Australian Government
Anti-Dumping Review Panel

APPLICATION FOR REVIEW OF A DECISION BY THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR A COUNTERVAILING DUTY NOTICE

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City
ACT 2601
P: +61 2 6275 5868
F: + 61 2 6275 6784
E: ADRP_support@customs.gov.au

APPLICATION FOR REVIEW OF

DECISION OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR COUNTERVAILING DUTY NOTICE

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

to publish : ☑ a dumping duty notice(s), and/or
☐ a countervailing duty notice(s)

OR

not to publish : ☐ a dumping duty notice(s), and/or
☐ a countervailing duty notice(s)

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application;
- provides reasonable grounds for the decision not being the correct or preferable decision; and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

☑ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

☑ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

☑ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

☑ Full description of the imported goods to which the application relates.

☑ The tariff classification/statistical code of the imported goods.

☑ A copy of the reviewable decision.

☑ Date of notification of the reviewable decision and the method of the notification.

☑ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.

☐ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Signature: .....

Name: M. S. HOWARD

Position: REPRESENTATIVE.

Applicant Company/Entity:

SFE STEEL CORPORATION

Date: 5/12/14.

SFE

JFE

JFE Steel Corporation: Review of Decision of the Minister whether to Publish a Dumping Duty Notice or Countervailing Duty Notice

I confirm that **JFE Steel Corporation** appoints and authorises Mr Zac Chami, partner, Clayton Utz Lawyers, and any lawyer or employee of Mr Chami, to act on its behalf in respect of an application for review of the injury aspects of the decision of the Parliamentary Secretary to the Minister for Industry on 28 October 2014 to impose anti-dumping measures in respect of the quenched and tempered steel plate exported from Finland, Japan and Sweden.

At the same time, I confirm that **JFE Steel Corporation** appoints and authorises Mr M J Howard, Staughton, and any specialists to act on its behalf in respect of an application for review of the dumping and other relevant aspects of the decision of the Parliamentary Secretary to the Minister for Industry on 28 October 2014 to impose anti-dumping measures in respect of the quenched and tempered steel plate exported from Finland, Japan and Sweden.

December 4, 2014

Takeshi Esumi
Staff Deputy General Manager
Export Planning & Coordination Sec.

Sales Coordination & Operation Planning Dept.
JFE Steel Corporation

JFE Steel Corporation
2-2-3 Uchisaiwaicho, Chiyoda-ku, Tokyo 100-0011, Japan
Tel: 03(3597)3111 Fax: 03(3597)3551

STAUGHTONS
Independent trade advisory group on anti-dumping & customs issue solutions

Staughtons Pty Ltd – ABN 40 156 647 988 **Ph +61 (0) 459 212 702**
PO Box 867, Bacchus Marsh, Vic., 3340 **jack@itada.com.au**

APPLICATION FOR REVIEW OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE

Name of APPLICANT:	**JFE STEEL CORPORATION** **2-3 Uchisaiwai-cho-2 chome** **CHIYODA-KU, Tokyo,** **JAPAN.**
Address of Applicant:	AS ABOVE
FORM of BUSINESS:	Manufacturer and Exporter of GUC subject to REP 234
Name of Contact:	Kenjei Hashimoto Staff Deputy General Manager Plate and Rail Section
PHONE:	81-3-3597-3766
EMAIL:	ken-hashimoto@jfe-steel.co.jp
Name of Representative: Consultant	M J Howard
Address of Applicant	P O Box 867 Bacchus Marsh 3340 :
PHONE	0459 21 2702
Descripition of the Goods:	As per REP 234 Q & T Steel Plate
Tariff Classification	7225 40 00
Reviewable Decision date	5th November 2014

Detailed Statement to Follow

M J HOWARD.

1. JFE Steel Corporation (***JFE***) is an interested party for Case 234. JFE is treated as an exporter in the investigation for Case 234 and was identified as cooperative.

2. On 5 November 2014, the Parliamentary Secretary to the Minister for Industry published a Public Notice under subsections 269TG (1) and (2) of the *Customs Act 1901* (Cth) (***Customs Act***) setting out the decision for Case 234. The notice reflected that the Parliamentary Secretary had considered, and accepted, the recommendations in the Commission's report for Case 234 (***REP 234***).

3. JFE makes this application to the Review Panel requesting a review of the decision for Case 234. JFE is also a party to a separate application in conjunction with Japanese producers, where such application is being lodged by Clayton Utz. To the extent of any inconsistency this application is to prevail as to the interests of JFE.

4. In accordance with the requirement under section 269ZZG of the Customs Act, the Review Panel is required to be satisfied that any application contains a statement that "sets out reasonable grounds for the reviewable decision not being the correct or preferable decision". JFE has identified in this application grounds which JFE considers supports the assertion that the Parliamentary Secretary's decision was not the correct or preferable decision. JFE has provided sufficient reasons supporting the identified grounds, including but not limited to:

    (a) identifying errors of fact and law applied by the Commission;

    (b) illustrating lack of detail and reasoning provided by the Commission to justify its conclusions; and

    (c) submitting what the correct or preferable decision should be.

5. In addition, JFE has sighted the draft application for review being submitted by Total Steel through Baker & McKenzie. JFE supports the arguments in that submission, the research for which was jointly prepared. This submission contains some identical arguments and some additional arguments. Once again, to the extent of any inconsistency this application is to prevail as to the interests of JFE.

Ground 1: The dumping duty notice incorrectly identified that the decision applies to goods falling outside the goods description contained in the Application lodged for Case 234

6. The decisions of the ADC and the Parliamentary Secretary are built on a fundamentally flawed application and decision-making process in terms of a fatally flawed description of the goods that were expressed to be those under consideration. This is so for two reasons, first, the goods under consideration as described by the applicant are not described in a coherent and workable manner. As such, the application should have been rejected at the outset at the initial review stage. Secondly, the attempt by the Commission to include a different tariff classification category late in the process based on the advice of the applicant as to what it "intended", was not within the Commission's powers and in any event, could not be a proper exercise of power as it cannot be justified simply by an assertion of an applicant as to what it subjectively aimed to say. The timing of the purported change to coverage of the application also adversely affected the due process and outcome rights of interested parties.

Ground 1.1: A flawed description was contained in the application

7. As to the first issue, the original description is internally illogical and cannot naturally apply to any imported goods. Secondly, the verbal description is inconsistent with the tariff classification identified by the applicant, being 7225.40.00.

8. The application described the goods as follows:

> "Flat rolled products of alloyed steel plate commonly referred to as Quenched and Tempered ("Q&T") steel plate (although some Q&T grades may not be tempered), not in coils, not further worked than hot rolled, of widths from 600 mm up to and including 3,200 mm, thickness between 4.5-110 mm (inclusive), and lengths up to and including 14 metres, presented in any surface condition including but not limited to mill finished, shot blasted, primed (painted) or un-primed (unpainted), lacquered, also presented in any edge conditions including but not limited to mill edge, sheered or profiled cut (i.e. by Oxy, Plasma, Laser, etc.), with or without any minor processing (e.g. drilling).
>
> Goods of stainless steel, silicone-electrical steel and high-speed steel, are excluded from the goods covered."

9. This description is internally inconsistent as there is no such thing as Q&T steel plate not further worked than hot rolled. The quenching and tempering itself is further work that is done to mere hot rolled product. Hence, it is not clear on the face of the application which of the two inconsistent descriptions prevails.

10. That is further complicated by the fact that the description expressly asserts that some Q&T grades may not even be tempered. That is somehow asserting that a tempered grade is not in fact tempered, again with no indication as to what that is to mean.

11. There is further confusion as the description includes primed and lacquered goods, which would indeed come within the plain meaning of "worked", notwithstanding that the description states that the goods are not further worked than hot rolled.

12. Even more confusingly, the description refers to plate "commonly referred to" as Q&T steel plate rather than plate which is <u>actually</u> of that nature. Obviously, an application and importantly a Ministerial taxing decision based on an application, cannot be dependent on how goods are referred to, but must relate to their inherent and objective features.

13. That there is a common term for the goods also seems to be without basis, given the Commission's own finding in REP 234 that terminology used to describe the goods examined as potentially the relevant goods, differed within the industry.[1]

14. These problems were even noted by the Commission itself, yet it did not reject the application and call for rectification of this problem. The Final Report page 20 notes the reference in the goods description to plate "commonly referred to as Q&T steel plate" and "notes that the meaning of this particular component of

[1] REP 234 page 18.

the goods description is not made clear by Bisalloy as part of its application. As a result, the wording has created some confusion for interested parties in interpreting the scope of investigation …"

15. For the foregoing reasons and based on a plain meaning approach, the application should have been rejected *ab initio* on the basis of such internal illogical and inconsistent phraseology.

16. No amount of permissive interpretation can overcome the internally illogical elements of the description but in any event, the aim of the vetting stage of an application is to ensure that no such ambiguity or illogicality exists.

17. These flaws on plain meaning that led to noted confusion are exacerbated when one considers that the expression "not further worked" is in fact a phrase found in the Customs Tariff and which relates to matters covered in the Brussels Notes that provide explanatory text about the proper meaning to ascribe to the Harmonised Customs Tariff used throughout the world. The Commission Report page 20 in fact noted that the reference in the goods description to plate "not in coil" follows the wording of tariff sub-heading 7225.40.00.

18. In this context it also needs to be understood that the relevant wording is not only the wording of the applicant, but is also the wording utilised by the Parliamentary Secretary in making the final determination. One might expect that the final decision-maker intended to apply the same meaning to the phrase "not further worked than hot rolled" as is the proper meaning to be given to that phrase under the Customs Tariff.

19. Where ambiguous phrases in the Tariff are concerned, it is permissible to resort to the Brussels Notes. The Notes indicate when subsequent manufacture and finishing can properly be said to convert goods into other articles for classification purposes. The relevant provision refers to "surface treatment, or other operations … to improve the properties of the metal …." The Notes indicate that except as otherwise provided in the text of certain headings, such treatment will not affect the heading in which the goods are classified. Reference is made to hardening, tempering and similar heat treatments to improve the properties of the metal, which are indeed key processes applied to the imported goods under consideration in this case.

20. The typical way that the Customs Tariff "otherwise provides" is by the inclusion of the phrase "not further worked". This general phrase is used to signify an intent to override the presumption in the Notes. Thus it would be proper to conclude that the use of that phrase signifies the intent to send further worked goods into another classification. That means as a result, that such heat treatments are properly seen as further working and hence goods so treated do not come within the relevant description of "not further worked" or the original Tariff heading that is limited by that expression.

21. While the Brussels Notes are not intended for dumping administration, given the fact that the same words have been used and are relied upon by the Parliamentary Secretary, they should be taken to intend the same meaning. It would be problematic if the same words were interpreted differently by trade remedies and by classification officers. The Ministerial delegate would hardly be expected to intend this.

22. In any event, the description is flawed whether it is approached under plain meaning or by way of accepted principles of Tariff interpretation.

23. That then leads to two related conclusions. The better view is that either on plain meaning of "not further worked" or on the meaning intended under the relevant Customs Tariff wording that has been adopted in the application, the goods produced by JFE do not fit within the ambit of the application by reason of actually being further worked. More significantly and for the reasons outlined above, there is such internal illogicality in the description that it should be seen as fatally flawed from the outset in relation to most if not all importers.

Ground 1.2: An incorrect classification was contained in the description

24. The application is further flawed by reason of wrongly identifying the classification of the goods, describing them as coming within tariff heading 7225.40.00, rather than 7225.99.00 for some importers at least. While the Anti-Dumping Commission is not bound by a tariff advice for classification purposes, the Commission was made aware that TSA indeed obtained such an advice that classified its goods under a different heading to that referred to in the application. A mismatch between the description and the tariff classification in the application is a further internal inconsistency.

25. Page 6 of the Anti-Dumping Manual indicates that the Commission may use its own resources to verify the tariff classification. If it had done so it could only have concluded that the application was flawed for this reason as well and should have been rejected and recast by the applicant.

Ground 1.3: The Commission improperly changed the application

26. The Commission erred when it instead sought to include heading 7225.99.00 at the SEF stage to somehow rectify this flaw in the application itself. The Commission asserted (SEF p 14) that "(t)he term 'not further worked than hot-rolled' in the context of the goods description was intended to describe further processing and workings such as drilling, counter-sinking, welding etc."

27. The Commission does not have the power to effectively modify an application to overcome such irregularities. The express provisions contemplate that a flawed application will be rejected, not modified by the Commission itself.

28. Such an approach by the Commission would in any event be an unreasonable exercise of a power if one were held by it. The description of the goods comes from the applicant and the applicant's subjective intention communicated privately should not be relevant to any positive duty decision undertaken by the decision-maker in due course. Nor is the intent of the Commission relevant.

29. The approach taken in this case of amending mid-stream is also inconsistent with past practice. In an unrelated anti-dumping investigation, on 12 June 2012 the then CEO made a report to the Minister entitled "Report to the Minister No 181: Aluminium Road Wheels Exported from the People's Republic of China." In that report, the CEO stated:

> "It should be noted that 'the goods' described in the initiation notice for an investigation cannot be changed once the investigation has commenced." (this was also cited by Mortimer J in the Federal Court in

GM Holden Ltd v Cmr of the Anti-Dumping Commission [2014] FCA 708 para 137)

30. That is clearly the correct view as the Commission is not itself the applicant and has no power to make applications or to amend them.

31. If the Commission found after consultation that the applicant subjectively intended something different to what it stated in the application, it should have rejected the initial application and called for a new application consistent with the subjective intent. Alternatively, if it proceeded with the initial application, it should have limited its coverage to its objective terms.

Ground 1.4: The added classification adds a further internal inconsistency

32. Even if such a power to amend existed, simply including category 7225.99.00 as the Commission has purported to do cannot be justified, as by definition, the latter category cannot cover the goods as expressly described, the description being limited to goods "not further worked", while category 7225.99.00 impliedly only covers goods that are actually further worked. Hence the Commission has incorporated a tariff number that is inherently inconsistent with the wording provided by the applicant.

33. Either the original wording should have been modified to stay linked to heading 7225.40.00 by removing reference to Q&T, lacquering and the like or the wording needed to be changed to expressly or impliedly cover further worked items for the purposes of 7225.99.00. Either way, the treatment of JFE is improper. The latter change would not have been a permissible exercise of the Commission's power at that stage and the initial approach would not cover JFE goods.

34. The Commission's statement is also illogical in suggesting that the kind of further work "intended" to be excluded covered drilling, given that the original goods description expressly referred to drilling as an activity that did <u>not</u> take goods out of the description.

Ground 1.5: The Commission's faults in approach are matters of the utmost legal and commercial significance that undermine due process and lead to different conclusions than would otherwise pertain

35. The drafting problems are not a mere technical concern, but indeed go to fundamental issues of due process, transparency, timing of analysis and the rights of interested parties.

36. As to due process, anti-dumping investigations, both under Australia's legislation and under the terms and spirit of the WTO Anti-Dumping Agreement (ADA), require people to be properly informed from the outset as to whether their interests are affected and to be given an opportunity to analyse their position and present their arguments. The initial screening process is aimed at ensuring that only an application that meets minimal standards calls for a response from other interested parties. Section 269TB(4) sets out the requirements for a valid application. These include a requirement for an appropriate description of the goods. The Dumping and Subsidy Manual states that on receipt of an application the Commission "will examine whether the applicant:

- has sufficiently identified the allegedly dumped or subsidised goods. …" (page 6)

37. It is particularly important to have an accurate description at the outset as this frames the process that then ensues; the tasks to be performed by all interested parties including the Commission; and ultimately, the ambit of the powers of the Parliamentary Secretary.

38. Particular precision is required in description of the goods the subject of the application as particulars of such goods must be provided in the public notice signifying the commencement of an investigation pursuant to section 269TC(4)(a).

39. The explanatory memorandum to the Bill which became the Customs Legislation (World Trade Organisation Amendment) Act 1994 (Cth) referred, inter alia "to a formalisation and expansion of the public file system which is intended to provide interested parties with the opportunity to comment on information available to the investigating authority." The second reading speech to the Customs Legislation (Anti-Dumping Amendments) Act 1998 (Cth) stated that "(o)f particular importance is the obligation that 'throughout an investigation all interested parties must have a full opportunity for the defence of their interest', including the opportunity to see all relevant information, to acquaint themselves with the opposing views and to offer rebuttal arguments."

40. From a due process perspective, it must be improper to simply announce, after all of the foreign visits, exporter questionnaires and primary analysis, that a new classification is being incorporated. Potential interested parties must be entitled to look at an application and the notification of the ambit of the investigation and rely on a tariff advice to conclude that they are simply not affected.

41. An SEF is not an appropriate place to make such a change even if such was permitted. An SEF, as the name implies, merely offers some preliminary conclusions of facts about an application already made. It cannot constitute a change to a different application. That is not its permitted status in the legislative scheme. It also cannot simply be defended as a proper finding of fact that the goods as described actually fit within this different classification, as that is impossible for the reasons outlined above.

42. As to the way the description frames the later steps, the problem in fact undermines the entire investigation, as even the applicant's goods do not fit within it own description as all it appears to do is further work greenfeed material, yet it is concerned with goods that are not so further worked. The Commission would naturally have undertaken its injury analysis in relation to the applicant's goods, yet if they did not fit within the application, the process is flawed for that reason as well.

43. The flawed description permeates every other step. The definition of like goods is tied to identical goods and goods with characteristics closely resembling those of the goods under consideration. The goods under consideration are those as described by the applicant. Such goods frame the rest of the investigatory exercise. The export price under section 269TACB is for goods the subject of the application. Normal value considers like goods to such goods. Questions of cumulation and causation are also framed by a proper understanding of the goods under consideration.

44. For these reasons, an incorrectly framed description necessitates an incorrectly framed investigation and decision. It also circumscribes powers. Justice Mortimer in *GM Holden Ltd v Cmr of the Anti-Dumping Commission* [2014] FCA 708 made the following relevant comments, and noted that it was accepted by all parties "that the application is intended by the scheme to frame the investigation which was being conducted …" (para 14) Her Honour noted "the focus of section 269TB is on a specific consignment of goods – in that way, the 'goods' are readily identifiable at a factual level." (para 16) Her Honour noted that the report to the Minister pursuant to section 269TEA deals with the subject matter, being "'the goods the subject of the application', emphasising again how the scheme relies on the goods identified in the application to frame the investigation and decision-making powers and functions under Part XVB." (para 21) She also noted that "the application frames the investigation … on which the Minister's satisfaction must be based." (para 29)

45. In addition to the due process and framing concerns, there would also be methodological differences from purportedly but improperly revising the application rather than rejecting it and contemporaneously having these flaws rectified at the outset as should have been the case. The most important reason is that the time of acceptance of an application determines the relevant time for analysing dumping margins and material injury. This simply would have meant a different time period if the application had been rejected and revised in due course. A different period would have different normal values, different export prices and almost certainly, a different market scenario in which to analyse material injury, causation and non-injurious prices.

46. Furthermore, a revision of the application which clarified the ambit of the goods under consideration would almost certainly have led to different products being analysed, either a broader or narrower group and hence different normal values and dumping margins would have been calculated for that reason as well.

47. For the foregoing reasons, the Panel should already be in a position to recommend to the Parliamentary Secretary that the duty notice should be revoked, with the application rejected as inadequate.

Ground 2: The Commission failed to adequately address differences in products and markets

48. The Commission has made erroneous decisions about the nature of the goods, the ambit of like goods to the goods under consideration, the essential nature of the Australian industry, the ambit of exclusions and the consequential desirability or otherwise of cumulation on consideration of injury.

49. As indicated in the previous section, the first difficulty is to understand what kind of further working is in fact properly included in the application and what is not.

50. Given that the Commission included consideration of a whole range of goods and was provided with evidence in the submissions about differences between the processes, product characteristics and distribution and market circumstances of all interested parties, the Commission erred in largely rejecting all arguments to distinguish the goods, distinguish the markets and identify different products for calculation purposes. Either the Commission should have identified differing products, should have made full and appropriate allowances or should at least

have ensured that there is no cumulation analysis that would undermine effective comparability.

51. On the issue of product specification and quality differences, the Commission in REP 234 acknowledged that based on the evidence "there may be some degree of technical and quality differences in locally produced and imported Q&T steel plate and that certain customers may have different requirements".[2] This assessment of the evidence conflicts with the Commission's finding that "Bisalloy's Q&T steel plate has characteristics which, although not identical, closely resemble those of imported Q&T steel plate".[3] There are no reasons given for the Commission's finding on this point (and so no explanation of why the Commission made its findings given the Commission's recognition that the evidence demonstrated several differences).

52. A proper analysis of the different properties of imported goods and the distribution chains and customer needs in the Australian market, should have led ADC to conclude that JFE product should not be cumulated. On that basis, attention would have then been properly given to the impact of those imports on injury.

Ground 2.1: There is no proper finding in REP 234 on whether thermo mechanically controlled process steel plate (TMCP) produced by JFE falls within the scope of goods identified for the investigation

53. As noted above, it was only in respect of one matter that the Commission did in fact exclude certain goods from the analysis. This related to certain thermo mechanically controlled processed steel plate (***TMCP***). Where this was concerned, however, the Commission wrongly concluded that the TMCP plate produced by JFE should not be excluded. That was doubly problematic given that the Commission chose to exclude similar plate from other suppliers the subject of this investigation. The Report shows no justifiable grounds for having done so.

54. The Commission noted properly that the Australian industry does not manufacture TMCP steel plate products. Para 1.8.1 of the Report notes the Commission's view that TMCP steel plate is not the goods. It concluded that such plate did not constitute the goods and are not like goods and asserted that it did not include them in its dumping margin calculations. (Report p 21) That is the only proper conclusion given the clear differences in product attributes using TMCP processes and the separate market for such attributes.

55. It is hard to reconcile these emphatic conclusions with other comments and in particular, the treatment of JFE. Previously, the Commission noted that TMCP may have different meanings within the industry, with direct quenching sometimes referred to as a form of TMCP. (Report p 18) Page 17 states that "co-operating manufacturers claim that the direct quenching (and tempering) process alters the final characteristics of the plate, reducing manufacturing time and cost." At page 18, the Commission concludes that while Bisalloy does not use direct quenching, its steel plate closely resembles the goods manufactured by exporters. On this basis it is not clear why it excluded some TMCP products, although it is also unclear what the Commission meant by reference to "resembles" which is not the test of "like goods." It is also unclear why the

[2] REP 234 page 24.
[3] REP 234 page 24.

Commission concluded that TMCP processes of any or all manufacturers were simply "quenching." That is not the case where JFE is concerned.

56. The Commission was provided with information about end-attributes as well as information about TMCP itself. For example, JFE advised that certain of its grades contain titanium carbide alloy and certain grades have an additional minus 40° Celsius Charpy impact test guarantee. The Commission noted the differences but concluded without reasons that Bisalloy's Q&T steel plate has characteristics which closely resemble those of imported Q&T steel plate. (Report p 24) The Commission provides no logical reason why Bisalloy's product closely resembles each and every one of the imported grades in light of the evidence as to attributes. Simple logic dictates that you cannot be harmed by things you cannot make and which are required by customers. It is again not clear how this conclusion is consistent with the conclusion that at least some TMCP processed product should be excluded.

57. At page 25, the Commission concludes that Bisalloy's production processes are similar to production processes employed by overseas manufacturers. It is again not clear how this conclusion is consistent with the conclusion that at least some TMCP processed product should be excluded.

58. The Commission concluded that in the context of its investigation, its reference to TMCP plate was to plate "manufactured by heating an alloyed slab to a high temperature and controlling the temperature of the plate during the rolling process. This form of TMCP steel plate is not technically quenched as it does not involve rapid cooling." (Report p 18)

59. Once again it is simply unclear why the Commission concluded that JFE plate does not comply with that test or indeed, why such a test is determinative.

60. The confusion may be understood in the context of the investigation process itself. The Commission was advised that JFE's TMCP was produced at the Fukiyama works and was invited to make a site visit to that facility. It did not do so and have taken an erroneously limited view of JFE's TMCP process.

Ground 2.2: The Commission erred in excluding TMCP of other exporters it found to have similar processes

61. It would appear on the face of the Report that JFE has been treated adversely as compared to Ruukki at least. This is because footnote 10 on page 18 of the Report refers to Ruukki's submission at No. 9 of the public record referring to direct quenching as a special case of TMCP. The footnote goes on to imply that JFE's form of direct quenching was not excluded for that reason. It does not purport to indicate that Ruukki direct quenching was similarly seen as sufficiently like the goods under consideration.

62. On the material that was before the Commission, there is no justification for differentiating between TMCP processes and certainly no justification for treating exporters who utilise what it describes as direct quenching differently. That differential treatment impacts upon the normal values and in turn dumping margins applied to each and in turn their competitive relationship after application of a dumping duty.

63. Furthermore, that differential treatment alters the relevant imported goods upon which an analysis of causation of material injury is to be undertaken once the decision was made to cumulate. Because the differential treatment of exclusion was unreasonable, dumping margins and causation analysis are similarly unreasonable. The decision to cumulate was itself flawed by reason of a failure to give sufficient consideration to the differing attributes of all TMCP product.

Ground 2.3: REP 234 reflects that the Commission may have incorrectly applied tests for an Australian industry producing like goods and exemptions that are different to the required test in the Customs Act

64. It is not clear from the Report whether the reference to goods being "generally reflective" is a reference to a test of "like goods" or a criterion by which to determine entitlement to exemptions. Regardless of which view was intended, the use of such expression must be improper. The proper meaning of the phrase "like goods" as defined in the Australian legislation and as elaborated upon in WTO jurisprudence, does not purport to apply a "generally reflective" test and hence to the extent that it was applied in substitution for the proper criteria underlying a like goods analysis, such analysis must have been flawed.

65. Alternatively, if the phrase "generally reflective" was only intended to be applied in the context of exemption applications, this is again not the statutory test underlying exemptions.

66. For the foregoing reasons, the Commission should have come to different conclusions as to like goods, the ambit of the Australian industry, the distinctions in the market and in turn the basis for proper consideration of whether cumulation is appropriate or not. The failure to do so unfairly disadvantages JFE where it was well-known to the Commission that goods produced by JFE are imported by TSA primarily for made to order repair and maintenance equipment needed on an urgent basis by major entities in the mining and resources sector. Such entities depend upon long-standing relationships as to quality and timeliness of performance. It would have been abundantly clear to the Commission that if goods produced by JFE were considered separately in terms of their impact upon Bisalloy, no material injury could have been found. JFE endorses the comments in the application by TSA to the Review Panel where more detail is provided as to the business model of TSA and understands this to be true and submits that this should have been persuasive to the Commission.

Ground 3: The Commission failed to calculate the normal value for JFE goods in accordance with the Customs Act

Ground 3.1: The Commission adopted an improper hybrid approach

67. The Commission, to the extent permitted by law, had a choice between considering the product under consideration holistically or segmenting analysis on a model-by-model basis by concluding that the application indeed covered a range of products. The Commission has appeared to adopt a hybrid approach that should not be seen as a preferred methodology, particularly as it has not been applied consistently between the analysis of normal value and the analysis of causation.

68. While it is unclear from the material available to interested parties, it may also be the case that the approach was inconsistent with the way export prices and dumping margins were established.

69. Where normal value is concerned, if the Commission was simply considering the product as a whole, it would have been clearly of the view that there were 5% domestic sales in Japan and would have looked at actual sales figures in working out a weighted average for normal value. It did not adopt this approach.

70. Conversely, if it believed that a model by model approach was desirable given the nature of the various markets and the differences in attributes between models suggesting different products or suggesting that as the way to maximise comparability, this should have been followed through in a consistent manner at normal value, export price, dumping margin and causation stages of the analysis. It did not do this, although it is difficult to know exactly what it did.

71. It is simply impossible to understand what the Commission means by its comment at page 41 that it "considers it standard practice to analyse export price and normal value at an individual model level when performing dumping margin calculations, to neutralise, or at least minimise issues relating to comparability of sales data." If that is what the Commission believes to be appropriate, it should have been consistent in this analysis, in identifying individual dumping margins on a model level. There would then have been model dumping margins identified on the public record. That would then have allowed model by model analysis of causation of material injury. That would be of particular importance given the fact that the Commission built its whole causation analysis on price cutting power asserted to be available by reason of identified margins. On this logic, under a comprehensive model by model analysis, the Commission would then know whether that supposed price undercutting power on one model was similar to or different to a price undercutting power on other models. This did not occur. Instead, the Commission has adopted single weighted average export prices and normal values regardless of models, an approach inconsistent with what it perceived to be "standard practice" when at the very least, it must have known of comparability challenges given the detailed submissions about the different characteristics of the goods and customer markets.

Ground 3.2: The Commission may have misapplied section 269TAC(14)

72. If instead the Commission is simply indicating that its practice is to consider individual models under a 5% test to determine whether sales data is meaningful or not, that is not an approach directed by TAC(14).

Ground 3.3: The Commission failed to narrow analysis to the most relevant sector in Japan

73. The Commission has also erred in relation to inconsistent findings about domestic prices and models where it was asked on behalf of JFE to concentrate its attention on particular sectors of the Japanese market for proper comparator purposes.

74. There is an inconsistency between the Commission's conclusion that it found that the price for the construction sector in Japan was the lowest and at the same time concluding that there were no distinct price differences between the different levels of trade. (Page 43) At best that mixes two distinct concepts,

differences in customer bases and difference in levels of trade, the latter dealing with such things as wholesalers, distributors and end users.

75. If it concluded that the construction sector overall is the lowest but that there were differences in selling prices on a customer by customer basis, that is no reason to reject consideration of weighted averages in the construction sector alone. It was made clear to the Commission that this sector was the most reasonable comparator given that Japan does not have a mining sector and that this suitability is confirmed by third country figures for even better comparators in US resource market.

76. In the JFE Verification report, it is clear that JFE submitted to the Commission the relevance of the construction industry's use of its goods within Australia. There is no suggestion this was rejected by the Commission. It is therefore unclear why the Commission would not have considered the use of Japanese construction industry pricing as relevant given the relevant end users within Australia.[4]

Ground 3.4: The Commission made inappropriate conclusions as to volume effects

77. The Commission also concluded that there were no identifiable trends in price differences based on volume. That was certainly to be expected given that all volumes in Japan are so low. No customers were buying at such volumes to engender a volume-based discount. This should not have been a basis for rejecting resort to the most important sector. If volume effects were important, these would have been discernible from the third country figures in any event and could have led to an adjustment.

Ground 3.5: Failure to utilise s 269 TAC (2) in appropriate circumstances

78. Where normal value is concerned, a model by model approach by the Commission that considers it persuasive that certain models have too low volumes to justify sales figures, could have led the Commission to form the view that section 269TAC(2) would have been the preferable way to identify normal value in such circumstances. That is the express provision dealing with low volumes.

79. The methodology adopted by the Commission makes little sense, as it begins by rejecting the sales figures on the basis of low sales volume, but then uses internal price guides to effectively get back to a similar position. The lower the sales volumes, the less reliable the prices and the more likely it is that a foreign supplier could extract an unduly higher price from a domestic customer, in each case skewing the normal value assessment to an excessively high figure. It simply makes no sense to consider actual sales at small volumes in the Japanese domestic market as unreliable commercial indicators, but then use non-binding internal price guidelines for that very market to make adjustments under section 269TAC(8) to effectively get back to a similar position.

[4] Public document 078, section 4.3 at page 17.

80. That is supported by WTO jurisprudence, for example the comments of the Appellate Body in *US – Hot Rolled Steel* that normal value should not be based on abnormally high prices.[5]

Ground 3.6: The Commission improperly used internal price guidelines

81. The Commission placed improper reliance on a mere internal price guideline the contents of which was inconsistent with the actual sales data verified by it.

82. The Commission should not have relied on mere internal price guidelines, when it found both domestically in Japan and generally in Australia that there was no uniformity of pricing that correlated with such a document. The document should have been rejected as unreliable per s 269TAC(7).

Ground 3.7: The Commission failed to make appropriate adjustments to derive normal values from the sales data and price guidelines noted by it

83. The Commission noted that in some instances, adjustments could be based on differences in the cost of production but considered that where JFE is concerned, such differences did not reflect the differences in price quoted in internal price guidelines or in actual selling prices to Australia, third countries and domestic sales in Japan. The latter comment is remarkable given that the Commission has sought to identify an alternative normal value because it did not believe that domestic sales prices for low domestic sales volumes were otherwise reliable. To come up with an alternative methodology that gets back to the same point cannot be the preferable approach.

84. The Commission asserts that the adjustments it made under section 269TAC(8) were "to account for specification differences to ensure comparability of domestic sales with export sales." That is not what the Commission in fact did as it refused to use cost to make figures that would have directly addressed specification differences, but instead appears to have again relied upon internal price guidelines that would have been known by it to have no correlation to specification differences by reason of the cost to make figures presented by JFE.

85. The Commission investigators were also advised that the price guidelines were not rigidly followed and again this could only have been confirmed by their own analysis of domestic sales. Hence they should not have used them for TAC(8) purposes.

86. The summary of adjustments asserts that the Commission deducted credit cost for exporting domestic sales to align them with cost credit terms (page 45) but in fact did not do so, instead deducting a nominal potential credit cost. That credit deduction does not accord with credit terms in the contracts verified by the Commission or that may be directed by the Japanese Commercial Code, the nominal adjustment made being significantly below either of the above.

[5] *US – Hot Rolled Steel*, paras 140-158.

Ground 3.8: The Commission failed to adopt constructed or third country sales approaches where these would have been clearly preferable to the approach adopted

87. Given the low volumes of a number of models, either a constructed value or third country sales approach should have been adopted, for those models at least.

88. The Commission was invited to adopt a cost to make and sell approach plus a representative profit as is commonly the case in such circumstances. The Commission rejected that approach on the basis that the actual prices were not reflective of differences in cost to make. While the Commission may have been correct to note a lack of correlation, it makes no sense for it to then adopt a methodology based on an internal price guide that presumes such a correlation where none exists and where this was known to the Commission. The Commission's own investigation led it to conclude that there was no correlation between prices, sectors, customers and production costs and no correlation with the internal price guide. A cost to make approach plus a representative profit would be a much better comparator to a larger and more competitive Australian market than the methodology employed in such circumstances.

89. The Report page 39 also shows a complete misunderstanding of JFE's submissions in erroneously suggesting that JFE objected to the Commission using constructed normal values for models with low domestic sales volumes pursuant to section 269TAC(2)(c) as adjusted under section 269TAC(9). To the contrary, JFE wished for a constructed methodology which was not in fact employed by the Commission.

90. The Commission was also invited to adopt a third country model as indeed being even more preferable. The primary reason why a third country model should have been preferred is that it would have been clear to the Commission that the goods exported to Australia were primarily for the mining sector. Export sales to other countries with significant mining sectors, such as the US, Canada and South America would hence have been more relevant comparators as to pricing in high volume and fully competitive markets. Comparing instead with the domestic market in Japan where there is simply no mining sector of any consequence is inherently protectionist, which will inevitably compare normal values in a high price country with export prices in a properly competitive country in relation to differing markets that are not truly comparable. Either the Commission should use figures from a comparable market or make appropriate adjustments to a different market used by them.

91. A habitual disinclination to use third country data should not be a reason to ignore it when it is clearly the most appropriate method. Such a habitual approach is also an improper fettering of the discretion given to the investigator and in due course, the Parliamentary Secretary. Such an approach is contrary to WTO jurisprudence, which calls for a careful consideration of all factors and alternatives as a means to identify the most reasonable response in the particular circumstances.

Ground 3.9: The approach to determining normal value also involved due process errors

92. There are also significant due process concerns in the way the Commission dealt with normal value. At page 41 of the final Report, the Commission admits that the legislative references to section 269TAC(2)(b) and section 269TAC(9) were

incorrect in SEF 234 but alleges that the calculations were correct. An examination of the equivalent provisions in the PAD suggests instead that at that stage, the Commission believed that it was using a section 269TAC(2) approach as the preferred approach. The PAD made it clear that for exported models with low volume of domestic sales, a constructed value was calculated pursuant to section 269TAC(2)(c). The PAD para 7.5.1 expressly states:

> "For those models, the normal value was constructed based on the cost to manufacture the exported goods, uplifted by domestic selling, general and administrative costs and a weighted average profit calculated for domestic sales of like goods sold in the ordinary course of trade during the investigation period."

93. Certainly the representative of JFE and TSA took this to be the intent of the Commission both in oral discussions and in relation to the statements from PAD. As a result, all of his ensuing representations were seeking to show that the Commission was making erroneous calculations under section 269TAC(2) and did not begin to address the fundamental question as to why that section should apply, given the impression by the Commission that the section applied in any event. When SEF 234 para 6.5.1 indicated that section 269TAC(2)(c) was used to calculate normal values for exported models with insufficient comparable domestic sales but concluded that there should be a dumping margin of 27%, JFE simply thought that the 27% was an erroneous calculation of cost to make under the above-mentioned section and addressed that issue alone. If the Commission knew that the SEF was misleading and naturally understood that the representative of JFE was indeed misled by the content and tenor of his submissions, it should have corrected its error immediately.

94. Due process under the Australian provisions contemplates that an interested party has a right to respond to an SEF. Because the SEF misled JFE in terms of the utilisation of a constructed value, it is simply not sufficient for the Commission to allege that its calculations are correct without interested parties having had an opportunity to argue to the contrary.

Ground 4: Export price

95. The Commission may also have erred in calculation of export price in a range of ways.

Ground 4.1: The proper exporter may not have been considered

96. It is appropriate to concede that JFE did not complain about being treated as the exporter and indeed willingly completed a questionnaire to that effect. Nevertheless, and as indicated below, it has been significantly disadvantaged by reason of the Commission determining export prices on an ex works basis of JFE produced goods. Export prices must be calculated on an FOB basis to comply with the statute which has also been common and consistent practice in the past.

97. Given that the Commission has taken the view it has in terms of an ex works basis of calculation, JFE feels bound to raise the question of law as to the proper exporter and importer for section 269TAB purposes, notwithstanding a failure to raise this in the past. The lack of previous submissions to that effect should not be of relevance in any event as the Commission was required to apply the

law and must independently make an accurate determination of who is the exporter, who is the importer and the proper price it pays.

98. In the first instance, the Commission has wrongly adopted a blanket principle that any entity which it calls a trading house, must be excluded for calculation purposes. That cannot be correct under either the legislation or the WTO Agreement. The Commission is required to consider the actual contract for export which should be based on an analysis of the appropriate contract documentation. If the foreign manufacturer truly sells to an independent entity that then sells to an Australian importer, it is possible that the better legislative view is that this is the independent entity that in fact caused the export sale. If the Commission was to look at the contract of sale between MISI and TSA, there would have been higher export prices and hence lower dumping margins. That would also naturally be at an FOB point in time given that the contracts between MISI and TSA are indeed on an FOB basis. Either way, the Commission seems to be in error. Section 269TAB(1) not only calls for an understanding of who is the exporter but also who is the importer and the price that they paid. If the Commission formed the view that TSA was the importer, and it would be difficult to conclude to the contrary, it has to be the price it pays to someone. The only price it pays is to MISI. If for whatever reason the Commission still does not believe that this makes MISI the exporter, it must find someone else who is. If it identifies JFE as that party, no price is paid by TSA to JFE. If it seeks to ignore MISI entirely and considers that the two contracts should be treated as one (even if it was valid in law), whatever profit is earned by MISI and the internal transport from JFE to the wharf would inevitably be incorporated, hence the dumping margins would be significantly lower by reason of higher export prices.

99. Uncertainty as to the true identity of the relevant exporter for statutory purposes, feeds into other necessary calculations. Exchange rate calculations are complicated by the fact that it is unclear which contract is the proper contract for dumping valuation purposes. As would have been made clear to the Commission, TSA acquire product from MISI and pay in Australian dollars. JFE provides product to MISI in Yen. It is hard to then determine which contract or contracts to apply and what if any currency conversion is required.

Ground 4.2: Calculation of export prices for unco-operative exporters and the calculation on an ex works basis for JFE but not all interested parties

100. An additional concern is that where unco-operative exporters are concerned, it is not exactly clear how the export price calculations were made. Para 6.5.1 of SEF 234 simply states that the Commission considers it appropriate to use the price from JFE on an ex works basis even though JFE did not sell on those terms. No reason was provided. That is different to the way that export prices were calculated for SSAB, the latter which was allowed to consider prices on an FOB basis. Similarly calculating JFE's export prices on an FOB basis can only decrease the export price and hence increase the chance of dumping being found.

101. There is no statutory basis to calculate export prices on an ex works basis if one is adopting the statutory language in section 269TAB(1). Perversely, to adopt this approach for JFE but not for other exporters, can only put it in a comparatively disadvantaged position after dumping duty would be payable. There is no justifiable basis as presented in the Report for this to occur. Quite the contrary, given that data shown to the Commission indicated that the sales

transaction bringing the goods to Australia as produced by JFE was on an FIS or FOB stowed basis.

102. Not only is it unclear as to how the Commission ended up adopting an ex works basis for calculating export prices but it would seem to be the case that the more favourable and consistent FOB approach was adopted at the PAD stage. While that is not expressly stated in that document, it is important to note that the dumping margin identified at that stage was a mere 18%, the difference most likely being reflected in the use of FOB pricing. At the PAD stage, unco-operative Japanese exporters were given a 26.1% dumping margin, with export prices being calculated under section 269TAB(3) and normal values calculated under section 169TAC(6). There seems no valid reason for this differential to have largely been dissipated in relation to unco-operative exporters by the time of the final Report. At the SEF stage, para 1.5.4 of the SEF identifies a dumping margin for JFE of 27% as compared to 18% at the PAD stage. Unco-operative Japanese mills were at that stage given a 35.8% dumping margin. Nevertheless, proposed measures as per 1.5.9 of SEF contemplated 24.5% ad valorem for JFE with 26.1% ad valorem for other Japanese mills.

Ground 4.3: Erroneous ex works calculations

103. The Commission has made erroneous calculations even if ex works is valid as noted in the confidential Annex to this submission. On certain grades, the Commission failed to account for credit terms.

Ground 5: Calculation of the dumping margin would also have been erroneous

104. It would appear from the confidential annexes that the Commission purported to work out a quarter by quarter normal value for each model. What is not clear is whether they also did so in the context of calculating an export price. Even if they did so, at no stage have they published model by model dumping margins. As noted, this would be particularly important as it considered the size of the dumping margin a crucial factor in supporting price impact in the injury analysis. If different models had differing dumping margins, the Commission's conclusion about price impacts would vary accordingly, although as noted below, that whole methodology is flawed.

Ground 6: REP 234 contains several errors in the Commission's finding on material injury and causation

Ground 6.1: Wrongly determining price undercutting based on a dumping margin and not actual sales behaviour

105. The most serious defect is the suggestion that the dumping margin itself shows that in an economic sense, the exporter was able to undercut prices. Para 8.5.1 suggests that the size of the margin provided exporters with the ability to offer Q&T steel plate at significantly lower prices than would otherwise be the case. That has no commercial logic. The dumping margin in and of itself cannot show such market power or likely behaviour as the margin does not indicate actual domestic and export prices, but only some differential between them. Cost to make and minimum acceptable profitability is what allows for undercutting, not constructed dumping margins. One can still have a higher dumping margin where the export price is still well above the prices of the local industry. It is the pricing power in the Australian market that matters, not the mere presence of high prices overseas.

106. ADC should have used its assessment of actual prices at different levels of competition in conducting this analysis.

107. The Ministerial Direction on Material Injury of AP2012 indicated that the identification of material injury be based on facts and not on assertions unsupported by facts. DSM (page 15) indicates that when examining prices, the Commission may take into account export price, the difference between the price payable for goods produced in Australia and the price paid or payable for imported goods when sold in Australia where the landed duty paid in the store cost of the imported goods at the same level of trade and the effect that dumped goods are having or are likely to have upon the price of the goods produced in Australia. This calls for an examination of actual or hypothesised prices and not an examination of the dumping margin per se, particularly where the latter is based on some artificial construction. The Manual goes on to say that an examination of prices will show whether there has been undercutting or price suppression.

108. An example of the use of real prices would be the prices that Bluescope would have been offered by Bisalloy as compared to the prices it was offered by Ruukki and others.

Ground 6.2: The Commission erroneously found price injury caused even though it rightly concluded that there was no volume injury caused

109. ADC found that only price, revenue and profit injury was caused by dumped goods. It also concluded that volume injury was caused by normal downturn in economic circumstances and not by dumped goods. It is simple logic that if loss of volume was natural, revenue and profit injury can only be a result of dumped goods if prices were adversely affected by those goods. A further problem with the undercutting analysis is that if prices can so readily be undercut, why does this not cause a loss of volume?

110. The Commission noted that price undercutting could not be consistently demonstrated but considered that "there is sufficient evidence from the price undercutting analysis to conclude that the dumping at levels outlined … (in the range of 21.7% to 34%) created a competitive benefit to importers, and demonstrates that the Australian industry faced price pressure from imported goods." (Page 61)

111. The most significant concern is that the Commission's analysis showed no consistency in price undercutting and hence no correlation between dumping and prices offered by Bisalloy. If dumping is assumed to always be there at high margins based on the Commission's quarterly analysis, but often with no undercutting, a causal link simply is not there.

112. There are other flaws with the price undercutting analysis. If imports can truly undercut domestic prices then volumes should decrease. Yet the Commission has emphatically concluded that there is no material injury caused through dumping by way of volume effects.

113. If there is price undercutting but Bisalloy still makes sales at acceptable volume, this would be illogical in a fully open market with truly identical products. The fact that there was some price undercutting with Bisalloy still keeping its volume can only raise the logical hypothesis that there are indeed differences in

products as alleged by interested parties, differences in distribution chains, quality and timing of delivery, differences in customer specifications or the like to explain this phenomenon, all factors which would need to have been taken into account in the causation analysis and which would have undermined the positive conclusion of material injury caused by dumping.

114. The only alternative hypothetical commercial reason why the undercutting might not have been effective even where Bisalloy keeps selling at higher prices would be if there was an ill-informed market that did not know about other prices, which cannot be presumed to be the case with such specialty products and sophisticated and large scale customers.

115. A further concern is that ADC should be consistent in its methodological approach as between domestic and Australian price analysis. It found no consistency in Japan sector by sector, so why was there presumed consistency in undercutting power in material injury in Australia on the causal link analysis? The Commission concluded that differential pricing in Japan meant that no uniform conclusions could be drawn about Japanese market sectors, yet somehow concluded that vastly differentiated pricing in Australia shows sufficient presence of price undercutting as a dominant driver of behaviour. They both cannot be concurrently valid conclusions.

Ground 6.3: The Commission erroneously presumed price suppression to be evident

116. Where price suppression is concerned, the Commission noted that reduced demand is likely to have contributed to the lowering of prices but considered that based on its undercutting analysis, the Australian industry was forced to reduce prices in order to compete. (Page 62) That cannot be a valid conclusion as the Commission could not have found a consistent relationship between Bisalloy and import prices, otherwise there would not have been such a differential in the undercutting analysis with prices fluctuating from significantly below to significantly above.

117. If the undercutting analysis found no correlation between dumping and prices, with wild fluctuations between negative and positive undercutting, it is simply not reasonable for the Commission to conclude that the industry was forced to reduce prices to compete. The Commission found that the imported prices were either higher or lower than Bisalloy from time to time regardless of Bisalloy's prices or vice versa. Either way, the inconsistency in the undercutting analysis shows that there were no reasonable grounds to conclude a consistent reduction in prices by Bisalloy to match imports.

118. Where price suppression is concerned, the Commission also concluded that lower market demand caused a downturn in mining investment lowering Bisalloy's capacity utilisation and contributing to a higher unit CTMS. It concluded that without dumping, it would have been likely to be in a position to maintain pricing at levels necessary to cover the increase in CTMS. There is simply no analysis to show why this would be so and simple analytical logic would suggest the contrary. In a depressed market, knowing the problem that manufacturers are in as a result of needing to keep their facilities operative, at least to cover fixed costs, buyers will have significant power to obtain reduced prices. That is also the case where the Commission knew that key traders had overstocked inventories. The Commission knew traders had to sell at a loss for cashflow purposes. That is even more likely for manufacturers who must cover

their fixed costs in any event and keep steel mills in production given the costs and problems of de-commissioning and re-commissioning.

Ground 6.4: The Commission is likely to have concentrated on inappropriate Australian sales figures in identifying undercutting

119. As noted above, while it is not clear exactly what injury and pricing data the Commission considered, it is highly likely that their approach was flawed by reason of concentrating on low domestic sales and pricing by traders and similar distributors who acquired inappropriately excessive stock and for liquidity reasons have had to sell at low prices.

120. The Commission noted that in conducting the price undercutting analysis it compared FIS prices sold by importers and Bisalloy weighted average FIS prices. Such an exercise would skew the analysis, as many traders were selling at low prices regardless of their purchase price from foreign suppliers because of overstock and liquidity concerns. An anti-dumping regime is essentially concerned with the behaviour of exporters who engage in differential pricing causing material injury. It should not be concerned with proper pricing by exporters to local distributors who for financial reasons are prepared from time to time to sell at little or no profit or indeed sell at a loss for cashflow reasons. Sales from excess inventory are unreliable figures on which to base meaningful comparisons and should have been rejected accordingly.

121. If the inconsistent undercutting as found by the Commission included such sales, it is flawed for that reason alone. Indirect undercutting by the exporter should only be found to exist if the exported product reached the Australian market via a trader or distributor who applied its normal pricing model to a sufficiently low export price that accommodated profitable undercutting at the domestic Australian level.

122. The above logic is clearly supported by the evidence before the Commission. It would have been abundantly clear to the Commission that some key traders and distributors made incorrect speculative decisions during the end of the mining boom, to acquire more product in the hope that demand would continue at high levels. When that did not eventuate, they had to clear such excessive inventory at distressed prices. The Commission established that many stockists/importers were holding a significant amount of excess stock leading into the investigation period and that the clearing of such excess stock may partly explain the volume injury experienced by Bisalloy (page 68). It also noted the chairman's address for the Bisalloy Steel Group in 2013 where he stated that "many companies are over-stocked due to rapid decline in demand which increased the pressure for lower prices as excess inventory is cleared from the supply chain."

123. To conclude that there was excess stock, that this partly explained volume injury, to similarly conclude that volume injury was not caused by dumped products, but not then make a similar conclusion that lower prices were also in large part caused by clearing of excess stock, is simply illogical and inappropriate given the evidence of the Bisalloy chairman himself.

124. Para 7.7.1 of the Report seems to be implying instead and without reasons, that any decrease in profit must therefore be price suppression and/or depression, which cannot be valid reasoning.

Ground 6.5: The Commission failed to take adequate notice of the differences in product characteristics and market segments in addressing causation based on its pricing analysis

125. The Commission's pricing conclusion is also inconsistent with its finding (page 69) that Q&T steel plate is a somewhat specialised product with purchasing decisions based on a variety of factors including dimension limitations, quality differences, access to and security of supply and global brand recognition with price being an important factor but not the only consideration.

126. If product and market differences are properly considered as they should be, TSA's particular business focus will be given the distinct consideration that it deserves. The natural conclusion would then be that if volume injury is not caused by dumped goods and is not more than could be expected in the downturn, and if the repair and maintenance work is not expected to reduce in a downturn, as breakdown of equipment is not impacted upon by general economic circumstances, TSA's general business model cannot cause injury to Bisalloy. As noted above and below, that is a further reason why cumulation was inappropriate.

Ground 6.6: The Commission wrongly concluded that the current economic downturn aided the causation analysis rather than undermining it

127. The Commission also referred to the Ministerial Direction on material injury inviting the Commission "to consider … the greater impact of injury during periods of economic downturn and reduced rates of growth as an element of injury."[6] Given that the Commission has found that decreased volume was not caused by dumping, the only relevant factor is price impact. It accepted that some price impacts were caused by the downturn itself and not by dumping. Hence the Ministerial Direction can be of little aid in considering the extent of the price impact from dumped imports.

Ground 6.7: The Commission's approach failed to take the steps required under WTO jurisprudence to deal with a complex pricing analysis

128. JFE would concede that the Commission has a difficult task in analysing causation and material injury where the evidence shows total inconsistency between importer and Bisalloy pricing, but with some undercutting from time to time, at the same time as allegations of price suppression and depression which can be caused by a myriad of factors.

129. It is clear from the WTO jurisprudence that on the one hand, full scientific precision is not required for the Commission's determinations, but on the other hand, minimum standards of investigation and analysis are required.

130. The jurisprudence further makes clear that the obligation to properly investigate is on the Commission, regardless of the ambit of any submissions made by the parties, or evidence presented by them. The WTO Anti-Dumping Agreement imposes such obligations directly on decision-makers.

131. A basic analytical consideration of the way parties compete on price would have identified appropriate lines of investigation for the Commission.

[6] ACDN No. 2012/24-New Ministerial Direction on Material Injury, referred to at Rep 234 p 62.

132. If it properly concluded that the applicant did not lose volume because of dumped imports, which was the only proper conclusion, either the goods do have strong elasticity of demand or they do not. If they do not, particularly because of the need to have some relationship between supplier and importer, such as TSA with regard to a repair and maintenance business, then the hypothesised injury from price undercutting could not exist.

133. Conversely, if there was true price undercutting in a competitive market with strong price elasticity, then volume would have been lost by reason of undercutting from dumped imports. The conclusion that volume was not lost by reason of dumped imports must lead to the conclusion that such imports could not have consistently undercut prices so as to attract volume which in turn undermines that hypothesis.

134. The applicant's contentions thus fail analytically either way.

135. If the Commission has any valid reasons to take a different view, it must further investigate. In such circumstances the Commission simply needs to identify the elasticities based on their examination of Bisalloy's business model, lines of distribution and the degree to which end users shifted their custom back and forth from Bisalloy to alternative sources of supply. Such analysis could only support the above assertions.

136. For all the foregoing reasons, the Commission's causation analysis is flawed even if cumulation was permitted.

Ground 7: Cumulation

137. As noted above, a failure to appropriately distinguish the analysis based on the characteristics of goods and differing markets, impacts upon causation analysis and would particularly do so if cumulation is wrongly determined to apply.

138. In that regard, the Commission should not have cumulated TSA imports with other imports under the provisions of section 269TAE(2C) given the differences and conditions of competition between imported goods targeted for the repair and maintenance sector and imported goods targeted for other sectors. The Commission's conclusion (page 56) that importers and Bisalloy are both selling goods into the same market, or alternatively, that domestically produced Q&T steel plate can be substituted for imported Q&T steel plate, simply looks at what it thinks is theoretically possible and not what is actually occurring in the relevant market where local miners must have urgent responses to their repair and maintenance needs.

139. Based on the Commission's own investigation, that would not even be theoretically possible under a realistic assessment of the circumstances of the market as found by it. In any event, the Commission must formally present a view as to why cumulation is appropriate in the particular circumstances. It has failed to do so.

140. As a result, the Commission should not have cumulated all imports given that the conditions of competition between R&M and OEM products are fundamentally different. It should also not cumulate imports by an entity such as TSA where Bisalloy will not offer product at competitive prices.

Ground 8: The Commission failed to take appropriate note of other factors that would have been likely to have caused injury.

Ground 8.1: Reduced general demand was not appropriately accounted for

141. The Commission acknowledged that reduced demand and volume has a flow-on effect to other injury factors such as increased price competition and reduced profitability. The Commission simply made no attempt to quantify how much of that flow-on effect, not attributable to dumping, should be excluded from the calculation of NIP.

Ground 8.2: Bisalloy's business model and differential pricing was not appropriately accounted for

142. The Commission notes all of the concerns about Bisalloy's distribution strategy, lack of competition, production model and efficiency of operations and business structure. Without any reasoning, the Commission simply concludes (page 72) that it does not consider that Bisalloy's business model contributed materially to the Commission's assessment of injury, in contrast to the impact from dumping.

143. In considering Bisalloy's distribution network and business model, the Commission has no reasonable basis to reject the information provided on behalf of TSA that it simply cannot buy at competitive rates from Bisalloy. If Bluescope intends to earn a profit on top of its cost price from Bisalloy, then it makes no sense for it to be able to significantly undercut Bisalloy's prices. That information must have been before the Commission.

144. Furthermore, if Bisalloy is willing and able to offer such excessive prices to TSA and to comparable importers, it is hardly suffering from price undercutting or showing susceptibility to price depression.

Ground 8.3: Currency effects were not appropriately differentiated

145. The Commission concluded that the effects of the Australian dollar had limited impact because it did not find that imported prices increased with depreciation of the dollar. It is erroneous to simply consider <u>actual</u> movements and not consider price suppression as a result of currency movements as occurs in relation to the price analysis at the domestic level (page 73).

Ground 8.4: Bisalloy's decreased export success

146. The Commission also rejected the relevance of export performance by Bisalloy. It is not clear how the Commission concludes on the one hand that Bisalloy's exports sales have shown a general decline in volume, which is a contributing factor to its increased inventory levels and decreased capacity utilisation, and concludes immediately thereafter that it is satisfied that export performance and productivity is not a significant contributing factor to other injury factors such as the decline in profit and profitability (page 73). That is only a logical conclusion if the changes in export performance are not significant. The Commission could not have so concluded.

147. That is also inconsistent with the conclusion on the same page that "to a lesser extent the decline in volume of export sales, has impacted upon Bisalloy's economic performance."

Ground 8.5: Anti-competitive aspects of the Australian market were not given due weight

148. The Commission should also have noted that the cost to make and sell of Bisalloy has inevitably increased because it is buying green feed from a local monopolist that achieved increased monopoly power as a result of anti-dumping protection against imports of competitor products from China, Korea, Taiwan and Japan.

149. The Commission should have noted further unique aspects of the crucial relationship between Bisalloy and Bluescope, the latter providing the bulk of its green feed, having recently successfully obtained an anti-dumping duty against other green feed sources and at the same time being a key distribution outlet for Bisalloy products. Bluescope has at various points in time has also had a significant relationship with Ruukki. Price pressure imposed from the domestic monopolist of green feed sources is not price pressure properly attributable to imports.

Ground 8.6: The impact of un-dumped imports was not appropriately dealt with

150. Given that the Commission's conclusion was based on price undercutting, an important consideration would have been whether there was undercutting by non-dumped imports. That would certainly have been so to a similar degree to that as found in relation to the goods under consideration.

151. The Commission has also erred in part as it appears to have used inconsistent figures as to the amount of un-dumped imports which in turn did not seem to align with ABS statistics.

152. Injury caused by un-dumped prices could be gleaned in a broad sense at least from ABS statistics. For example, one could calculate the per unit price of the 6,700 tonnes from China. The reference to 6,700 tonnes from China is a hypothesis based on Customs data which shows that tonnage was delivered to New South Wales in green feed form. That would appear to have been product imported by Bisalloy from its Chinese joint venture. If such prices undercut Bisalloy's prices or are comparable to them, this suggests that such un-dumped prices set the benchmark and are the ones that cause suppression and/or depression.

153. A simple "but for" analysis would confirm this. But for the dumping, the un-dumped prices would remain the same, would set the benchmark and hence would independently cause all of the resultant injury. It is only if the dumped prices in turn suppress the un-dumped import prices that a contrary conclusion would be valid. No attempt was made by the Commission to analyse this.

154. Either the lower prices from China and other presumptively un-dumped sources are setting market price levels and are the cause of price suppression or depression, or conversely, the Commission should have determined that price is not the key factor but instead, quality, speed of service and distribution networks are determinative.

Ground 8.7: The allocation analysis was flawed

155. There is simply no logical basis for the conclusion that "the minimum amount of injury suffered by Bisalloy that can directly be attributed to dumped exports is reflective of the individual dumping margin." (Page 74) If that was the case,

there would be consistent price undercutting proportional to those margins, Yet the Commission's findings on pricing were quite to the contrary. To simply conclude that the prices were lower than they otherwise would have been but for exports at dumped prices, does not indicate to what extent that would be so. Furthermore, there is no reasonable basis to conclude that an increase in price equal to the lowest dumping margin calculated, even if sufficient to allow Bisalloy to operate profitably, could in fact have been achieved in the absence of importation at dumped prices. (page 74)

156. In *US – Certain Hot Rolled Steel Products from Japan* (WT/DS184/AB/R) the Appellate Body stated that the assessment pursuant to Article 3.5 of ADA:

> "Must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports rather than the other factors."

157. As was noted by Justice Rares in *Siam Polyethylene Co Ltd v Minister of State for Home Affairs*,[7] "where a decision-maker must consider matters prescribed by law, generally, he or she cannot jettison or ignore some of those factors or give them cursory consideration in order to put them to one side."

Ground 9: The Commission also failed to appropriately determine a non-injurious price.

158. Such prices must be determined pursuant to section 269TACA.

159. In considering the unsuppressed selling price (***USP***), Bisalloy asserted that it should use average unit CTMS in 2013, that being higher than 2012, but then uplifted by weighted average unit profit achieved in 2012. The Commission used weighted average selling prices in calendar years 2010 to 2012, clearly including periods which are wholly unrealistic in current circumstances. A consideration of the weighted average selling price during the period unaffected by dumping must be a period that is properly comparable to the investigation period. Because of the downturn in the mining industry, any earlier period would inflate the USP.

160. The Commission noted (Report p 32) that "a downturn in the mining sector led to a rapid decline in demand for Q&T steel plate during the investigation period." Given that the Commission concluded that reduced demand is likely to have contributed to the lowering of prices, it was also required to indicate how much of such lowering of prices was caused other than by dumping and ensure that this was not attributed to the dumping itself. A calculation of an NIP could only have been validly done under a hypothetical scenario where reduced demand from such a downturn was hypothesised to exist. It would have been wholly inappropriate to look at an earlier point in time before that was prevalent.

161. The Commission concluded that the injury in terms of price and profit effects due to dumped steel plate is greater than that likely to have occurred in the

[7] [2009] FCA 837 at para 99.

normal ebb and flow of business in the contracting market. (Page 63) The Commission was required to quantify the difference to ensure that price and profit effects not caused by dumping were not attributed to the latter.

162. The judge at first instance in *Siam* quoted with approval from *SPP Nemo SA Comercial Exportadora v Minister of State for Small Business and Consumer Affairs* [1998] FCA 1627 to the effect that in calculating a non-injurious price it had to be calculated by reference to the question of material injury and an assessment of its extent and the establishment of the causal link between dumping and the injury must be identified. This is because the Minister is required to consider the minimum price necessary to prevent the injury or the recurrence of the injury.

163. There were far better methodologies available. While the Commission noted that the price of un-dumped imports may at times be a suitable methodology in certain instances, it asserted that the database did not allow comparison based on thickness, width or length. The Commission was inconsistent in aggregating all models and specifications in doing the dumping margin analysis, but not employing the same methodology for USP.

164. Even rejecting un-dumped imports as the methodology does not mean that average weighted selling price during boom years is the most reliable methodology. The Commission should have identified a period with similar total demand to that which pertains in the investigation period.

165. Furthermore, the Commission could have used Bisalloy's own imports from its China joint venture to set a USP. ADC would have known the prices charged by Bisalloy's joint venture, although of course they would be prices to a related party. ADC could easily have identified the cost to make of the Chinese joint venture and added a profit that is reasonable in the current steel climate, not the expectations of former boom years.

166. Such an NIP would also ensure that Bisalloy could not utilise unfair market power were an anti-dumping duty to remain. If it can bar other imports effectively via excessive duty rates and have duty free access to its own goods where those goods can be sold far below the identified NIP, there will simply be no meaningful competition in the Australian domestic market.

167. Alternatively, an approach that looks at other products produced by the applicant might look at the armoured plate produced by Bisalloy for the Australian Defence Forces and consider the cost, profit and pricing in 2013, being similar market conditions. Even that would be unduly favourable to the applicant given that there is presumably not a similar downturn in defence as there is in the mining sector.

168. The NIP assessment also did not purport to identify a domestic premium that a local producer could charge to account for the closer proximity to customers, the lesser need for transport costs and the lesser risk of international transport.

Ground 10: Public interest was not assessed

169. The Commission noted various arguments about the public interest in various submissions but did not indicate whether the allegations could be treated as true and made no recommendation. The Commission should have assisted the Parliamentary Secretary with such an analysis. The Parliamentary Secretary

could only have meaningfully employed his discretion in that regard with appropriate assistance from the Commission Report and recommendations.

Conclusion

170. In view of the foregoing, JFE submits that the only reasonable conclusion is to hold that the decision of the Parliamentary Secretary was in error and was also not the preferable one and recommend revocation of the duty notice and/or a full review of the Commission's findings.