

Canberra
6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
ACT 2609 Australia
+61 2 6163 1000

Brisbane
Level 4, Kings Row Two
235 Coronation Drive
Milton, Brisbane
QLD 4064 Australia
+61 7 3367 6900

Melbourne
Level 39
385 Bourke Street
Melbourne
VIC 3000 Australia
+61 3 8459 2276



commercial + international

01 October 2021

The Director
Anti-Dumping Commission
GPO Box 2013
Canberra
Australian Capital Territory 2600

By email

Dear Director

Investigation 584 – Merchant bar from Taiwan thyssenkrupp comment on material injury allegation

As you know, we represent thyssenkrupp Materials Australia Pty Ltd (“**thyssenkrupp**”) in this investigation.

thyssenkrupp provides this submission with the anticipation its market knowledge and experience may assist the Anti-Dumping Commission (“the Commission”) in forming a robust and well interrogated injury assessment. Our client wishes to see the continuance of fair and open competition in this market and is concerned when it identifies that distortions or misrepresentations have been presented to the Commission in such a way as might consolidate the Australian industry’s already considerable market dominance.

Rather than being reflective of material injury, it is often the case that the applicant’s market behaviour is self-serving and ultimately reflective of its own unilaterally formed sales policies, and not those of the smaller players in the market. **thyssenkrupp** sees this case as being a prime example of such a state of affairs.

This submission provides the Commission with context about the operation of the relevant market and tests the injury allegations made by the Australian industry in that context. We trust it will assist the Commission in its assessment.

A Nature of the overall merchant bar market

This investigation represents the first foray of the Commission into the “merchant bar” product. This is despite the applicant’s historically prolific implementation of the anti-dumping system against its

PUBLIC RECORD

Moulegal Pty Limited ACN 614 584 539

competitors and the longstanding usage of imported merchant bar in Australia. This is not by happenstance. The mechanics of this market are materially dissimilar to the mechanics of the markets of most other steel products as have been the subject of an anti-dumping inquiry.

Where other steel products are high volume and relatively homogenous, merchant bar encompasses a wide variety of products that are different in their shapes and dimensions. Manufacturers tend to focus on a subset of the full merchant bar range of products, because it is simply inefficient to attempt to produce the full variety of products available and to spread sales efforts across such a great diversity of needs. We understand that the description of the goods in this investigation is reflective of **[CONFIDENTIAL TEXT DELETED – production capability]**. However, those products do not encompass the full range of products that fall within the relevant tariff codes. Consequently, import data based on tariff codes will include non-subject goods, and a significantly large proportion of non-subject goods at that. This considerably restricts the relevance of this type of import data in market share or other analysis and renders irrelevant the applicant's claims of injury where it relies on such data. In its use of ABF or other import data the Commission should take care to exclude the merchant bar that may fit within the tariff classification but fall outside the scope of the goods description, to ensure the correctness of the data sets relied on.

This level of variety underpins customer behaviour. Merchant bar products are sold in small quantities and on an "as required" basis. The Australian market is not a viable market for many foreign manufacturers, due to the typically small volume requirements of traders and end users for the different types of products. Now, the supply of merchant bar for the Australian market is generally sourced from either the Australian industry, exporters from Taiwan or increasingly exporters from other markets.

Merchant bar is produced, generally, by way of melting scrap.¹ As a result the price of merchant bar is tied closely to the price of scrap.

B Australian industry market power

It is critical for the Commission to understand the structure and behaviour of the Australian industry and its related parties in order to undertake its injury and causation assessment. The dominant party in the Australian market is the Australian industry applicant. The Commission has every right to be confused to find that the Australian industry is, for the first time in decades, alleging injury to its merchant bar production, and doing so at a time in which the steel industry, including InfraBuild Group,² is generally reporting record profits, both here in Australia and globally. It is unfortunate that this context has not already been provided in the application, however we are grateful for the opportunity to expose these matters in the process of this investigation.

Based on the application:

- the applicant for this investigation is InfraBuild NSW Pty Limited ("InfraBuild NSW"); and

¹ An exception is where iron ore-based billet is used, such as is the case with the Australian industry. Please refer to the application at page 19.

² "Saving Sanjeev Gupta and the big Australian profit", <https://www.theaustralian.com.au/business/mining-energy/saving-sanjeev-gupta-and-the-big-australian-profit/news-story/1bf0920d3c4862a0bfccfbd365264fec>.

- the other member of the Australian industry is its related company Australian Steel Company (Operations) Pty Ltd (“ASC”).

The two companies are collectively referred-to in the application as “InfraBuild Steel”.

InfraBuild NSW and ASC are related parties under the umbrella of the InfraBuild group of companies (“InfraBuild Group”). The involvement of the InfraBuild Group in the Australian market for the subject goods is not limited to InfraBuild NSW and ASC. InfraBuild Group companies are also active importers and distributors of the subject goods.

We respectfully query the extent to which this market information has been conveyed to the Commission, as it certainly is not present in the public record version of the application. In fact, when asked to identify and detail any relationship the applicant has to an Australian importer of the goods, the application states:

InfraBuild Steel has no relationship with an exporter to Australia or Australian importer of the goods the subject of this application.³ [underlining supplied]

It may be correct in a narrow sense that InfraBuild NSW and ASC do not have a shareholding interest in any Australian importers of the goods, however it cannot be ignored that they do have a relationship with certain importers via the InfraBuild Group. This is confirmed at a later point, where the application explains:

All distributors, including those that are part of the InfraBuild Group, also distribute imported product.⁴

This level of obfuscation makes it difficult for interested parties to accurately comment on information presented. It is even more egregious if it presents the Commission with an inaccurate depiction of the market.

For clarity, it is **thyssenkrupp’s** understanding that there are **[CONFIDENTIAL TEXT DELETED – number]** InfraBuild Group companies that operate in the market as importers, **[CONFIDENTIAL TEXT DELETED – product sourcing details]**. **[CONFIDENTIAL TEXT DELETED – company information]**.

It is our client’s understanding that in addition to purchasing **[CONFIDENTIAL TEXT DELETED – product source]**, **[CONFIDENTIAL TEXT DELETED – InfraBuild Group details]** purchase subject goods from **[CONFIDENTIAL TEXT DELETED – product source]**. **thyssenkrupp** understands **[CONFIDENTIAL TEXT DELETED – company sales practice]**.

This level of market penetration and **[CONFIDENTIAL TEXT DELETED – selling practice]** cannot be ignored. InfraBuild Group is the dominant player in the Australian market, as it both produces and imports the subject products. Its dominant position allows it to set the price in the market and dictate terms to other participants.

The application appears to indicate a form of parity pricing, where the Australian industry is seemingly required to follow the price set by its competitors. However, the structuring of InfraBuild Group in this

³ Application at page 10.

⁴ Application at page 24.

market is a manipulation of the import parity pricing idea. In this case, the distribution arms of InfraBuild Group influence the setting of market prices through the importation of the subject goods. Then, the production arm of InfraBuild Group applies import prices to its own pricing formula. In doing this the InfraBuild Group production arm will be applying to its parity pricing formula either the import prices agreed to by the distribution arm or competitor import prices that are themselves substantially influenced by the InfraBuild Group's own distributor's, who strongly influence the market. With this approach, pricing pressure on the Australian industry is overstated as either (a), the related distributor purchases from the related producer at a lower price and sells with a higher margin or (b), the related producer sells at a higher price and the related distributor sells at a slightly lower margin. In either case, the InfraBuild Group wholistically prospers.

C Condition of the Australian market has changed

Historically, the Australian market for merchant bar has been stable, with a healthy level of competition and minimal price fluctuation. This stability was disrupted in [CONFIDENTIAL TEXT DELETED – year] with the [CONFIDENTIAL TEXT DELETED – market activity]. This caused a very significant structural change to the market. Prior to [CONFIDENTIAL TEXT DELETED – market activity], [CONFIDENTIAL TEXT DELETED – historical market practices]. Post [CONFIDENTIAL TEXT DELETED – market activity], [CONFIDENTIAL TEXT DELETED – change in market practices]. However, due to [CONFIDENTIAL TEXT DELETED – change in supply circumstance], **thyssenkrupp** understands that [CONFIDENTIAL TEXT DELETED – company name] [CONFIDENTIAL TEXT DELETED – change in purchasing behaviour] in order to meet its customers' demands for supply. This [CONFIDENTIAL TEXT DELETED – change in purchasing behaviour] coincides with the investigation period.

The other significant shift in the market has been caused by the global pandemic. The effect of COVID-19 conditions on the steel industry have been dramatic. The Australian merchant bar market has not been immune from that impact. The application does not mention the pandemic, a failing which we consider to be both bewildering and misleading. We note and applaud the fact that the Commission has raised the issue of the impact of the pandemic for consideration by interested parties.⁵

It is a fact that steel prices have increased sharply because of the pandemic. This is because of long shipping delays and supply constraints contrasted with continued and growing demand for product. This is best observed in changes in the price of scrap over the past 15 months:

[CONFIDENTIAL CHART – monthly scrap price for investigation period]

The most significant shift in the scrap price was in [CONFIDENTIAL TEXT DELETED – month]. The increase in the price at that time coincides with the date from which the application claims material injury commenced. Given the price of merchant bar is [CONFIDENTIAL TEXT DELETED – pricing pattern], the November effect on the applicant is understandable. Our client also understands that increasingly over the period the Australian industry has [CONFIDENTIAL TEXT DELETED – change in production circumstance] which is affecting [CONFIDENTIAL TEXT DELETED – production operations] for production of the product, with customers [CONFIDENTIAL TEXT DELETED – change in customer purchasing behaviour].

⁵ Consideration Report at page 22.

D Injury was not caused by dumped imports

Our client observes that the injury allegations do not reconcile with the information presented in the application for this investigation. To that end **thyssenkrupp** appreciates that the Commission's initial screening of the application has already identified that the *"analysis does not support a conclusion that the Australian industry experienced any decline in its sales volumes, revenue or profit"*.⁶ We support this view.

On the other hand, the Commission has considered there was reasonable ground to support a finding of injury in the form of reduced market share, which coincides *"with a decline in profitability, a reduction in prices and a narrowing of the gap between price and costs (indicating price suppression and price depression)"*.⁷ On our review of the application, we must respectfully disagree.

1 Materiality of injury

The application shows that injury indicators for the overall 2020 period were generally consistent with the indicators for the previous three years, indicating 2020 was consistent with seasonal trends for the goods. Notwithstanding this seasonal consistency, the application focuses the allegations on a limited period, being injury that is said to have commenced on or about November 2020, stating:

*The Australian industry considers that although its overall sales volume may have increased across the injury analysis period, it has suffered material injury in the form of lost sales volume since November 2020, which continued to decline month on month until February 2021.*⁸

Essentially, the Australian industry's complaint appears to be that despite enjoying an increase in overall sales volume from 2017, the Australian industry saw a decline in sales for a four month stretch from November 2020 to February 2021.⁹ The application points to specific months. However, we respectfully remind the Commission that injury is to be considered over the whole period, to take account of the ebbs and flows that are a natural and accepted aspect of doing business. There is no justification for cherry-picking certain months and then ignoring the circumstances of the entire period.

A graphical representation of imports is provided in the application as follows:¹⁰

⁶ Consideration Report at page 21.

⁷ Consideration Report at page 21.

⁸ Application at page 62.

⁹ Application at page 62.

¹⁰ Application at page 74.

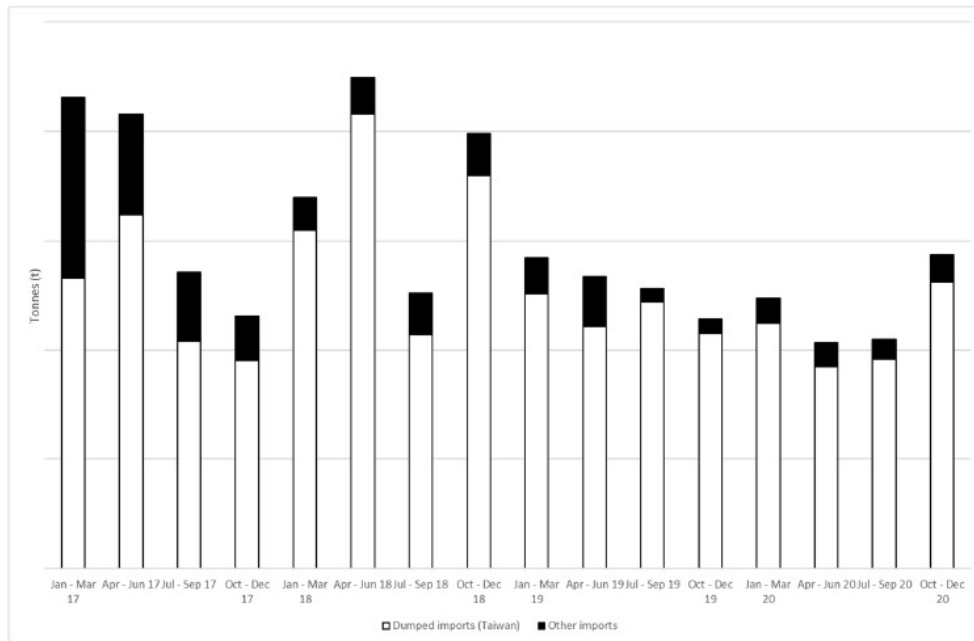


Figure A-9.6.1.1: Volume of imports from Taiwan and other sources (Source: [appendix A2](#))

This chart clearly demonstrates that since 2017 overall import volumes have decreased year-on-year. This is a consistent trend that continued in 2020. Based on the applicant's chart, imports did increase in *one* quarter (October-December 2020), however the chart also shows that in the *two immediately preceding* quarters the volume of the imported goods were at their lowest levels since 2017. Seasonal fluctuations in import volume are expected in the ebb and flow of this market and focussing on one quarter to the exclusion of the others to support an allegation of injury is completely misleading. Further, there have been quarters in previous years in which there has been a significantly higher volume than the one quarter the Australian industry has now chosen to complain about in its application.

2 Market share

If it is indeed the case that the market share of the Australian industry has reduced, it is likely only a reduction in a technical sense. It is important to understand that the Australian industry has been operating at a consistently high capacity for a number of years:

Index of capacity (merchant bar)

Period	CY 2017	CY 2018	CY 2019	CY 2020
output max. capacity*	100	104	102	101

*data from [appendix A7](#)

Index of capacity utilisation (merchant bar)

Period	CY 2017	CY 2018	CY 2019	CY 2020
capacity utilisation*	100	116	103	109

*data from [appendix A7](#)

It is also illustrative to consider the indexed sales volume for the same four-year period.

Indexed table of sales quantities

Period	(a) Your Sales	(b) Other Aust* Sales	(c) Total Aust* Sales (a+b)	(d) Dumped Imports	(e) Other Imports	(f) Total Imports (d+e)	Total Market (c+f)
CY 2017	100	0	100	100	100	100	100
CY 2018	107	0	107	131	39	107	107
CY 2019	93	0	93	94	29	77	86
CY 2020	107	0	107	87	24	71	91

The information in the application demonstrates that the Australian industry has produced roughly the same amount of product in each of the four years for which data is provided, with a reduction in 2019 and an increase in 2020. So-called dumped imports have reduced in comparative volume every year since 2018.

In our mind the impression provided by the combination of capacity, capacity utilisation and sales data is of an Australian industry that sells everything it produces, with imports supplying the remainder of the market. In these circumstances an inability to increase market share is meaningless.

3 Price undercutting

The application claims that the Australian industry's prices were undercut, and that it would have:

...achieved higher prices in the absence of offers for sales of merchant bar exported from Taiwan at dumped prices, in other words, the price undercutting caused the Australian industry to experience price depression that it would not have otherwise experienced if not for the offers for sale of dumped goods.¹¹ [underlining supplied]

First, injury should not be attributed to imports because the Australian industry chooses to chase hypothetical offers used by customers as a sales negotiation tactic.

Secondly, it must be remembered that a large proportion of the Australian industry's sales are to other InfraBuild Group companies. The application makes the stale suggestion that:

...sales to its related entities are arm's length sales and it is appropriate to include those sales in its injury analysis as the Australian industry producing like goods.¹²

¹¹ Application at page 53.

¹² Application at page 29.

The mere fact that the Australian industry wants these sales to be factored into the injury analysis should be more than enough to convince the Commission not to accept them as being at arm's length. For how long is the Commission going to put up with claims by the Australian industry that it has been materially injured by the price of imports when its multiple distribution arms make massive profits? What are we missing here?

On top of that, we now have a situation in the Australian market where those self-same related distribution companies import and/or sell the goods that its manufacturing arm alleges to be dumped and causing it injury. How profit is shifted around the InfraBuild Group is a material consideration. Where sales to related parties are included in the injury analysis, why is the extended profit margin of the related entity ignored? How does the profitability of Infrabuild Group's distribution companies compare with industry averages? Has the Commission benchmarked one against the other?

Thirdly, the application goes on to explain that the supposed price undercutting commenced from about November 2020, increasing to March 2021 before receding from April 2021 to June 2021.¹³ This implies that it is the price of imports that materially changed. However, in actuality it appears that it is the Australian industry's own costing that changed, resulting in a choice it had to make, at the factory level, as to whether to increase its price.

4 Injury commencing November 2020

The pivot in the investigation period that appears to have triggered this application took place in November 2020. The application seeks to characterise this as a change in import sales behaviour that has caused material injury.

Our client's experience is that it was in about [CONFIDENTIAL TEXT DELETED – date] that the steel industry in Australia and overseas experienced significant increases in the price of [CONFIDENTIAL TEXT DELETED – product]. This increase in cost is reflected in the application, with the Australian industry experiencing a massive 14% increase in its CTMS in December 2020 compared to what it had been in the previous month. In January 2021 it increased another 3%, and in February it increased by another 2%:¹⁴

Index of cost variations (merchant bar)

Period	CY 2017	CY 2018	CY 2019	CY 2020
unit CTMS [†]	100	119	116	111

Period	Jul 2020	Aug 2020	Sep 2020	Oct 2020	Nov 2020	Dec 2020	Jan 2021	Feb 2021
unit CTMS*	100	95	99	99	102	116	119	121

*use data from label J of appendix A6.1

¹³ Application at page 53.

¹⁴ Application at page 37.

Contrastingly, the price of the Australian industry’s product was relatively steady over the same period:¹⁵

Index of price variations (merchant bar)

Period	CY 2017	CY 2018	CY 2019	CY 2020
unit sales revenue*	100	117	118	111

Period	Jul 2020	Aug 2020	Sep 2020	Oct 2020	Nov 2020	Dec 2020	Jan 2021	Feb 2021
unit sales revenue*	100	98	97	95	96	97	99	102

*data from label L of appendix A6.1

In such circumstances, it is obvious that profit levels will retract if pre-committed prices cannot automatically respond by increasing in a commensurate fashion, or if opportunities to increase prices are not taken up. Remarkably, the Australian industry claims that because of dumped imports it was not able to raise its prices in such fashion:

Distributors use the lower dumped import prices to leverage lower price outcomes from InfraBuild Steel. InfraBuild Steel can either choose to lower its prices closer to those of landed dumped imports or risk losing substantial sales volumes.¹⁶

This is ridiculous. Customers will always attempt to negotiate down a price. This is true of all markets. The Australian industry says it has a choice about whether to lower its price or not. Why, then, in an industry that is clearly incurring greatly increased costs, in markets where prices will clearly increase accordingly, does the applicant choose to (a) maintain its prices at the factory level and (b) blame imports for its own unfathomable low-pricing decisions?

Infrabuild is the dominant power in the merchant bar market in Australia, at all levels. It has **[CONFIDENTIAL TEXT DELETED – market dynamic]**. Its related company distributors across the country **[CONFIDENTIAL TEXT DELETED – company sales practice]**. In the Infrabuild organisation, it seems to be the case that distribution companies will make money no matter what the import price is, because the pain of pricing decisions is always pushed downwards to the production level. Put simply, when a choice needs to be made between profitability at the production and distribution levels, it is the production level that suffers.

E Threat of injury claim not supported

The application also argues the following:

However, further or in the alternative, if material injury to the Australian industry is not yet evident, then the industry applicant alleges that the increase in the volume of the dumped

¹⁵ Application at page 37.

¹⁶ Application at page 24.

imports from Taiwan, at increasingly higher rates of dumping will create a situation where the threat of material injury to the Australian industry is foreseeable and imminent.

“Further, or in the alternative”? If the Australian industry was to manage to convince the Commission that material injury had been caused in the investigation period, which we deny it can do, then there is no need to establish that there is a threat of material injury. A threat claim is therefore never a “further” claim, in the sense of an accumulation of claims that must be proven or that need to be proven in order to impose dumping duties. A threat argument in an investigation such as this can only ever be put in the alternative.

And how does the Australian industry frame its threat allegation? It is said that the increase in the volume of dumped imports at increasingly higher rates of dumping will create a situation where the threat of material injury is foreseeable and imminent. This allegation is itself insufficient, because it postulates a situation *in the future* that will create a situation *in the future* where threat of material injury is foreseeable and imminent. Postulation of a future situation where a threat might emerge bears no resemblance to the legislative test for a “threat” argument to succeed, so far as we understand it.

Section 269TAE(2B) of the *Custom Act 1901* states:

(2B) *In determining:*

(a) *for the purposes of subsection (1), whether or not material injury is threatened to an Australian industry; or*

(b) *for the purposes of subsection (2), whether or not material injury is threatened to an industry in a third country;*

because of the exportation of goods into the Australian market, the Minister must take account only of such changes in circumstances, including changes of a kind determined by the Minister, as would make that injury foreseeable and imminent unless dumping or countervailing measures were imposed.

The Commission’s dumping and subsidy policy manual provides further guidance about the factors to consider in undertaking this assessment in line with the requirements of the WTO Anti-Dumping Agreement:

Threat of material injury

Articles 3.4 and 3.7 of the ADA and Article 15 of the SCM Agreement set out the factors to be considered in a determination of threat of material injury.

The Agreements give a non-exhaustive list of factors that should be considered in totality when making a determination of threat of material injury.

- *A significant rate of increase of dumped/subsidised imports into the domestic market indicating the likelihood of substantially increased importation.*
- *Sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped/subsidised exports to*

the market, taking into account the availability of any other export markets to absorb any additional exports.

- *Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports.*
- *Inventories of the product being investigated.*
- *In subsidy cases only, the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom.*

The Commission will give consideration to these particular requirements of the Agreements.¹⁷

These are assessments that must be done now, based on present-day information. Anti-dumping measures cannot be imposed against imports because a threat of material injury might emerge in the future. Material injury must be foreseeable and imminent because of things known today.

The application has not provided sufficient information to satisfactorily evidence the factors identified above, at this time, particularly as to why injury is “foreseeable and imminent”. We make these points:

- the merchant bar market in Australia has enjoyed a long period of stability, with no dumping measures having ever been imposed against merchant bar imports;
- the import statistics show a lower volume of imports in the investigation period than in previous years;
- the greater likelihood is that the scrap cost increase will be [CONFIDENTIAL TEXT DELETED – price effect].

As evidence of the last point, price offers that our client **thyssenkrupp** [CONFIDENTIAL TEXT DELETED – price offer source] are about [CONFIDENTIAL TEXT DELETED – percentage movement] than the prices [CONFIDENTIAL TEXT DELETED – pricing information]. As an example, please refer to Confidential Attachment 1 which provides [CONFIDENTIAL TEXT DELETED – price offer detail].

We see no ability for Infrabuild to succeed in its attempt to conjure up a threat argument, to the high standard of foreseeability and imminence that is demanded by the applicable laws and as interpreted by the Commission itself.

There was a sudden upward movement in scrap costs in the last quarter of 2020. The Australian industry did not increase prices immediately, nor sufficiently, at its production level. A blip in its financial condition was faintly registered in its accounts. Blame for the blip cannot be laid at the door of merchant bar imported from Taiwan. The blip was not material. The blip was not lasting. There is no evidence the blip will become a blob.

¹⁷ ADC Dumping and Subsidy Manual at page 23.

On behalf of our client **thyssenkrupp** we request the Commission to terminate this investigation once the Commissioner achieves the state of satisfaction referred to in Section 269TDA(13) of the *Customs Act 1901*, namely *“that the injury, if any, to [the] Australian industry... that has been, or may be, caused by [exports from Taiwan] is negligible”*.

Yours sincerely



Daniel Moulis
Partner Director

+61 2 6163 1000



Macky Markar
Associate

+61 2 6163 1000