Australian Government
Anti-Dumping Review Panel

Application for review of a Commissioner's decision

Customs Act 1901 s 269ZZQ

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Commissioner of the Anti - Dumping Commission.

Section 269ZZO *Customs Act 1901* sets out who may make an application for review to the ADRP of a review of a decision of the Commissioner.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after the applicant was notified of the reviewable decision.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel begins to conduct a review (by public notice in the case of termination decisions and by notice to the applicant and the Commissioner in the case of negative prima facie decisions, negative preliminary decisions and rejection decision). Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after the Panel begins to conduct a review. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

[1] By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZQA(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application, refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: OneSteel Manufacturing Pty Ltd

Address: Level 6, 205 Pacific Highway, St Leonards NSW 2065

Type of entity (trade union, corporation, government etc.): Corporation member of the Australia industry producing like goods

2. Contact person for applicant

Full name: [redacted]

Position: [redacted]

Email address: [redacted]

Telephone number: [redacted]

3. Set out the basis on which the applicant considers it is entitled to apply for review to the ADRP under section 269ZZO

The applicant for review was the applicant in relation to an application under section 269TB of the *Customs Act 1901* that led to the making of the reviewable decision – being a member of the Australian industry producing like goods.

4. Is the applicant represented?

Yes ~~**No**~~

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

Refer Part E (Authorised Representative) below.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under

☐ Subsection 269TC(1) or (2) – *a negative prima facie decision*

☒ Subsection 269TDA(1), (2), (3), (7), (13), or (14) – *a termination decision*

☐ Subsection 269X(6)(b) or (c) – *a negative preliminary decision*

☐ Subsection 269YA(2), (3), or (4) – *a rejection decision*

☐ Subsection 269ZDBEA(1) or (2) – *an anti-circumvention inquiry termination decision*

6. Provide a full description of the goods which were the subject of the reviewable decision

The goods the subject of the reviewable decision were:

Hot-rolled solid sections of 'alloy steel', having round or near-round cross-sectional dimensions of not less than 9.5 millimetres (mm) and not greater than 98.5 mm, not in coil.

For the purpose of the description of the goods the subject of this application, 'alloy steel' here means steel containing a chemical composition that at least meets or exceeds the minimum chemical element proportions specified in Note (f) "Other alloy steel" to Chapter 72 under Schedule 3 of the Customs Tariff Act 1995 ("the Tariff") as appearing on the date of this application.

Commonly identified as 'rod', 'round bar', 'engineering bar', 'spring steel', 'alloy bar', 'high alloy bar', 'silico-manganese bar', 'grinding rod' or 'bar used for the production of grinding media', the goods covered by this application include all round or near-round hot-rolled solid sections of alloy steel bar meeting the above description of the goods regardless of the particular grade, coating, or minor modification of bar-end finish (including but not limited to, painting or chamfering).

Goods excluded from this application are:

- *Round or near-round hot rolled solid steel sections composed of:*
  - *'stainless steel' as defined under Note (e) "Stainless steel" to the Tariff; or*
  - *'high-speed steel' as defined under Note (d) "High speed steel" to the Tariff;*
- *steel reinforcing bar containing indentations, ribs, grooves or other deformations produced during the rolling process;*
- *steel rod in coil;*
- *chromium plated steel; and*

- *solid sections of steel which may be square, rectangular or hexagonal in cross-section.*

7. **Provide the tariff classifications/statistical codes of the imported goods**

   The goods are classified to the tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995* specified below:

   - 7228.20.10 (statistical code 44)
   - 7228.20.90 (statistical code 47)
   - 7228.30.10 (statistical code 70)
   - 7228.30.90 (statistical code 41)
   - 7228.60.10 (statistical code 72)
   - 7228.60.90 (statistical code 55)

8. **If applicable, provide the Anti-Dumping Notice (ADN) number of the reviewable decision**
   If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

   Anti-Dumping Notice (ADN) No. 2018/017.

9. **Provide the date the applicant received notice of the reviewable decision**

   25 January 2018.

Attach a copy of the notice of the reviewable decision to the application

A copy of the notice of the reviewable decision is attached as Appendix A to this application.

PART C: GROUNDS FOR YOUR APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

A. The reviewable decision was not the correct or preferable decision because the Commissioner's identification of the production of the Australian industry, which formed the basis of the decision to terminate investigation 384 because of allegedly negligible injury, was not authorised by the terms of Part XVB of the Act.

B Alternatively, if the Commissioner did correctly identify the Australian industry, his assessment of the degree of injury was incorrect because he failed to examine and assess the injury suffered by one of the alleged producers and this failure prevented a proper calculation of the degree of injury that would have demonstrated that injury to the Australian industry was not negligible.

C Alternatively, to the extent (if any) that the Commissioner's claim that a significant portion of injury experienced by OneSteel resulted from factors other than dumping formed part of his decision to terminate the investigation, it was not authorised by the terms of s.269TAE(2A)

Elaboration of these grounds can be found at Appendix B attached.

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10

The correct or preferable decision would have been for the Commissioner to find that:

- injury to the Australian industry caused by exports of dumped goods was not negligible; and
- injury, if any, experienced by OneSteel as a result of factors other than dumped imports did not constitute a significant portion of the total injury experienced by the company.

12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision

Only answer question 12 if this application is in relation to a reviewable decision made under subsection 269X(6)(b) or (c) of the Customs Act.

Not applicable.

PART D: DECLARATION

The applicant~~/the applicant's authorised representative~~ *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* beginning to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: 

Name: 

Position: Manager Trade Development

Organisation: OneSteel Manufacturing Pty Ltd

Date: 26/02/2018

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative:	John Cosgrave
Organisation:	MinterEllison Lawyers
Address:	Minter Ellison Building, 25 National Circuit, FORREST ACT 2603
Email address:	john.cosgrave@minterellison.com
Telephone number:	+61 2 6225 3781

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:... [redacted] .....

(Applicant's authorised officer)

Name: [redacted]

Position: Manager Trade Development

Organisation: OneSteel Manufacturing Pty Ltd

Date: 26/02/2018

FOR PUBLIC

Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

Customs Act 1901 – Part XVB

ANTI-DUMPING NOTICE NO. 2018/17

Alloy Round Bar

Exported from the People's Republic of China

Termination of Investigation

Public notice under subsection 269TDA(15) of the Customs Act 1901

On 10 January 2017 I, Dale Seymour, the Commissioner of the Anti-Dumping Commission, initiated an investigation into the alleged dumping of alloy round bar (the goods) exported to Australia from the People's Republic of China (China) following an application lodged by OneSteel Manufacturing Pty Ltd (now trading under the business name Liberty OneSteel) (OneSteel) under subsection 269TB(1) of the *Customs Act 1901* (the Act).

Public notice of my decision to not reject the application and to initiate the investigation was published on the Anti-Dumping Commission's (the Commission) website on 10 January 2017. The ADN is available at www.adcommission.gov.au.

As a result of my investigation, I am satisfied that there has been dumping of the goods (other than exports by Jiangsu Yonggang Group Co. Ltd[1]) but the injury, if any, to the Australian industry that has been, or may be, caused by that dumping is negligible and, therefore, I have terminated the investigation in accordance with subsection 269TDA(13) of the Act so far as it relates to China.

Termination Report No. 384 (TER 384), which sets out reasons for the termination decision including the material findings of fact or law upon which the decision is based, has been placed on the Commission's public record at www.adcommission.gov.au.

In making the decision to terminate, I have had regard to OneSteel's application, submissions from interested parties in the course of the investigation, *Statement of Essential Facts No. 384* (SEF 384), submissions in response to SEF 384, and other relevant information as set out in TER 384.

[1] In relation to Jiangsu Yonggang Group Co. Ltd, the investigation was terminated on 27 October 2017 in accordance with subsection 269TDA(1) of the Act as the goods exported by this exporter were not dumped. Refer to ADN 2017/152 on the public record.

The applicant may request a review of this decision to terminate the investigation by lodging an application with the Anti-Dumping Review Panel in the approved form and manner within 30 days of the publication of this notice.

Enquiries about this notice may be directed to the case manager on telephone number +61 3 8539 2477 or email at Investigations1@adcommission.gov.au.

Dale Seymour
Commissioner
Anti-Dumping Commission

25 January 2018

APPENDIX B

PART C: GROUNDS FOR YOUR APPLICATION

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

A. INTRODUCTION

1. Section 269TDA(13) of the *Customs Act 1901* (**Act**) provides:

> Subject to subsection (13A), if:
>
> (a) application is made for a dumping duty notice; and
>
> (b) in an investigation, for the purposes of the application, of goods the subject of the application that have been, or may be, exported to Australia from a particular country of export, the CEO is satisfied that the injury, if any, to an Australian industry or an industry in a third country, or the hindrance, if any, to the establishment of an Australian industry, that has been, or may be, caused by that export is negligible;
>
> the Commissioner must terminate the investigation so far as it relates to that country.

2. In reaching his decision to terminate investigation 384 the Commissioner has found that the Australian industry for the purposes of the investigation into the dumping of alloy round bar consists of OneSteel Manufacturing Pty Ltd (**OneSteel**), Milltech Pty Ltd (**Milltech**) and Commonwealth Steel Company Pty Ltd trading as Moly-Cop (**Moly-Cop**).[1] OneSteel disputes that finding and contends that in addition to itself the Australian industry consists only of Moly-Cop to the extent that it produces and sells an insignificant volume of grinding rods. However, OneSteel further submits that even if the Commissioner's view of the composition of the Australian industry was correct, his failure to consider or take account of injury to Moly-Cop vitiates his finding that any injury to the Australian industry was negligible. OneSteel also contests the Commissioner's finding[2] that a significant portion of the injury experienced by OneSteel resulted from *...changes in the behaviour of its key customer Donhad* [Donhad Pty Ltd (**Donhad**)] *in response to quality concerns and normal commercial behaviours.*

[1] TER 384. p.70
[2] ibid, - p.70

B. THE AUSTRALIAN INDUSTRY

Profile

3. Of the three companies identified by the Commissioner as members of the Australian industry only OneSteel and Moly-Cop produce alloyed steel billet which is the feedstock for production of alloy round bar. Milltech sources alloy round bar from domestic producers and importers and further processes the goods to produce heat treated and peeled alloy round bars and precision ground bars which the Commissioner claims fall within the description of the goods the subject of the application.

4. OneSteel agrees with the following findings of the Commissioner:

   a. the market for alloy round steel bar consists of four distinct segments which, in order of sales volumes, are grinding bar, spring steel bar, engineering bar and strata bar;

   b. alloy round bar is generally not substitutable between the segments;

   c. OneSteel supplies all four segments of the market;

   d. Milltech only supplies the engineering bar segment:

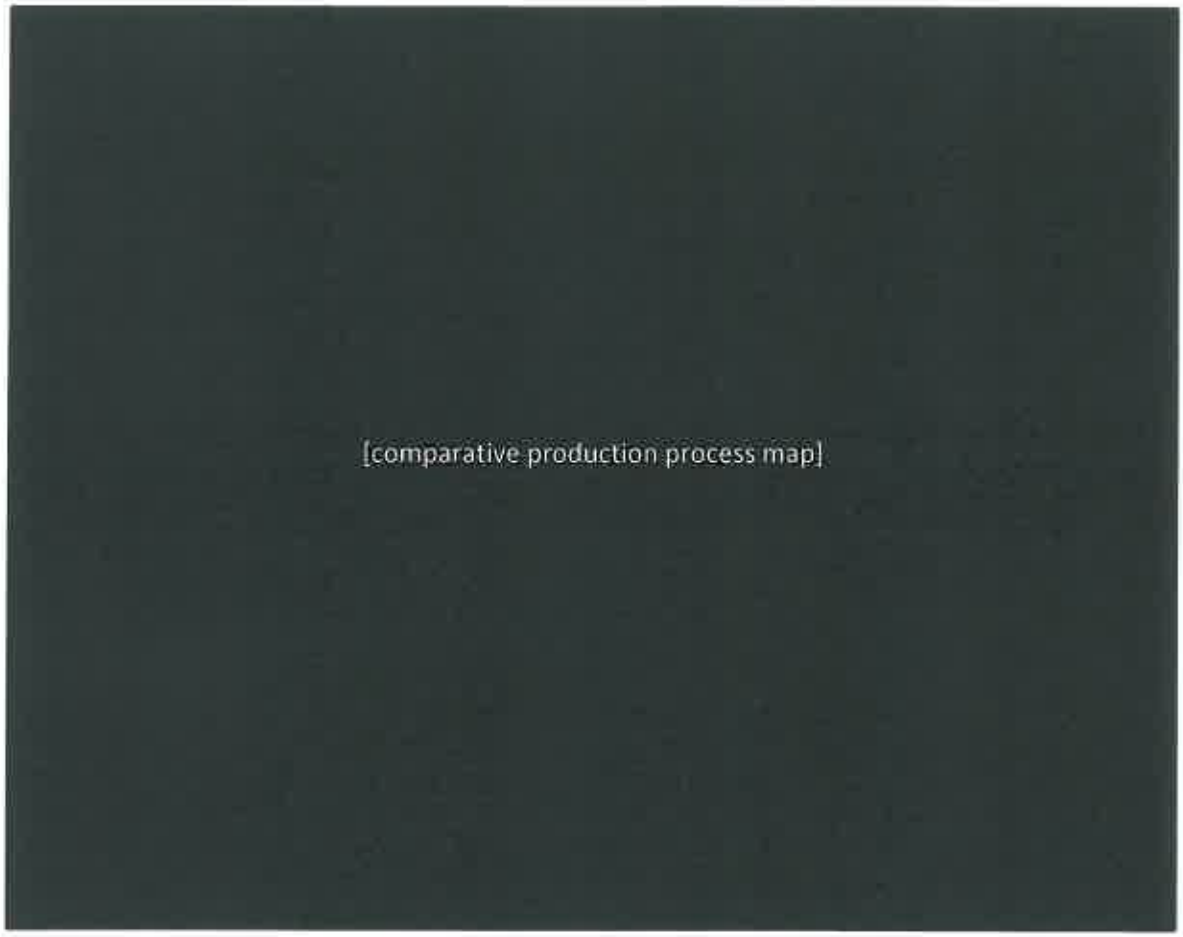
   e. apart from a minor volume of grinding rods, that are grinding bars cut to size, Moly-Cop does not sell alloy round bar to any of the market segments;

   f. the grinding bar market accounts for about two thirds of Australian produced alloy round bar and about 95% of imported alloy round bar is supplied to the grinding bar segment.

   g. Moly-Cop uses self-produced alloy round bar to manufacture grinding balls for sale to the Australian mining sector.

5. Details of the Australian production and sale of both grinding bars and grinding balls are illustrated in CONFIDENTIAL FIGURE 1 (below).

CONFIDENTIAL FIGURE 1



6. OneSteel provides, [redacted] [*confidential commercial relationship between OneSteel and Moly-Cop*] billet into alloy round bar which it then sells to a major supplier of mining consumables, Donhad, for the production of grinding balls for sale to the mining sector. Donhad also sources alloy round bar from importers. Moly-Cop processes its own alloyed steel billet into alloy round bar which it uses to produce grinding balls for sale to the mining sector in competition with Donhad.

The Investigation

7. In Anti-Dumping Notice 2017/002 of 10 January 2017 the Commissioner announced the initiation of an investigation following receipt of an application from OneSteel alleging dumping of, and material injury caused by, exports of alloy round steel bar from China. OneSteel's application stated that it was the largest Australian producer of the goods the subject of the application and that the only other domestic production was the alloy steel grinding rod manufactured by Moly-Cop in such limited volume that they had elected not to

be a party to an application for a dumping duty notice. The Australian industry identified in the application consisted of OneSteel and Moly-Cop, detailed industry production data consisted of the sum of OneSteel's production of alloy round bar and Moly-Cop's grinding rod production and the detailed Australian sales data represented the sum of the sales of that production and imports from China and other sources.

8. Using that production and sales data the Commission in Consideration Report 384 (**CON 384**) applied the tests set out in s.269TB(6)(a) and (b) and found that OneSteel's production accounted for almost 100% of total Australian production by local producers supporting the application and also accounted for not less than 25% of total production. Again based on that production and sales data and cost information provided by OneSteel, the Commission also found that there were reasonable grounds to support the claim that dumped imports from China had caused material injury to the Australian industry defined by OneSteel in its application for a dumping duty notice.

9. In the course of the investigation, however, the Commission revised its view of the scope of the Australian industry to include domestic production of heat treated and peeled alloy round bars and precision ground bars by Milltech and domestic production of alloy round bar used by Moly-Cop in the production of grinding balls. Using this revised finding to calculate a new denominator for the quantification of price and volume injury to OneSteel and price injury to Milltech, the Commissioner concluded that revenue lost to OneSteel and Milltech due to dumped imports was less than 2% of the redefined industry's imputed[3] revenue and sales volume lost to OneSteel was also less than 2% of the redefined industry's total sales volume. Coupled with the Commissioner's finding considered below concerning Donhad's purchasing behaviour, the redefinition of the industry and the attendant quantification exercise formed the basis of the conclusion that any injury to the Australian industry caused by dumped goods was negligible.

Identifying the Industry

10. While 'Australian industry' is not defined in the Act, s.269T(4) provides that:

> For the purposes of this Part, if, in relation to goods of a particular kind, there is a person or there are persons who produce like goods in Australia:
>
> (a) there is an Australian industry in respect of those like goods; and
>
> (b) subject to subsection (4A), the industry consists of that person or those persons.

[3] It is not clear from TER 384 how the Commission estimated a notional revenue from Moly-Cop's captive production of alloy round bar

The goods of a particular kind in the present matter are the goods the subject of the application by OneSteel and the Commissioner, after first acknowledging that the only production of like goods in Australia other than by OneSteel was Moly-Cop's minimal production of alloy steel grinding rod, later determined that the 'whole' industry consisted of OneSteel, Moly-Cop and Milltech. OneSteel points out that the Commissioner as a matter of policy maintains that the scope of the goods the subject of an application for a dumping duty notice cannot be altered in the course of an investigation[4] and submits that it is the identification of the producers in such an application, when accepted by the Commissioner under s.269TC of the Act, that determines the scope of the Australian industry for the purposes of the investigation. To argue to the contrary as the Commissioner has done admits the possibility that an unlawful investigation involving producers that lack standing under s.269TB(6) may be undertaken by the Commissioner.

11. In purporting to change the scope of the investigation to include captive production by Milltech the Commissioner has cited observations of Lockhart J in the *Swan Portland Cement.*[5] In that case his honour stated that:

> 39. In my opinion, the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria. The difficulty seems to me to lie, not in defining the expression, but in determining on the facts of a given case whether a particular industry answers the statutory description of an Australian industry. The latter is not a question of construction; it is a question of identification by the relevant fact finding body, in this case, the Authority.
>
> 40. 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.

12. The case involved consideration of the claim by West Australian producers of cement clinker that they were an Australian industry separate from eastern Australian producers. In rejecting the claim Lockhart J relied on the above observations and the fact that the Australian Parliament had not enacted into law the separate geographic market provisions of the *GATT Anti-Dumping Code*[6]. However, in claiming that a case dealing with separate geographic markets provides authority for consolidating all Australian producers of like goods to goods of a particular kind into an Australian industry in all circumstances, the

[4] eg, Hot Rolled Plate Steel from China, Indonesia, Japan, Korea and Taiwan - REP 198, p.17
[5] *Swan Portland Cement Ltd v Minister for Small Business and Customs* [1991] FCA 49
[6] ibid, at **[46-48]**

Commissioner has gone beyond both the essence of the judgement and the ordinary meaning of the relevant provisions of the Act.

13. Following the terms of s.269TB(1)(b), an Australian industry for the purposes of Part XVB of the Act consists of one or more producers of like goods to goods of a particular kind. This accords with Article 4.1 of the WTO Anti-Dumping Agreement which provides that *...the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like product ....*". In OneSteel's view Moly-Cop is not a producer of alloy round bar for the purposes of the Act. [redacted] [*confidential commercial relationship between OneSteel and Moly-Cop*] there cannot be two producers of the same goods for the purpose of assessing the materiality of injury under s.269TAE.

14. As a converter of its own alloyed steel billet to alloy round bar for captive use in the production of grinding balls, Moly-Cop makes no sales of the intermediate goods and is most appropriately referred to as a converter or consumer, with the term producer attaching more relevantly to its role as a manufacturer and supplier of grinding balls – a role in which it enjoys the fair market conditions afforded by a dumping duty notice applying to Chinese imports of that end product. Excluding production for captive use from assessments of causation and the materiality of injury to an Australian industry in dumping investigations involving an integrated manufacturer is a feature of earlier investigations by the Commission of imported steel products. For example in Report 190 (**REP 190**) dealing with aluminium zinc coated steel the Commission excluded from its injury analysis a product known as unchromated coated steel even though it formed part of the goods the subject of the application. The injury analysis excluded the unchromated product that was manufactured and used captively by BlueScope to produce painted products and focussed exclusively on the sales of the Australian industry.

15. A similar approach was adopted in continuation inquiry 400 (**REP 400**) concerning Hot Rolled Coil (**HRC**) from Japan, Korea, Malaysia and Taiwan which contained the following statement:

> The Commission also notes that BlueScope is an integrated manufacturer which utilises a portion of the HRC produced as an input to the production of other steel products (such as zinc coated (galvanised) steel. As this HRC does not enter the market for HRC generally, the Commission has confined its analysis to HRC produced and sold by BlueScope in that form[7].

[7] Hot Rolled Coil Steel from Japan, Korea, Malaysia and Taiwan - REP 400 - p. 21

Contrary to the claim of the Commissioner that *...there is no express requirement in the legislation for a member of the Australian industry to sell or trade the goods which they produce in the Australian market...*[8] s.269 TAE(1)(c) and (e) of the Act do establish the requirement of sales or consumption in Australia. Furthermore the latter paragraph by excluding any reference to consumption recognises that using internal corporate data to assess price related injury in relation to captive production is an unsafe practice. The approach adopted by the Commission in REPs 190 and 400 undoubtedly reflects this concern at the absence of any arms length price data for captive production and the uncertainty attached to the probative value of estimates.

16. OneSteel concludes, therefore, that taking account of the relevant terms and overall purpose of Part XVB of the Act and the desirability of consistency in the administration of that legislation, Moly-Cop is a part of the Australian industry for the purposes of quantification of injury only in so far as it produces and sells a small volume of grinding rods.

17. OneSteel also contends, for different reasons, that Milltech is not part of the Australian industry. In relation to heat treated and peeled bar the Commission concludes, without analysis, that Milltech undertakes a substantial process in the manufacture of the goods as required by s.269T(3). Contrary to the Commission's assertion, however, OneSteel concedes that heat treatment and peeling do constitute processes of manufacture but submits that they are not 'substantial' processes. In particular they do not result in a substantial increment to the total cost of production. In relation to precision ground bar OneSteel agrees with Milltech's submission of 15 September 2017 that the product is not a like good to the goods the subject of the application. The Commission's rejection of that submission fails to engage with the central issue – does precision ground bar have characteristics closely resembling the goods the subject of the application? In OneSteel's view the Milltech submission clearly establishes that it does not. OneSteel concludes therefore that, in addition to itself, the Australian industry consists only of Moly-Cop to the extent that it produces and sells a small volume of grinding rods.

[8] TER 384: p. 22.

C. DEGREE OF INJURY

18. Even if the Commissioner's redefinition of the scope of the Australian industry was correct OneSteel submits that the finding of negligible injury was incorrect. The change in the denominator for measuring the quantum of injury that arose out of the Commissioner's redefinition of Australian industry was not accompanied by any change in the numerator to reflect the quantum of injury to Moly-Cop due to dumped exports of alloy round bar. TER 384 states specifically that ...*Moly-Cop has not provided information and evidence regarding injury it has experienced* ...[9] and further that [T]*he Commissioner makes no finding concerning the impact of the dumped goods on Moly-Cop*[10]. While the claim of no finding may be literally true it cannot conceal the fact that in proceeding to calculate the degree of injury to the Australian industry ...*in a wider context*[11] ... the Commission has simply assumed that Moly-Cop has not suffered any injury from dumped imports of alloy round bar. Proceeding by way of assumption is unconscionable and clearly renders worthless the calculations concerning the alleged immateriality of injury on which the Commissioner has relied.

19. The absence of any analysis of Moly-Cop's economic performance in TER 384 clearly indicates that the Commissioner failed totally to consider the consequences of facts relevant to an assessment of that performance that was available to him from both the current and earlier related investigations. The sharp decline in OneSteel's production volumes of alloy round bar in the investigation period[12] would have significantly impacted Moly-Cop's revenue [*confidential commercial relationship between OneSteel and Moly-Cop*] and increased its production costs of alloyed steel billet and alloy round bar. Furthermore, the substantial increase in the investigation period in dumped Chinese exports[13] destined for use in Donhad's production of grinding balls would have impacted Moly-Cop's competitive position in that market and had flow through additional negative impacts on its production costs as well as impacting its revenue from grinding ball sales.

20. The Commission's failure to examine the economic condition of Moly-Cop's alloy round steel bar operations is contrary to its own expression of proper procedure at page 51 of TER 384:

> ... the publication of a notice under section 269TG requires the Minister to be satisfied that dumping has caused material injury to an Australian industry producing like goods. In the

[9] TER 384, p. 41.
[10] ibid, p. 70.
[11] ibid, p. 51.
[12] ibid, p. 42.
[13] ibid, p. 43.

> Commission's view, and consistent with *Swan Portland Cement*, this requires an assessment of all industry members producing like goods, and consideration of whether these industry members have been injured by the presence of dumped imports in the market as a whole.

21. This view accords with the observations of the WTO Appellate Body[14] when considering an investigating authority's responsibilities to assess the impact of dumped imports on the captive processing and merchant sales sectors for a particular product.

> 181. We begin with a brief description of the United States' measure at issue in this part of the dispute. Section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended (the "captive production provision"), provides that, in certain statutorily defined circumstances, the USITC "shall *focus primarily* " on a particular segment of the "domestic industry", when "determining *market share* and the factors affecting *financial performance* ", as part of an injury determination. (emphasis added) The industry segment on which the USITC is directed to "focus primarily" is the segment of domestic producers that sell in the so-called "merchant market", or the open market, in the United States, for the like product. Imports of the like product are generally sold into the merchant market. The merchant market is distinguished from the "captive" market, which covers internal transfers of the like product that generally do not enter the open market, because the product is used by an integrated producer to manufacture a downstream product. Domestic producers whose production is captive do not, therefore, compete *directly* with importers, as imports are not generally used in the captive production of the downstream product.
>
> .....[182 – 206]
>
> 207. As far as the captive production provision is concerned, we have observed that the United States sees this measure as an "analytical tool" which enables a proper "comparative analysis" of the merchant *and* captive markets. In an industry where a significant part of domestic production – captive production – is shielded by the structure of the domestic market from direct competition with imports, this comparison between these two parts seems particularly important. Accordingly, we agree with the United States that, in an industry with significant captive production, a "comparative" examination of *each* part of the domestic market – which "juxtaposes" the merchant market *and* captive market – "enhances" the ability of the investigating authorities, here the USITC, to make an appropriate determination about the state of the domestic industry as a whole.

22. The satisfaction of the Commissioner as to the negligibility of injury required by the terms of s.269TDA(13) must be based on reasonable grounds. Failure to adhere to its own expression of the requirements of the Act and the unequivocal assessments of the Appellate Body by failing to consider or take account of the impact of dumped imports of alloy round bar on Moly-Cop undermines the integrity of the termination decision. In the absence of any reasonable grounds OneSteel submits that the decision to terminate the investigation was neither the correct nor preferable decision and should be revoked by the Panel.

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[14] *US – Hot Rolled Steel*: WT/DS184/AB/R

D OTHER KNOWN FACTORS

23. In the course of the investigation Donhad has raised; and the Commission has examined; three alleged other known factors – quality issues, a value proposition and a new grade requirement. The Commissioner claimed that a significant portion of OneSteel's injury was caused by these factors but in deciding to terminate the investigation he appears to have relied only on his mathematical calculations of the degrees or volume and price injury caused to a redefined Australian industry. If this is the case then OneSteel contends that the observations referred to do not form part of the reviewable termination decision and consequently are not grounds reviewable by the Panel.

24. In the event, however, that the Panel forms the view that the claim does form part of the reviewable decision, OneSteel takes this opportunity to comment on the correctness of the assertions by Donhad and the acceptance of those assertions by the Commissioner.

25. The requirement to have regard to other known factors in an injury assessment is set out in s.269TAE(2A) of the Act:

> In making a determination in relation to the exportation of goods to Australia for the purposes referred to in subsection (1) or (2), the Minister must consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods such as:
>
> (a) the volume and prices of imported like goods that are not dumped; or
>
> (b) the volume and prices of importations of like goods that are not subsidised; or
>
> (c) contractions in demand or changes in patterns of consumption; or
>
> (d) restrictive trade practices of, and competition between, foreign and Australian producers of like goods; or
>
> (e) developments in technology; or
>
> (f) the export performance and productivity of the Australian industry;
>
> and any such injury or hindrance must not be attributed to the exportation of those goods.

26. This subsection reflects the terms of Article 3.5 of the Anti-Dumping Agreement. In both cases the cited examples of a non-attribution requirement involve issues that are not directly related to the exportation of goods at dumped prices. This is obvious in the case of paras (a) and (b) above and para (c), for example, in fact provided the ground in the Commission's inquiries into Hot Rolled Coil Steel for concluding that the demise of the Australian car industry was an other known factor in the injury assessment process.

27. Such factors, however, are to be distinguished from the issues raised by Donhad that are direct causes of that company's decision to increase its volume of dumped imports. To cite a common example from steel industry investigations the right of a customer to dual source from local and overseas steel producers is unquestioned but such a practice is routinely rejected as an excuse for importing dumped product. Similarly Donhad's presentation of other known factors as an excuse for importing dumped product does not give rise to any legitimate claim to apply the non-attribution provisions in s.269TAE(2A).

28. To the extent that the Commissioner relied on his conclusions concerning the existence and consequence of these factors, he is in error because:

- he failed to consider OneSteel's evidence concerning "breakage/explosion" incidents and "drop-test" performance;
- no decision maker can reasonably conclude that the claimed "value proposition" was a factor genuinely affecting the customer's decision to purchase the like goods, and at the same time accept the existence of the claimed "quality issues". The acceptance of one invalidates the existence of the other; and
- the evidence does not support his conclusion that the "development of a new grade" was a factor other than dumping causing injury.

Evidence does not support claimed "quality issues"

29. The Commissioner wrongly found as follows:

> The Commission notes, however, that OneSteel's submission does not address the following quality concerns raised by Donhad:
>
> i. The multiple incidents in which there were breakages/explosions of the grinding balls manufactured from the OneSteel product; and
> ii. The drop tests performed by Donhad comparing the performance of grinding balls manufactured from the OneSteel product with grinding balls manufactured from the imported product[15].

30. In reliance on the false belief that OneSteel did *not address the... [two specific] quality concerns*, the Commissioner concluded:

> The Commission considers that these specific incidents and the results of the tests performed were the key driver in Donhad's decision to import the Chinese product as a replacement for the specific grade previously supplied by OneSteel and for which the quality incidents had occurred[16].

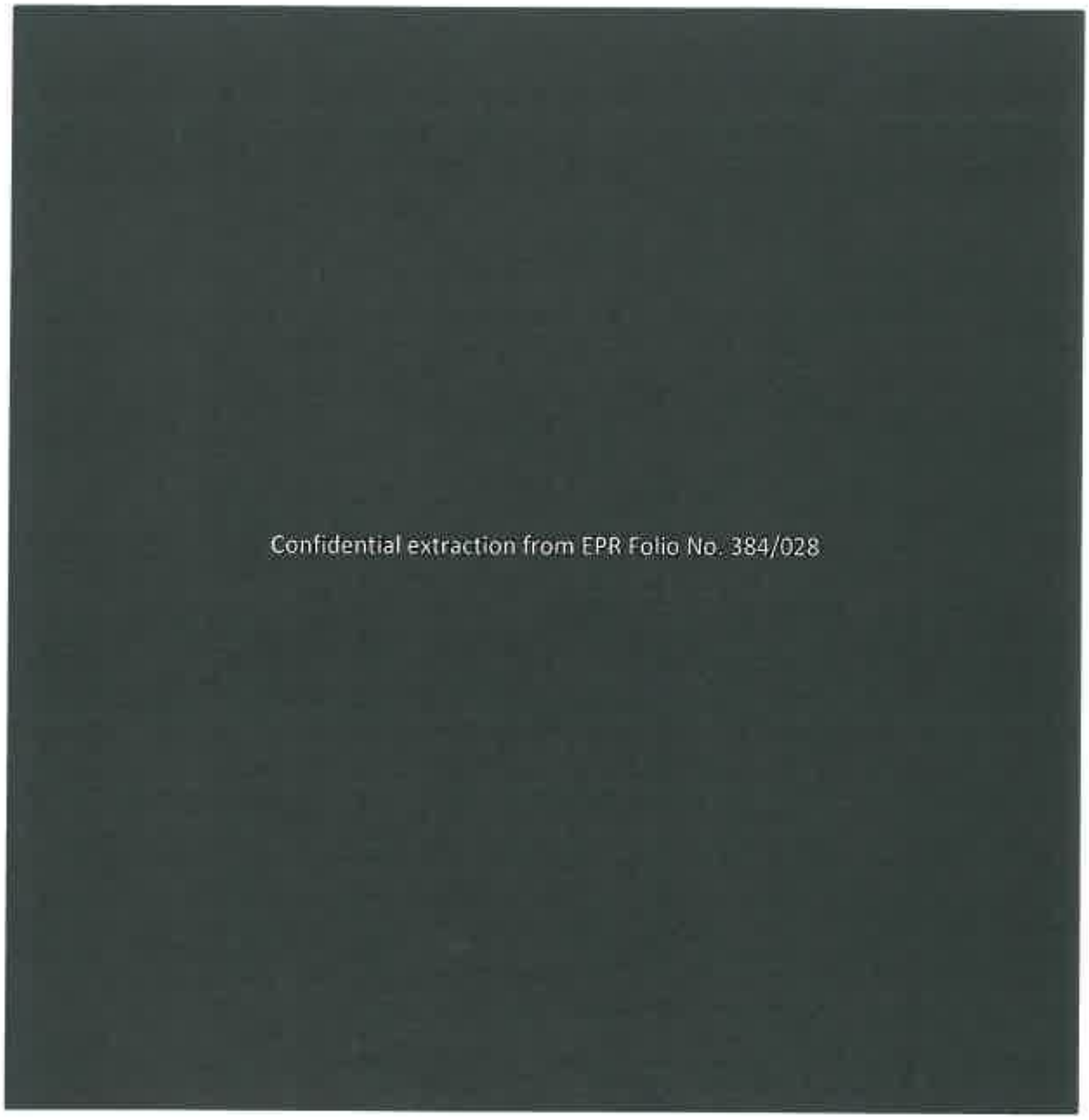
[15] TER 384, p. 66.
[16] TER 384, p. 66.

31. Contrary to the Commissioner's finding, OneSteel did in fact address the claims in its submission dated 23 May 2017[17]. In the confidential summary attached to the submission, OneSteel led the following evidence to address the quality concerns specific to the following issues:

    i. breakages/explosions of the grinding balls incidents; and

    ii. the drop tests performed by Donhad.

    The evidence submitted forms CONFIDENTIAL ATTACHMENT 1, but is reproduced in relevant part below:



[17] EPR Folio No. 384/028 (Public File version)

32. The evidence before the Commissioner was that the quality issues identified by Donhad, were not isolated to OneSteel's supply of the goods. This evidence was ignored by the Commissioner. OneSteel contends that if the Commissioner properly had regard to this evidence, there would have been no grounds on which to attribute injury caused to the industry to factors other than the dumped exportation of the goods.

33. Even if there was some basis to Donhad's claim that it had regard to 'quality issues' at the time it exercised its decision to purchase the dumped goods in preference to like goods produced by OneSteel, the Commissioner wrongly attributed causative weight to this other factor.

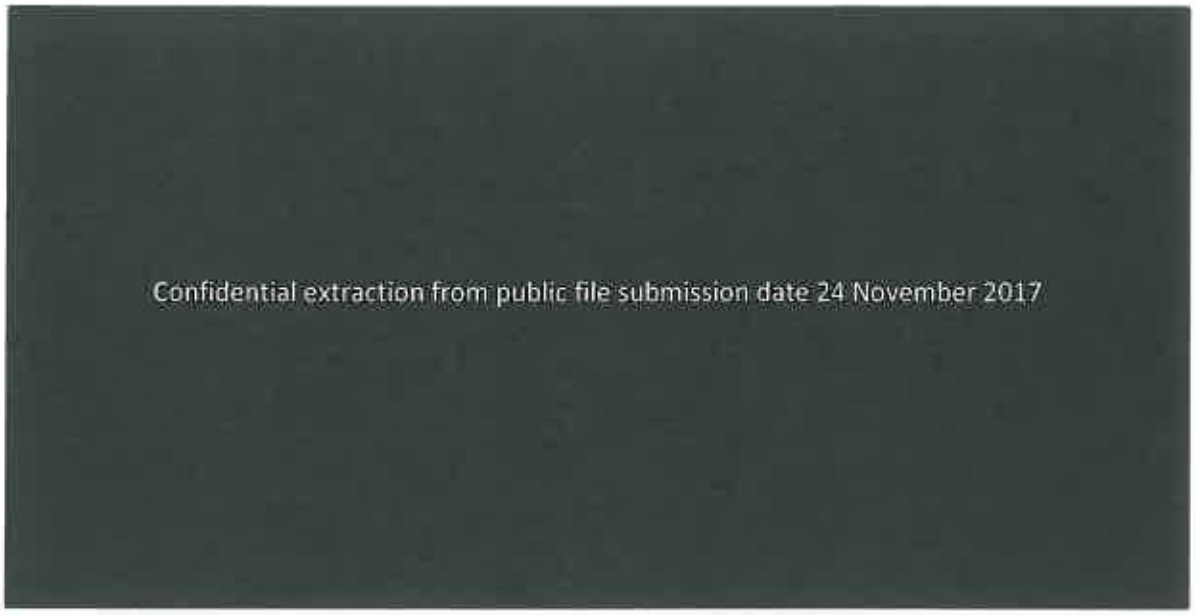
34. The Commissioner, correctly assessed these injury factors in section 7 of TER 384, and in light of a dumping margins of 35.3 per cent for the major exporter of the goods to Australia, and positive findings of injury across OneSteel's economic indicators, the Commissioner has placed undue weight on a factor other than dumping. Even though considerations of the matters under s.269TAE(1) are subject to consideration of factors under s.269TAE(2A), the mere existence of any one or more of those factors possibly causing some injury cannot overwhelm the magnitude of the dumping margins, lost volume and price undercutting acknowledged by the Commissioner to have been experienced by OneSteel. Furthermore such factors provide no justification for Donhad's response of substantially increasing its purchases of dumped imports.

Evidence does not support the existence and consequence of the claimed "Value Proposition"

35. OneSteel led evidence, and the Commissioner accepted, that in spite of requests for minimum order quantities by the applicant industry, this condition was never enforced by OneSteel when supplying quantities to the customer (Donhad) beneath these volumes (OneSteel's 24 November 2017 submission refers):

> [T]here 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] per month and minimum [redacted] per quarter".[18] 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]

[18] CONFIDENTIAL ATTACHMENT 2 (citing CONFIDENTIAL ATTACHMENT 8.5.3 therein)



36. However, rather than dismissing the relevance or materiality of this alleged "value proposition" factor, the Commissioner seeks to elevate its importance in TER 384:

> Whether these commitments were entered into or not does not detract from them being part of the negotiations between the parties.
>
> Donhad claimed that in its negotiation for purchases of the imported alloy round bar from China, a commitment to minimum volumes was not required. The Commission confirmed this point with the major importer of alloy round bar for the grinding media market, Stemcor. The Commission is of the view that this issue of a commitment to volume thresholds is a factor that Donhad would have considered in its decision making when purchasing the goods.[19]

37. The Commissioner has ignored the relevant evidence that OneSteel did not insist on compliance with the minimum order condition and again he has ignored Donhad's unjustified response of resorting to sourcing dumped imports.

Evidence does not support the existence and consequence of the claimed "Development of New Grade"

39. The Commissioner reaches the contradictory conclusion that Donhad's claimed "development of new grade" factor both explains the customer's reduction in sales placed with OneSteel, and the reason for continuing to place orders (albeit at reduced prices) with OneSteel:

> Donhad has noted the need to diversify its supply source and minimise the risk of a supply shortage. In those circumstances it has reverted back to OneSteel and the original grade in order to meet the demand of its own customers

[19] TER 384, p. 67.

40. OneSteel contends that the Commissioner's reasoning is unsound, and cannot be both a factor to excuse sales volume injury and (simultaneously) price effects injury when OneSteel's like goods are purchased by Donhad. In addition the Commissioner's acceptance for the Donhad position again provides support for the claim that the new grade factor is an excuse for purchasing dumped imports.

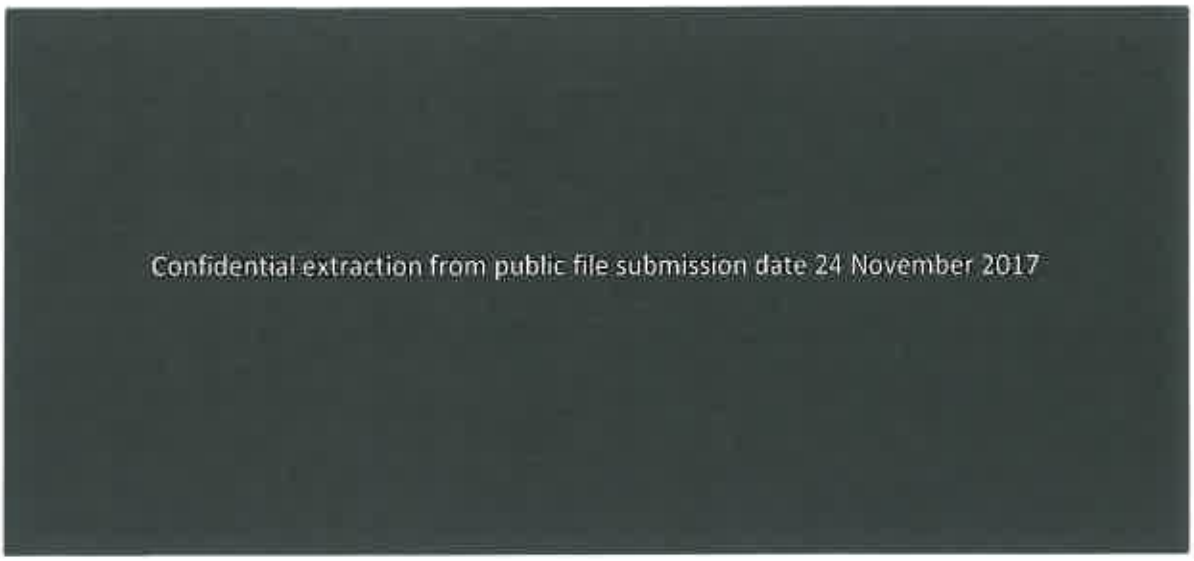
Commissioner has failed to assess the materiality of value injury to OneSteel when assessing the materiality non-attribution factors

41. Even if the other known factors explain why Donhad reduced its sales volume of like goods produced by OneSteel the Commissioner has nevertheless neglected to account for the materiality of the price injury suffered by the applicant.

42. OneSteel led evidence of the materiality of the injury suffered by it in its submission to the Commissioner dated 24 November 2017[20]:

> 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.[21]
>
> ...
>
> 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".[22] 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:

[20] EPR Folio No.384/053 (Public File version)
[21] CONFIDENTIAL ATTACHMENT 2 (citing CONFIDENTIAL ATTACHMENT 8.7 therein)
[22] *Ministerial Direction*, p. 2.



43. In TER 384 the Commissioner, rather than accounting for the price injury caused to OneSteel, seeks to ignore OneSteel's submission on grounds that it *does not provide an explanation or rationale for why it would have being able to raise its prices by 35.3 per cent*[23]:

> The Commission notes that, in its submission, OneSteel does not provide an explanation or rationale for why it would have being able to raise its prices by 35.3 per cent. In its application, OneSteel stated that it has sought to maintain a price model based on an index. For the reasons outlined in Confidential Attachment 9 – OneSteel pricing model the Commission considers that the prices generated by this index are unaffected by the actual prices of imports of alloy round bar in Australia, and therefore the index is not affected by the dumping of the goods. The Commission notes that increasing selling prices by 35.3 per cent takes the proposed OneSteel selling price well above the maximum price generated by the pricing model for the period from January to September 2016 (i.e. 9 months of the investigation period).
>
> The Commission considered the actual selling prices of OneSteel for sales of alloy round bar to Donhad in Newcastle, noting the majority of sales to Donhad were to Newcastle. **As a result of negotiation between the parties, actual selling prices achieved were at a discount of between 6 to 10 per cent on the prices generated by the pricing model and sought by OneSteel**. OneSteel argues that the final (reduced) price has been influenced by the competing prices of dumped goods. The Commission notes that the **model price does not recover OneSteel's CTMS in any month of the period examined**, and therefore does not consider it reasonable to uplift prices by 35.3 per cent (as proposed by OneSteel)[24].

44. In making the above observations, the Commission in fact admits that it has sufficient and reliable information to recalculate OneSteel's assessment of the materiality of price injury. The Commission has access to the FIS sale prices and OneSteel's prices generated by the pricing model. In fact, the Commission has assessed that the actual selling prices negotiated between the parties were at a *6 to 10 per cent discount on the prices generated by the pricing model*. The Commission has the verified sales volumes, but instead of evaluating the

[23] TER 384, pp. 56 - 57.
[24] *Ibid.*

loss of value caused by the exportation the goods, the Commission only objects to OneSteel's model.

45. The Commissioner has failed to account for the materiality of price injury caused to OneSteel from its sales of like goods in light of the significant price undercutting by the exportation of the dumped goods.