sup>37</sup> PAD, p 2.

<sup>38</sup> PAD, p 12.

<sup>39</sup> Submission 019 on the ADC Public Record, p 2.

<sup>40</sup> Submission 027 on the ADC Public Record, p 5.

<sup>41</sup> Ibid, p 3.

<sup>42</sup> Submission 021 on the ADC Public Record.

<sup>43</sup> Submission 031 on the ADC Public Record, pp 4-5.

Most recently, BHP asked the Commissioner to withdraw the requirement that securities be taken in respect of interim dumping duty.<sup>44</sup> First, BHP questioned the basis upon which the Commissioner could be satisfied that securities are necessary to prevent injury to the Australian industry, especially in light of the ADC's extension of time in relation to the SEF because of the complexities of the Investigation. Secondly, BHP emphasised the significant administrative, legal, logistical and commercial burdens that the taking of securities has on importers and end-users of the Goods.

Rio Tinto supports both of these submissions. If the ADC requires further time to assess a number of relevant factors in this Investigation properly, it undermines the strength of its previous finding that it is necessary to take securities immediately to prevent ongoing injury occurring to Australian industry. It is unreasonable, in Rio Tinto's respectful submission, to burden trade in Australia in this manner without a firm factual foundation for taking such measures, especially when the exercise of the discretionary power contained in s269TD(4)(b) of the Act is conditioned by reference to the concept of 'necessity'.

### 5.3 Rio Tinto's submission

In addition to the matters discussed in section 5.2 of this Further Submission, Rio Tinto submits that it is unsatisfactory administrative practice for such a burden to be placed on industry without transparent reasoning being provided by the Commissioner.

Section 269TD(4)(b) of the Act grants the Commonwealth the power to require and take securities under s42 of the Act in respect of interim duty that may become payable only if the 'Commissioner is satisfied that it is necessary to do so to prevent material injury to an Australian industry occurring while the investigation continues'.

Although the power is conditioned on the Commissioner's satisfaction, that jurisdictional fact is not satisfied if the Commissioner's satisfaction is illogical, irrational or has no reasonable basis.<sup>45</sup> If there is no reasonable basis given in the Commissioner's reasons, it may be inferred that the decision-maker was not 'in reality' satisfied of the requisite matters or that there is an absence of any real basis for the decision.<sup>46</sup>

Although the PAD set out the Commissioner's preliminary views on the injury experienced by the Applicant, it did not set out how the Commissioner considers that securities are therefore 'necessary [...] to prevent material injury'.<sup>47</sup> The Commissioner must be satisfied not simply that there may be injury to the Applicant, but that any such ongoing injury would be prevented by securities. Given that the ADC did not outline in the PAD the basis on which it was satisfied that it was necessary for securities to be taken to prevent injury, it may be inferred that either the Commissioner could not be truly satisfied of the requisite matter or that there is no reasonable basis on which the Commissioner could be so satisfied. If that is the case, the Commonwealth's decision to take securities was tainted by jurisdictional error and is liable to be set aside.

Accordingly, Rio Tinto submits that the ADC ought to provide adequate reasons identifying the precise injury that the taking of securities prevents, and how the taking of securities is

<sup>44</sup> Submission 033 on the ADC Public Record, p 2.

<sup>45</sup> See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR at 648 [131] (per Crennan and Bell JJ).

<sup>46</sup> *Ibid* at 623 [34] (per Gummow ACJ and Kiefel J).

<sup>47</sup> The Act, s269TD(4)(b).

necessary to prevent that injury. The nature of this injury should not be explained in the abstract. If the ADC is unable to do this, Rio Tinto submits that it should withdraw its requirement to take securities under s42 of the Act, with retrospective effect, and refund any securities paid by interested parties to date.

Ultimately, Rio Tinto submits that it has demonstrated in its Initial Submission and Supplementary Submission that no injury is being suffered by Australian industry in relation to the Goods which can be attributed to dumping or subsidisation. In those circumstances, the PAD should never have been made. There was no material injury which the Commissioner could have been satisfied that it was necessary to protect Australian industry from by requiring and taking securities, and there is no ongoing injury which would necessitate such a protection while the Investigation continues.