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

61 2 6275 6784

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: Steve McHugh

Position: General Manager, Total Steel of Australia Pty Ltd

Applicant Company/Entity: Total Steel of Australia Pty Ltd

Date: 5 December 2014

Total Steel
total quality total service **Total Steel**

5 December 2014

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
CANBERRA CITY ACT 2601

By email
ADRP_support@customs.gov.au

Dear Sir/Madam

Application for review of the Minister's decision to publish a dumping duty notice in respect of Anti-Dumping Commission Case 234 - Quenched and Tempered Steel Plate Exported from Finland, Japan and Sweden

Please find attached for your consideration Total Steel of Australia Pty Ltd's application for the review of the Minister's decision to publish a dumping duty notice in respect of Anti-Dumping Commission Case 234 - Quenched and Tempered Steel Plate Exported from Finland, Japan and Sweden (***Application***).

The attached Application details the grounds for which the Minister's decision is not the correct or preferable decision.

If you have any questions in respect of this Application or would like to discuss any aspect of the Application, please do not hesitate to contact me on (03) 9369 8855.

Yours faithfully

Steve McHugh
General Manager

Total Steel of Australia Pty Ltd A.B.N. 34 001 201 850

Admin
Suite 12, 35-37 Railway Pde
Engadine NSW 2233
PO Box 70
Engadine NSW 2233
Telephone: (02) 8508 4800
Fax: (02) 9520 8628
admin@totalsteel.com.au

Sydney
46 Anzac Avenue
Smeaton Grange NSW 2567
Box 3205
Narellan DC NSW 2567
Telephone: (02) 4648 8111
Fax: (02) 4647 8011
sydney@totalsteel.com.au

Melbourne
207-211 Fitzgerald Road
Laverton North VIC 3026
PO Box 477
Laverton VIC 3026
Telephone: (03) 9369 8855
Fax: (03) 9369 8866
melbourne@totalsteel.com.au

Brisbane
876 Kingsford Smith Drive
Eagle Farm QLD 4009
PO Box 481
Hamilton QLD 4007
Telephone: (07) 3268 6266
Fax: (07) 3268 6570
brisbane@totalsteel.com.au

Perth
102 Kurnall Road
Welshpool WA 6106
PO Box 58
Welshpool WA 6986
Telephone: (08) 9451 9477
Fax: (08) 9451 5708
perth@totalsteel.com.au

Darwin
48 Dawson Street
East Arm NT 0828
PO Box 38158
Winnellie NT 0821
Telephone: (08) 8984 4324
Fax: (08) 8947 4515
darwin@totalsteel.com.au

Web: www.totalsteel.com.au

1. Applicant details

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

The name of the applicant is Total Steel of Australia Pty Ltd (***Total Steel***).

The address of the applicant is Suite 10 / 35-37 Railway Parade, Engadine NSW 2233.

Total Steel is a proprietary company that is an importer in the investigation for Case 234 as the major Australian customer for over 20 years of JFE Steel Corporation.

2. Applicant's contact details

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

The contact person at Total Steel is Steve McHugh, General Manager of Total Steel. Mr McHugh can be contacted by:

- Direct landline: (03) 9369 8855
- Mobile: 0419 107 302
- Fax: (03) 9369 8866
- Email: stevemchugh@totalsteel.com.au

3. Applicant's representative

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

Total Steel is represented by Anne Petterd, Partner of Baker & McKenzie. Alternative contacts are: Alex Wolff, Partner; Andrew Emmerson, Senior Associate; and Sanil Khatri, Associate.

The contact details for these representatives of Total Steel are below:

- Direct landline (Anne Petterd): (02) 8922 5221
- Fax: (02) 9225 1595
- Email: Anne.Petterd@bakermckenzie.com; Alex.Wolff@bakermckenzie.com; Andrew.Emmerson@bakermckenzie.com; Sanil.Khatri@bakermckenzie.com

A copy of Total Steel's authorisation for Baker & McKenzie to be its representative for this Application (***Authority to Act***) is provided at Annexure A.

4. Description of imported goods

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

This application is in relation to quenched and tempered steel plate exported from Japan.

As stated on pages 13-14 of the Anti-Dumping Commission (***ADC***) Report 234, the imported goods to which this application, and the relevant investigation, relates are described 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 600mm up to and including 3,200mm, thickness*

between 4.5-110mm (inclusive), and length 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 condition including but not limited to mill edge, sheared or profiled cut (i.e. by Oxy, Plasma, Laser, etc.), with or without any other minor processing (e.g. drilling).

Goods of stainless steel, silicon-electrical steel and high-speed steel, are excluded from the goods covered.

5. Tariff classification of imported goods

The tariff classification/statistical code of the imported goods.

The tariff classification code of the imported goods is 7225.40.00 described in Schedule 3 to the *Customs Tariff Act 1995* (Cth) as "[o]ther, not further worked than hot-rolled, not in coils".

The ADC stated at page 15 of Report 234 that "[t]ariff subheading 7225.40.00 refers to flat-rolled products of other alloy steel, of a width of 600mm or more, not further worked than hot-rolled, not in coils. The relevant statistical codes for tariff subheading 7225.40.00 are:

- statistical code 21 - high alloy: quenched and tempered; and
- statistical code 23 - other: quenched and tempered."

In relation to a small volume of imports, the ADC also identified that "Q&T steel plate was declared under tariff subheading 7225.99.00 during the investigation period" and included tariff subheading 7225.99.00 as within the goods description.

The ADC specified that "[t]ariff subheading 7225.99.00 refers to other flat rolled products of other alloy steel of a width of 600mm or more, not specified or included in preceding tariff subheadings."

6. Reviewable decision

A copy of the reviewable decision, date of notification of the reviewable decision and the method of the notification.

The reviewable decision is the Parliamentary Secretary's decision to publish a dumping duty notice and impose dumping duties in respect of quenched and tempered steel plate exported from Finland, Japan and Sweden (***Reviewable Decision***).

A copy of the Reviewable Decision is provided at Annexure B.

The Reviewable Decision was published on 5 November 2014 in *The Australian* newspaper and *Commonwealth of Australia Gazette*.

7. Applicant's reasons

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

A copy of the Applicant's reasons is provided at Annexure C.

Annexure A: Authority to Act

Total Steel
total quality total service **Total Steel**

Authority to Act and Obtain Information

I, Steve McHugh, General Manager

of Total Steel of Australia Pty Ltd

authorise Baker & McKenzie Solicitors and staff (including Alex Wolff, Anne Petterd, Andrew Emmerson and Sanil Khatri of Baker & McKenzie Solicitors) and any external counsel engaged to act on behalf of Total Steel of Australia Pty Ltd to submit its application to the Anti-Dumping Review Panel to review Anti-Dumping Commission Case 234 (***Application***).

I also authorise Baker & McKenzie solicitors and staff to request and receive information and documentation in relation to Total Steel of Australia Pty Ltd's Application.

This authority to act and obtain information is provided for the duration of the Application, review by the Anti-Dumping Review Panel (***Review***) and any further actions in respect of the Application and Review.

Signature: _____

Print Name: Steve McHugh

Dated: 28.11.14

Witness signature: _____

Witness Name: ANTHONY LABAGNARA.

Total Steel of Australia Pty Ltd A.B.N. 34 001 201 850

Admin	Sydney	Melbourne	Brisbane	Perth	Darwin
Suite 12, 35-37 Railway Pde	46 Anzac Avenue	207-211 Fitzgerald Road	106 Mica Street	53-75 McDowell Street	48 Dawson Street
Engadine NSW 2233	Smeaton Grange NSW 2567	Laverton North VIC 3026	Carole Park QLD 4300	Welshpool WA 6106	East Arm,. N.T. 0822
PO Box 70	Box 3205	PO Box 477	PO Box 265	PO Box 626	PO Box 38153
Engadine NSW 2233	Narellan DC NSW 2567	Laverton VIC 3026	Carole Park QLD 4300	Welshpool WA 6986	Winnellie NT 0821
Tel. No. (02) 8508 4800	Tel. No. (02) 4648 8111	Tel. No. (03) 9369 8855	Tel. No. (07) 3723 9200	Tel. No. (08) 9351 6800	Tel. No. (08) 8984 4324
Fax: (02) 9520 8628	Fax: (02) 4647 8011	Fax: (03) 9369 8866	Fax: (07) 3271 1699	Fax: (08) 9351 6868	Fax No. (08) 8947 4615
admin@totalsteel.com.au	sydney@totalsteel.com.au	melbourne@totalsteel.com.au	brisbane@totalsteel.com.au	perth@totalsteel.com.au	darwin@totalsteel.com.au

Web: www.totalsteel.com.au

Annexure B: Reviewable Decision

PUBLIC RECORD

Australian Government
Anti-Dumping Commission

Customs Act 1901 – Part XVB

Quenched and Tempered Steel Plate

Exported from Finland, Japan and Sweden

Findings in Relation to a Dumping Investigation

Public notice under subsections 269TG (1) and (2) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of Quenched and Tempered steel plate (the goods), exported to Australia from Finland, Japan and Sweden.

The goods are classified to tariff subheadings 7225.40.00 (statistical codes 21, 22, 23 and 24) and 7225.99.00 (statistical codes 39 and 44) in Schedule 3 of the *Customs Tariff Act 1995*.

A full description of the goods is available in Anti-Dumping Notice (ADN) No. 2014/01 which is available on the internet at www.adcommission.gov.au.

The Commissioner reported his findings and recommendations to me in *Anti-Dumping Commission Report No. 234* (REP 234). REP 234 outlines how the Anti-Dumping Commission (the Commission) carried out the investigation and recommends the publication of a dumping duty notice in respect of the goods.

Notice of my decision was published in *The Australian* newspaper and the *Commonwealth of Australia Gazette* on 5 November 2014.

Particulars of the dumping margins established and an explanation of the methods used to compare export prices and normal values to establish the dumping margins are set out in the table below.

PUBLIC RECORD

Country	Manufacturer / exporter	Dumping margin	Inco term	Effective rate of duty	Method to establish dumping margin
Finland	All Exporters	21.7%	EXW	10.8%	Weighted average export prices were compared with corresponding normal values over the investigation period in terms of s. 269TACB(2)(a) of the *Customs Act 1901* (the Act).
Japan	JFE Steel Corporation	24.6%	EXW	24.5%	
	Uncooperative Exporters	33.8%	EXW	26.1%	
Sweden	All Exporters	34.0%	FOB	9.6%	

NB: Pursuant to s. 12 of the Customs Tariff (Anti-Dumping) Act 1975 (the Dumping Duty Act), conversion of securities to interim duty will not exceed the level of security taken. The rate of conversion for securities will be required per the notices published on 19 May 2014 and 27 August 2014.

The above table lists the effective rate of duty which is different from the dumping margins found, due to the application of the lesser duty rule pursuant to s. 8(5B) of the Dumping Duty Act. Pursuant to the lesser duty rule, consideration is given to the desirability of imposing duties at less than the full dumping margins, if the lesser amount of duty is adequate to remove injury to the Australian industry.

The effective rate of duty determined for Finland and Japan is an amount worked out in accordance with the ad valorem method and the effective rate of duty determined for Sweden has been calculated in accordance with the combination of fixed and variable duty method.

I, ROBERT CHARLES BALDWIN, Parliamentary Secretary to the Minister for Industry, have considered, and accepted, the recommendations of the Commissioner, including the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 234.

I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those goods and because of that, material injury to the Australian industry producing like goods might have been caused if the security had not been taken. Therefore under s. 269TG(1) of the he Act, I DECLARE that s. 8 of the Dumping Duty Act applies to:

(i) the goods; and

(ii) like goods that were exported to Australia after 19 May 2014 (when the Commissioner made a preliminary affirmative determination under s. 269TD of the Act that there appeared to be sufficient grounds for the publication of a dumping duty notice) but before the publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to the

PUBLIC RECORD

Australian industry producing like goods has been caused or is being caused. Therefore under s. 269TG(2) of the Act, I DECLARE that s. 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from Finland, Japan and Sweden.

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports on Australian industry prices and the consequent impact on the Australian industry including reduced revenues, price depression, price suppression, reduced profits and reduced profitability.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export prices, non-injurious prices, and normal values of the goods (as ascertained in the confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how anti-dumping measures are applied to 'goods on the water' is available in ACDN 2012/34, available at www.adcommission.gov.au.

REP 234 and other documents included in the public record may be examined at the Commission's office by contacting the case manager on the details provided below. Alternatively, the public record is available at www.adcommission.gov.au.

Enquiries about this notice may be directed to the case manager on telephone number +61 3 9244 8229, fax number +61 3 9244 8902 or email at operations3@adcommission.gov.au.

Dated this 28th day of October 2014

ROBERT CHARLES BALDWIN
Parliamentary Secretary to the Minister for Industry

Annexure C: Applicant's Reasons

BAKER & MCKENZIE

NON-CONFIDENTIAL APPLICATION

1. Introduction

1.1 Total Steel of Australia Pty Ltd (***Total Steel***) is an interested party for Case 234. Total Steel is an importer and the major Australian customer, for over 20 years, of JFE Steel Corporation (***JFE***), the only Japanese exporter which the Commission identified as a cooperative exporter for the investigation.

1.2 Total Steel applies to the Review Panel requesting a review of the decision for Case 234 made on 5 November 2014 by the Parliamentary Secretary to the Minister for Industry.

1.3 Total Steel advances the following grounds on which the decision to publish a dumping duty notice for Case 234 is not the correct or preferable decision:

(a) **Ground 1:** The Commission's decision to determine the dumping duty for all exporters for Japan and Finland on an ex-works (***EXW***) basis is flawed as it wrongly assumed the availability of an integer in its calculation (the manufacturing exporter's EXW's price) when it may not be available to an importer or Australian Customs and Border Protection Service (***Customs***).

(b) **Ground 2:** The description of goods the subject of the dumping duty notice is internally inconsistent and incapable of being used to identify the goods that are the subject of the investigation.

(c) **Ground 3:** The Commission made errors in identifying an Australian industry producing like goods as it failed to apply the required statutory test that any "like goods" must "closely resemble" the goods described in the Application.[1] The Commission also failed to adequately deal with product differences between goods.

(d) **Ground 4:** The Commission's approach in determining normal value for JFE goods is flawed as certain aspects are without logic.

(e) **Ground 5:** The evidence does not support the existence of a causal link between any dumping of like goods (noting the grounds above) and material injury found by the Commission. In so far as the JFE goods were concerned (and assuming that the goods were "like goods" and were "dumped"), the Commission should have found that:

(i) such dumping as may have been found to have occurred did not cause material injury to the Australian industry within the meaning of the *Customs Act 1901 (Cth)* (***Customs Act***) and consistent with the Agreement on Implementation of Article VI General Agreement on Tariffs and Trade 1994 (***WTO Anti-Dumping Agreement***); and

(ii) such injury as may have been sustained by the Australian industry was properly characterised as being caused by factors other than dumping.

(f) **Ground 6:** There are errors in the assessment of whether thermo mechanically controlled process steel plate (***TMCP***) produced by JFE falls within the scope of goods identified for the investigation because the Commission appears to have, without justification, taken an inconsistent approach in assessing the JFE goods compared to other exporters and has failed to accept evidence of JFE as to the distinguishing nature of some of its products by reason of the technical information provided.

[1] Bisalloy's Application Public Record document 001 page 9.

Reasons

1. Ground 1: Dumping duty for Finland and Japan exports is calculated on EXW basis

1.1 The dumping duty notice identifies that for exports from Finland and Japan, the effective rate of duty has been determined on an EXW basis. The Commission's decision to set the dumping duty on an EXW basis wrongly assumes the availability of an integer that is essential to its calculation (the exporter's EXW's price) that may not be available to an importer or Australian Customs. How this decision will be applied in practice has not been disclosed. However, Total Steel outlines below some of the problems with implementation:

(a) Under the decision, for exports from Finland and Japan, the dumping duty will be calculated on the importer's duty paid landed price, but applied with an EXW determined dumping duty percentage.

(b) The import price can be expected to be higher than the exporter's EXW price, particularly in cases where the manufacturing exporter supplies to a trader which then supplies to importers. As can be seen from REP 234, several parties identified as traders were involved in sales to Australia of the goods under consideration.[2]

(c) The consequence of this is that the importer will, at least initially, pay a higher duty than the dumping duty identified for the goods.

(d) The importer would then need to apply for a refund or other treatment to obtain reassessment to enable the importer to pay the correct amount of duty assessed on an EXW exporter's price.

(e) Such reassessment is dependent on the availability of data held by the manufacturing exporter that has not yet been sought and may not be made available (or dependent on determining an alternate acceptable approach).

(f) Such an approach unfairly presumes an ability for affected parties to withstand the financial impost of paying higher duty and awaiting any refund. That is clearly not a preferable approach.

1.2 The matter is further complicated by the fact that it is unclear under the Commission's approach which contract is the proper contract for dumping valuation purposes. Taking Japan as an example, the Japanese manufacturing exporter would provide product to the trading house in Yen. The importer would acquire product from a trading house under a contract of sale and pay in Australian dollars. It is hard to then determine which contract or contracts to apply to work out the duty and what, if any, currency conversion is required.

1.3 Apart from the administrative burden that the Commission's approach imposes on importers, the imposition of a dumping duty using the Commission's approach is flawed in circumstances where the Commission is unable to control the information required to establish the EXW basis and subsequent adjustment required at the time the dumping duty is to be applied.

1.4 Total Steel notes that the Commission's decision to determine the dumping duty for Finland and Japanese exporters on an EXW basis departs from its standard practice (and, Total Steel understands, the usual approach by countries to setting dumping duty), of determining the dumping duty on an free on board (**FOB**) basis. Had Total Steel known of the Commission's

[2] For example, see REP 234 section 6.3.1 (Traders) on page 36. Total Steel is subject to such a trading arrangement, purchasing its Q&T steel plate from its parent company, Marubeni-Itochu Steel Inc: see Public Record document 050 pages 9-11 and 21.

intention to depart from the Commission's standard practice, it would have pointed out in its submissions why this was problematic and why an FOB basis would be preferable.

2. Ground 2: Description of goods is flawed

2.1 The description of goods the subject of the dumping notice is flawed. Total Steel submits that the correct or preferable decision should be that either:

(a) the description of goods in the Application is fundamentally flawed and should have been rejected; or

(b) the goods the subject of the dumping notice do not include goods falling within tariff sub-heading 7225.99.00.

2.2 The drafting problems are not a mere technical concern, but:

(a) constitute a flawed description that 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. Such goods frame the rest of the investigatory exercise. The export price under section 269TACB of the Customs Act is for goods the subject of the application. Normal value is calculated for like goods to such goods under consideration. The dumping margin is hence dependent on that description. The Commission's causation analysis in this case was essentially premised on the size of the dumping margin; and

(b) go to fundamental issues of due process, transparency, timing of analysis and the rights of interested parties.

2.3 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*[3] 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 ...".[4] 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".[5] 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."[6] Her Honour also noted that "the application frames the investigation ... on which the Minister's satisfaction must be based".[7]

2.4 For the reasons set out below, the Commission could not have seen the description in the Application as being sufficiently clear and consistent so as to frame a proper process in the way identified by Mortimer J. The Commission should have called for a revision of the Application. Such a revision, which would clarify 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.

Description of goods in Application is fundamentally flawed

2.5 The description of the goods is incapable of being used to identify with particularity the goods which are the subject of the notice. The description provides that the goods are:

[3] [2014] FCA 708 (hereafter ***GM Holden***).
[4] GM Holden [2014] FCA 708 at [14].
[5] GM Holden [2014] FCA 708 at [16].
[6] GM Holden [2014] FCA 708 at [21].
[7] GM Holden [2014] FCA 708 at [29].

The goods which are the subject of this application are 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 600mm up to and including 3,200mm, thickness between 4.5-110mm (inclusive), and length 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 condition including but not limited to mill edge, sheared or profiled cut (i.e. by Oxy, Plasma, Laser, etc.), with or without any other minor processing (e.g. drilling).

Goods of stainless steel, silicon-electrical steel and high-speed steel, are excluded from the goods covered.[8]

2.6 Several problems arise from this description:

(a) Describing the goods as Q&T (ie, quenched and tempered) steel plate and then noting some Q&T grades may not be tempered does not make sense. It asserts that a tempered grade is not in fact tempered, with no indication as to what that in fact means.

(b) The description purports to apply to goods that are tempered (which requires further heat treatment but is not hot rolled), but at the same time identifies that steel plate that is further worked (other than hot rolled) falls outside the description. The description inadequately addresses the qualification intended by the words "not further worked". The description is also 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 to mere hot rolled product. Hence it is not clear which of the two inconsistent descriptions prevails.

(c) Referencing what goods are "commonly referred to as" is not a proper description of goods. The description should reflect what goods are *actually* of the nature of the goods intended to be covered. An application and, importantly, a Ministerial decision to set duties based on such an application, cannot be dependent on the way in which goods are commonly referred. The decision must relate to the inherent and objective features of the goods. 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.[9]

2.7 Problems with the description were noted by the Commission itself, yet the Commission did not reject the Application and call for rectification of this problem. REP 234 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 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 ...".

2.8 The description of goods must be capable of being given a clear meaning on the face of the words used. That test has not been met in this case as the goods are not described in a coherent and workable manner. No amount of permissive interpretation can overcome the internally illogical elements of the description. In any event, the aim of the vetting stage of an application is to ensure that no such ambiguity or illogicality exists.

Incorrect addition of tariff sub-heading 7225.99.00

[8] Bisalloy's Application Public Record document 001 page 9.
[9] REP 234 page 18.

2.9 If Total Steel's position outlined above is not accepted, Total Steel further submits that the Commission sought to amend the Application to change the meaning of goods the subject of the investigation for Case 234 when it was not entitled to do so. The Commission sought to do this through the late addition of a new tariff classification. In summary:

(a) The dumping duty notice identifies that the goods are classified to tariff subheadings 7225.40.00 (statistical codes 21, 22, 23 and 24) and 7225.99.00.

(b) The Application only identified that the goods (including some asserted misclassifications) are classified to tariff subheadings 7225.40.00 statistical codes 21, 22, 23 and 24.[10] Tariff classification 7225.40.00 is described as "Other, not further worked than hot-rolled, not in coils",[11] which was consistent with the description of the goods in the Application as "... not further worked than hot rolled...".

(c) Tariff subheading 7225.99.00 was not identified in the Application[12] or in Anti-Dumping Notice No 2014/01[13] as an applicable (or potentially applicable) tariff subheading.[14] Further, the Visit Report for Total Steel in section 2.2 (Tariff classification) identifies 7225.40.00 statistical codes 21 and 23 as the relevant tariff classifications for Total Steel Q&T steel plate relevant to the investigation.[15]

(d) Part-way through the investigation, the Commission amended the scope of goods to add goods falling within tariff sub-heading 7225.99.00.[16] Tariff classification 7225.99.00 is described as "Other".[17]

2.10 If a product could fall under tariff subheading 7225.40.00 or 7225.99.00, but the product is further worked (other than being hot rolled) then, applying tariff classification rules, 7225.99.00 must apply. The description of goods in the Application expressly excluded goods that are further worked (than hot rolled except for limited exceptions). Accordingly, goods that are further worked and that are classified under tariff subheading 7225.99.00 fall outside the description of goods the subject of the investigation and the classification heading identified by the applicant.

2.11 As acknowledged by the Commission in REP 234,[18] Total Steel raised with the Commission that the Commission had no authority to amend the scope of goods part-way through the investigation to include goods classified under tariff subheading 7225.99.00.[19] The Commission in REP 234 disagreed with Total Steel. In rejecting that contention, the Commission:

(a) interpreted Bisalloy's unexpressed intention as to what was to be covered by the Application. But the scope of the Application must be determined on its face, not on the basis of the Commission's subjective interpretation of what was intended but not actually expressed. Goods classified under tariff subheading 7225.99.00 were not

[10] Bisalloy's Application Public Record document 001 page 10.
[11] *Customs Tariff Act 1995* (Cth) Schedule 3, Sub-Chapter IV - Other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel, 7225 Flat rolled products of other alloy steel, of a width of 600 mm or more.
[12] Bisalloy's Application Public Record document 001.
[13] Anti-Dumping Notice No 2014/01 Public Record document 003 section 2.2 pages 7-8.
[14] Anti-Dumping Notice No 2014/01 appears to exhaustively list all tariff subheadings identified as applicable or on which the Commission intended to seek further clarification about during the course of the investigation.
[15] Total Steel Verification Report Public Record document 050 pages 7-8.
[16] The Preliminary Affirmative Determination (***PAD 234***) published 19 May 2014 (Public Record document 040) at page 11 appears to be the first time the Commission publicly identified that the Commission intended to expand the investigation to goods falling within tariff sub-heading 7225.99.00.
[17] Customs Tariff Act Schedule 3, Sub-Chapter IV - Other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel, 7225 Flat rolled products of other alloy steel, of a width of 600 mm or more.
[18] REP 234 section 3.4.1 page 15.
[19] Total Steel Submission Public Record document 089 pages 4-5.

identified in the Application as covered goods and so cannot be taken as *intended* to be within scope. Importantly, Bisalloy did not include tariff subheading 7225.99.00 in the Application despite the fact the Commission had discussions with Bisalloy prior to the "initiation of the investigation and the Application itself".[20] Had Bisalloy intended for goods falling within the scope of tariff subheading 7225.99.00 to be included in the tariff classification, it had ample opportunity to do so in its Application. Importantly, that that was what Bisalloy intended, Bisalloy would have needed to change the goods description by removing reference to not further worked;

(b) wrongly disregarded that the description of goods in the Application only applies to goods that are not further worked (other than being hot-rolled), while tariff subheading 7225.99.00 includes goods that are further worked; and

(c) wrongly concluded that adding tariff subheading 7225.99.00 "did not alter the goods description in any way".

2.12 The Commission's rationale on tariff classification is also flawed as it:

(a) does not recognise the defects in the description of goods, to which reference has been made above in sections 2.5 to 2.8; and

(b) gives an illogical reason in SEF 234 for adding tariff subheading 7225.99.00. In SEF 234 the Commission explained that:

The Commission clarifies that, for the purposes of the goods description for this investigation (as outlined at Section 3.3.1), the wording "not further worked than hotrolled" was not intended to exclude products which are heat treated. The 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, countersinking, welding etc. For this reason the Commission has included tariff subheading 7225.99.00 as an applicable tariff subheading for this investigation.[21]

The identification of drilling as a clarification needing to be addressed is illogical because the goods description in the Application expressly referred to drilling as an activity that did not take goods out of the description.

2.13 The approach taken in this case of amending the scope of goods mid-investigation is also inconsistent with past practice. In an unrelated anti-dumping investigation, on 12 June 2012 the then Customs 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.[22]

2.14 Page 6 of the Anti-Dumping and Subsidy Manual reflects that the Commission may use its own resources to verify the tariff classification. If the Commission had done so, it could only have concluded that the Application was flawed due to:

(a) the omission of tariff subheading 7225.99.00; and

(b) the description of goods provided by the applicant not fitting within the tariff heading contended for by the applicant.

[20] REP 234 section 3.4.1 page 16.
[21] SEF 234 section 3.4 page 14.
[22] REP 181 Aluminium Road Wheels section 3.4 page 21. The same point was made in REP 198 (Dumping of Hot Rolled Plate Steel Hot rolled plate steel exported from China, Indonesia, Japan, Korea and Taiwan) at section 3.4.3.

3. Ground 3: Errors in findings on an Australian industry producing like goods

3.1 REP 234 contains a number of material errors in relation to whether there is an Australian industry producing like goods, in particular in relation to:

(a) the Commission's application of the statutory test;

(b) its assessment of the evidence presented; and

(c) its conclusions in the face of the evidence identified in REP 234.

3.2 The first of these errors is of particular significance. If the goods under consideration are not identical in all respects, they may only be considered to be like goods if they "have characteristics *closely resembling* those of the goods under consideration" (emphasis added).[23] The Commission, however, applied a lower standard of "generally reflective" or "similar", thereby imposing an unwarranted gloss on the terms of the statutory test.

3.3 In applying the statutory test, the Commission must consider the practical reality of how the Australian industry produces and supplies goods, and take into account and give due weight to a range of considerations, including the physical, commercial, functional and production likeness between the imported goods and the goods the subject of the Application.[24]

Commission applied the wrong statutory test

3.4 It is apparent from REP 234 that, in a number of instances when assessing the goods against the above considerations, the Commission applied a different test to the statutory test of "closely resembling". For example:

(a) REP 234 reflects that on the criteria of differences in dimensions, the Commission applied a different and lower standard test of comparison as to whether or not the goods were "generally reflective".[25] According to the Macquarie Dictionary, *generally* means "with respect to the larger part, or for the most part" and *close* means "near together", "not deviating from a model or original" and "nearly even or equal".[26] The test of "closely resemble" does not align with the Commission's test of "generally reflective". It is evident that the test of "generally reflective" and "closely resemble" have significantly different requirements, and the Commission erred by applying the test of "generally reflective" in its determination of like goods.

(b) On the issue of production differences, the Commission concluded that Bisalloy's production processes are "similar" to production processes employed by overseas manufacturers in the manufacture of Q&T steel plate.[27] According to the Macquarie Dictionary, *similar* means "having likeness or resemblance, especially in a general way".[28] Looking for "similarity" of processes is a departure from the higher statutory test of whether goods "closely resemble" each other. Had the Commission applied the correct statutory test, it ought to have concluded that the relevant goods do not closely resemble each other due to the production differences.

Given the references to the goods being "generally reflective" and having "similar" production processes, the Review Panel is asked to recommend that the Commission reinvestigate its analysis and findings on these issues. Had the Commission applied the correct statutory test, it

[23] Section 269T(1) of the Customs Act.
[24] Dumping and Subsidy Manual pages 8-10.
[25] REP 234 section 3.7.2 page 23 in assessing differences in dimensions.
[26] See *Macquarie Dictionary* at www.macquariedictionary.com.au (2014) for the definitions of *generally* and *close*.
[27] REP 234 section 3.7.2 page 25.
[28] See *Macquarie Dictionary* at www.macquariedictionary.com.au (2014) for the definition of *similar*.

ought to have concluded that the relevant goods do not closely resemble each other as found in REP 234.

3.5 The Commission's findings on like goods in REP 234 conflicts in material respects with the evidence identified. For example:

Physical likeness

(a) REP 234 identifies that submissions were made about differences in dimension. Submissions made the point that Bisalloy is unable to produce Q&T Steel plate greater than 9.5 metres in length.[29] This was significant as the description of goods in the Application before the Commission relevantly included "length up to and including 14 metres". REP 234 goes on to state that, in response Bisalloy said that it "will readily accept orders for non-standard plate above 9.5 metres subject to minimum order quantities and price considerations".[30] It is unclear from the Bisalloy response and the findings in REP 234 whether or not Bisalloy does produce plate above 9.5 metres in length at all, or only on an ad hoc irregular and limited basis. In either case, Bisalloy's response does not support the Commission's findings that it "is satisfied that the dimensions of Q&T Steel plate sold by Bisalloy during the investigation period, whilst not matching exactly and entirely, are generally reflective of the dimensions in the goods description".[31] Total Steel submits that the correct or preferable decision based on the evidence would have been to find that the Australian industry is unable to readily produce Q&T Steel plate greater than 9.5 metres in length and so there is no Australian industry for Q&T Steel plate greater than 9.5 metres in length.

(b) 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".[32] 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".[33] 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).

Production likeness

(c) The Commission concluded that Bisalloy's production processes are "similar" to production processes employed by overseas manufacturers in the manufacture of Q&T steel plate.[34] REP 234 refers to there being substantial evidence submitted on differences in production processes.[35] However, REP 234 contains no reasoning from the Commission as to why a finding of merely "similar" production processes was (1)

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[29] REP 234 section 3.7.2 page 22.
[30] REP page 23; Public record document 55. Notably, the confidential evidence purported to support Bisalloy's claim was "an invoice example of >9.5m length". It is unclear from the REP 234 how the Commission's examination of Bisalloy's confidential evidence and its verified sales data over the investigation period could rise to be sufficient evidence to satisfy the more stringent "closely resemble" requirement.
[31] Noting as explained above that the *generally reflective* test is not the correct test to apply under the Customs Act.
[32] REP 234 section 3.7.2 page 24.
[33] REP 234 section 3.7.2 page 24.
[34] REP 234 section 3.7.2 page 25.
[35] REP 234 section 3.7.2 pages 24-25.

made and (2) is sufficient to satisfy the statutory test of like goods produced by Australian industry.[36]

4. Ground 4: Errors in calculating normal value for JFE goods

4.1 The Commission's approach in determining normal value for JFE goods is flawed as certain aspects are without logic.

4.2 The Commission, to the extent permitted by law, had a choice between considering the JFE goods under consideration holistically or segmenting analysis on a model-by-model basis. Based on the description in REP 234,[37] 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. Further, 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.

4.3 The Commission was asked on behalf of JFE to concentrate the Commission's attention on particular sectors of the Japanese market for proper comparator purposes. The Commission's approach on this issue is flawed, including in the following respects:

(a) There is an inconsistency between the Commission's conclusion 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.[38] Total Steel considers that these differences were no reason to reject consideration of weighted averages in the construction sector alone.[39] As illustrated in section 8.5 of the JFE Site Verification Report,[40] it was made clear to the Commission by JFE that the construction 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 United States (*US*) resource markets. 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 to ensure a proper and appropriate comparison.[41]

(b) 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 (construction). If volume effects were important, these would have been discernible from the third country figures in any event (which the Commission had for the US but chose not to use) and could have led to an adjustment.

4.4 Where normal value is concerned, a model by model approach that identifies certain models as having too low volumes to justify sales figures should have led the Commission to form the view that a constructed value approach in section 269TAC(2) would have been the preferable way to identify normal value in such circumstances. Section 269TAC(2) is the express

[36] Noting as explained above that a *similar* test is not the correct test to apply under the Customs Act nor the test that the Commission said it applied.
[37] REP 234 section 6.5.2 pages 39-44.
[38] REP 234 section 6.5.2 page 43.
[39] REP 234 section 6.5.2 page 43.
[40] JFE Verification Report Public Record document 078, section 8.5 pages 39 to 43.
[41] JFE Verification Report Public Record document 078, section 4.3 page 17.

provision dealing with low volumes. The methodology adopted by the Commission as described in REP 234 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 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.

4.5 The Commission's use of JFE's internal price guidelines in calculating normal value for JFE goods is flawed for the following reasons:

(a) 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 internal price guidelines should have been rejected as unreliable applying section 269TAC(7) of the Customs Act.[42]

(b) On page 42 of REP 234, the Commission noted that in some instances, adjustments could be based on differences in the cost of production. However, where JFE is concerned, the Commission considered that 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 use an alternative methodology which returns to the same point cannot be the preferable approach.

(c) 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".[43] That is not what the Commission in fact did as REP 234 page 42 reflects that the Commission refused to use production costs that would have directly addressed specification differences. The Commission 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 production costs presented by JFE. Total Steel understands that 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.[44] Hence the Commission should not have used the internal price guidelines for section 269TAC(8) adjustment purposes. It is significant that neither JFE's Verification Report nor SEF 234 mention the "internal price guidelines" and their importance to the Commission's approach. This is despite the Commission's assertion in REP 234 that "[i]n contrast (and as was the approach in SEF 234), the Commission considers it more appropriate and reasonable to apply an adjustment based on internal guidelines provided by JFE at [the] verification visit...".[45] Had the opportunity to comment on the Commission's proposed use of the internal price guidelines been available, submissions on the issues identified above could have been made by Total Steel and other interested parties.

(d) 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

[42] Section 269TAC(7) allows the Minister to disregard any information that the Minister considers to be unreliable.
[43] REP 234 section 6.5.1 page 41.
[44] JFE Verification Report Public Record document 078, section 6.3 page 33.
[45] REP 234 section 6.5.1 page 42.

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. The Commission's own investigation showed to its satisfaction, 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.

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

4.7 REP 234 on page 39 also shows the Commission misunderstood 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).[46] To the contrary, JFE wished for a constructed methodology which was not in fact employed by the Commission.

4.8 The JFE comments referenced above were made under a misapprehension by JFE about the calculation method applied by the Commission for low volume domestic sales. This was caused by the Commission's failure to notify interested parties about the Commission's error in SEF 234 prior to releasing REP 234:

(a) At page 41 of REP 234, the Commission disclosed that the legislative references to section 269TAC(2)(b) and section 269TAC(9) that the Commission included in SEF 234 were incorrect. The Commission then states that the calculations were correct. This statement conflicts with the Preliminary Affirmative Determination Report for case 234 (***PAD 234***). An examination of the relevant provisions in PAD 234 suggests instead that at that stage, the Commission believed that it was using a section 269TAC(2) constructed value approach as the preferred approach. PAD 234 made it clear that for exported models with low volume of domestic sales, a constructed value was calculated pursuant to section 269TAC(2)(c). PAD 234 section 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.[47]

(b) The representative of JFE and TSA for the investigation had discussions with Commission representatives in relation to the statements from PAD 234. From those communications, the representative understood the Commission to be taking the section 269TAC(2) constructed value approach. As a result, all of his ensuing representations and submissions to the Commission were seeking to show that the Commission was making erroneous calculations under section 269TAC(2).

(c) Had interested parties known of the Commission's approach expressed in REP 234 of applying section 269TAC(1) to low volume domestic sales, they could have had the opportunity to address the fundamental question as to why section 269TAC(1) or 269TAC(2) should apply to such sales.

[46] JFE Submission Public Record document 091 which is an 8 page submission largely on the Commission's methodology for calculating normal value based on SEF 234 which identified the Commission applied a constructed value approach under section 269TAC(2) for goods with low domestic volumes.
[47] PAD 234 section 7.5.1 page 17.

(d) 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% for JFE exports, JFE, TSA and their advisers considered 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 SEF 234 was misleading and naturally understood that JFE and interested parties were indeed misled by the content and tenor of their submissions, the Commission should have communicated its error immediately to the interested parties. An interested party has a right to respond to an SEF. Because SEF 234 misled TSA and JFE in terms of the use 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 submit their views in order to argue to the contrary.

4.9 The Commission was also invited by JFE to adopt a third country model as the preferable approach. 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 have been more relevant comparators as to pricing in high volume and fully competitive markets. The Commission's approach of comparing instead with the domestic market in Japan where there is simply no mining sector of any consequence is inherently flawed, as it seeks to compare normal values in a high price country with export prices in a properly competitive country.

5. Ground 5: Errors in findings on material injury - no causal connection or immaterial causal connection

5.1 A proper analysis of the different properties of imported goods and the distribution chains and customer needs in the Australian market, should have led the Commission to conclude that JFE and MISI exports should not be cumulated. On that basis, attention would have then been properly given to the impact of those imports on injury and lead to the correct and preferable decision that any dumping had not caused material injury.

5.2 The Commission should not have cumulated JFE exports with other exports 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 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 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.[48] The Commission must formally present a view as to why cumulation is appropriate in the particular circumstances.

5.3 The Commission should not have cumulated all imports given that the conditions of competition between repair and maintenance and original equipment manufacturer (***OEM***) products are fundamentally different. It should also not cumulate imports by an entity such as Total Steel where Bisalloy will not offer product at competitive prices.

5.4 The Commission has also failed to recognise the absence of a causal connection between the majority of JFE imported goods and the goods produced by the Australian industry. JFE importer submissions indicated that only a very small and immaterial volume of JFE Q&T steel plate is sold into a directly competitive market with the Australian industry. The vast majority of the JFE goods are subject to specific value adding processes by the importers and

[48] REP 234 section 8.3 page 56.

then supplied to meet repair and maintenance requirements for the mining sector. The Total Steel Verification Report established that "TSA stated that the majority of its Q&T plate sales are processed plate sales, where the plate is further worked and sold as part of a package or service, predominantly for repair and maintenance in the mining industry".[49] There is insufficient evidence to show that the Australian industry supplies or (absent any dumping) could realistically supply to meet these repair and maintenance requirements. Accordingly, any finding of dumping with respect to JFE goods cannot be demonstrated to cause material injury to the Australian industry given the limited potential for competition between the relevant goods.

5.5 Another serious error is that REP 234 fails to show that the Commission's analysis of material injury is supported by the facts. The Ministerial Direction on Material Injury indicates that the identification of material injury should be based on facts and not on assertions unsupported by facts.[50] The Dumping and Subsidy Manual indicates that when examining prices, the Commission may take into account:

(a) export price;

(b) the difference between the price payable for goods produced in Australia;

(c) 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

(d) the effect that dumped goods are having or are likely to have upon the price of the goods produced in Australia.[51]

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.[52]

5.6 Set out below are further aspects of the evidence before the Commission which ought to have directed its findings on material injury.

Value added production processes, commercial and functional considerations

(a) The submissions which were made to explain that the goods produced by Australian industry have several differences in commercial likeness and functional likeness from imported goods[53] supported the absence of competition, for the bulk of JFE imported goods (after undergoing the value adding processes by importers), with the Australian industry. For example, submissions showed that most JFE Q&T steel plate was used by importers in value add applications for servicing the repairs and maintenance segment of the mining and resources sector, meaning that JFE imports should be treated as competing in a separate market to Bisalloy.[54]

(b) In this regard, REP 234 does not address the evidence on the value added production lead times for the imported Q&T steel plate as compared to Bisalloy's production process. This issue is critical to understanding why the Australian industry is not competitive with the majority of JFE imports and should have been provided to the Commission (or was obvious information the Commission should have investigated)

[49] Total Steel Verification Report Public Record document 050 page 16. The Commission verified the limited sales of unprocessed Q&T during the investigation period: see Public Record document 050 page 18 at 6.2.3.
[50] *Ministerial Direction on Material Injury of No. 2012/24.*
[51] Dumping and Subsidy Manual section 4.3 page 15.
[52] Dumping and Subsidy Manual section 4.3 pages 15-16.
[53] REP 234 section 3.8 page 26.
[54] REP 234 section 3.7.2 page 25.

when examining production processes. The evidence on production time would have shown that Bisalloy's production process took significantly longer than the production process of importers although there are some variances between producers. This is directly relevant to the ability to service the mining repair and maintenance market.

(c) REP 234 contains no analysis addressing whether or not Bisalloy produced goods which can meet this repair and maintenance demand either directly or through its "value add" distribution network.[55] On this point, a key characteristic of repair and maintenance market requirements is the ability to produce product to specification quickly to minimise any loss of productive use of the relevant equipment. Given the differences identified in the slower Bisalloy production process, it does not seem feasible that Bisalloy could produce goods for repair and maintenance supply requirements. Submissions were before the Commission which addressed this issue, including the Submission of MMAL, which REP 234 fails to reference but which stated:

... in an industry where often Q&T steel plate is required quickly (particularly as the cycle shifts to repair and maintenance) Bisalloy's inability to supply certain Q&T steel plate any earlier than 12 weeks from order is a significant negative factor.[56]

Conditions of competition

5.7 The Commission found that the "conditions of competition between imported products and between imported and domestically produced Q&T steel plate are similar".[57] However, submissions showed that the imported and domestically produced Q&T steel plate have evident quality and technical differences, undergo different production methods, are used for different purposes by different end-users and compete in separate markets. The discussion above concerns the specific commercial repair and maintenance market for the mining and resource industry, which Bisalloy was unable to demonstrate it services. For example:

(a) End-users submitted that the distinction in quality affected their purchasing decisions.[58]

(b) MMAL stated that it "will not consider buying Q&T steel plate from Bisalloy unless and until the tests it intends to carry out establish that its Q&T steel plate is at least equivalent in quality to the Q&T steel plate provided by JFE and SSAB".[59]

(c) Total Steel submitted that "as the Commission is fully aware, the majority of JFE product never enters the separate Australian distributor market serviced by Bisalloy" because the majority of JFE Q&T steel plate sales in Australia are "not sold by the Australian importers in the same condition in which the product is imported".[60]

(d) Japanese mills submitted that the Commission had failed to recognise the different considerations for supplying product for repair and maintenance compared to other suppliers. As a result of the mining downturn and associated declining demand, Q&T steel plate is now driven by repair and maintenance requirements "with respect to operational machinery and infrastructure in old or ongoing projects".[61]

[55] REP 234 section 3.7.2 page 25.
[56] MMAL Submission Public Record document 087 page 11, paragraph 4.30.
[57] REP 234 section 8.3 page 56.
[58] See MMAL Submission Public Record document 087 page 6, paragraph 3.4.
[59] MMAL Submission Public Record document 087 page 7, paragraph 3.11.
[60] Total Steel Submission Public Record document 089 page 3.
[61] Japanese Mills Submission Public Record document 086 page 2.

Price undercutting

5.8 As noted by the Commission, "[p]rice undercutting occurs when imported product is sold at a price below that of the Australian manufactured product."[62] 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".[63] Confusingly, Total Steel also notes that REP 234 in section 1.8.6 page 9 does not list price undercutting as causing the Australian industry to suffer material injury as a result of dumped imports.

5.9 The difficulties in the Commission's analysis of price undercutting include:

(a) The Commission's price undercutting approach suggests erroneously that the dumping margin itself shows that in an economic sense, the exporter was able to undercut prices. REP 234 in section 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.[64] 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. 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.

(b) The Commission's assessment of the inconsistent nature of price undercutting conflicts with the Commission's conclusion that price undercutting caused material injury. The Commission's view is that there is evidence that Q&T steel plate exported to Australia from Finland, Japan and Sweden during the dumping period was dumped with significant dumping margins which support that the Commission assessed that dumping occurred consistently over this period.[65] However, the Commission also determined that "price undercutting could not consistently be demonstrated for every grade, customer, month and level of trade for each importer analysed".[66] REP 234 fails to rationalise how, if price undercutting did not occur consistently over the period but dumping was found to have consistently occurred, price undercutting could be found to cause material injury. The conclusion that there was "sufficient evidence" from the price undercutting analysis to find that dumping occurred resulting in a "competitive benefit to importers" is illogical.[67] The Commission's analysis showed no consistency in price undercutting and hence no correlation between dumping and prices offered by Bisalloy. If dumping is always there at high margins, but often with no undercutting, a causal link to material injury is not established.

(c) The Commission failed to distinguish injury caused from a transitioning market to injury caused from any price undercutting. The Commission's analysis of price undercutting has not taken into consideration that "a market in transition from a period of peak demand to a new landscape of limited demand volume and narrowed

[62] REP 234 section 8.5.2 page 59.
[63] REP 234 section 8.5.2 page 61.
[64] REP 234 paragraph 8.5.1 pages 58-59.
[65] REP 234 section 6.1 page 35.
[66] REP 234 section 8.5.2 page 61.
[67] REP 234 section 8.5.2 page 61.

sources of demand naturally limits or inhibits the increase of prices during the period in which the market is transitioning."[68]

(d) If imports can truly undercut domestic prices then Bisalloy volumes should decrease. Yet the Commission concluded that there is no material injury caused through dumping by way of volume effects.

(e) 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 supports the view 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, 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. The only other hypothetical commercial reason why the undercutting might not have been effective even where Bisalloy keeps to higher prices, would be if there was an ill-informed market. This cannot be presumed to be the case with such specialty products and sophisticated and large scale customers.

5.10 The Commission stated in REP 234 that there is currently insufficient evidence to conclude that "volume injury suffered by Bisalloy as a result of dumping is material and greater than that likely to have occurred in the normal ebb and flow of business in a contracting market".[69] The Commission confirmed that the importation of completed and partially completed products would have affected Bisalloy's sales volumes and that "Bisalloy's volume injury was not caused by dumping".[70] Total Steel agrees with these findings. However, given these findings, the Commission's conclusion that dumping caused material injury to Bisalloy is illogical.

5.11 The Commission 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. As a matter of logic, if loss of volume was natural, then 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 Commission's undercutting analysis is it does not explain why, if prices can so readily be undercut, this does not cause a loss of volume to Australian industry?

5.12 The Commission's conclusions make no commercial sense for other reasons. If the Commission properly concluded that the applicant did not lose volume because of dumped imports, either the goods do have strong elasticity of demand or they do not:

(a) If the goods do not have strong elasticity of demand, particularly because of the need to have some relationship between supplier and importer, such as Total Steel with regard to a repair and maintenance business, then the claimed causal injury from price undercutting could not exist.

(b) If the goods have strong elasticity of demand, then 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. Furthermore, 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.

[68] Japanese Mills Submission Public Record document 086 page 4.
[69] REP 234 section 8.8.2 page 58.
[70] REP 234 section 8.8.4 page 72.

5.13 Finally, with respect to JFE exports, as explained above, the Commission erred in finding price injury was caused by price undercutting by JFE exports because, apart from a small volume, most of JFE's exports do not enter the general distributor market serviced by Bisalloy,[71] are not sold in the same form in which they are imported, and are sold at different market levels. This limitation is not addressed in the price undercutting analysis contained in REP 234.[72]

Price suppression and depression

5.14 Following on from price undercutting, the Commission's conclusion that price suppression and price depression has occurred does not take into consideration other relevant factors that contributed to injury to Bisalloy including, but not limited to, volume injury suffered "in the normal ebb and flow of business in a contracting market".[73]

5.15 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.[74] 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. If the undercutting analysis found no correlation between dumping and prices, with large fluctuations between negative and positive undercutting, it is simply not reasonable for the Commission to conclude that the Australian 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.

5.16 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 cost to make and sell (***CTMS***). The Commission concluded that without dumping, Bisalloy 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. 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 certainly the case where the Commission was aware that key traders had overstocked inventories.

Insufficient analysis of known factors other than dumping

5.17 The Commission has failed to appropriately take note of other factors which were likely to cause material injury and ensure that injury caused by such factors is not wrongly attributed to goods asserted to be dumped. These include the factors listed below.

5.18 Bisalloy has acknowledged that "in the year ending September 2013, the Australian market for Q&T steel plate declined substantially due to a downturn in mining activity and that approximately 70 per cent of its Q&T steel plate is used in resource related activities".[75] It is evident that to a significant extent, Bisalloy's business has been affected by the mining downturn. The Commission confirmed that a "contraction in demand and changed pattern of consumption has occurred in the Australian market for Q&T steel plate and this has caused

[71] Total Steel Public Record document 089 pages 2-3.
[72] REP 234 section 8.5.2 pages 59-62.
[73] REP 234 section 8.8.2 page 58.
[74] REP 234 section 8.5.4 page 62.
[75] REP 234 section 8.8.2 page 67.

material injury to Bisalloy's domestic sales volumes".[76] The Commission further acknowledged in REP 234 that "reduced demand has flow on effects to other injury factors claimed by Bisalloy, such as:

(a) reduced capacity utilisation due to reduced sales volumes. The lower throughput of goods is likely to have contributed to higher CTMS;

(b) increased stock levels of inventory based on reduced demand;

(c) increased price competition due to the market's reaction in demand; and

(d) reduced profitability and revenue from reduced sales volumes."[77]

Despite this assessment of the evidence, the Commission has not adequately isolated the level of injury caused by these factors from the level of injury caused by any dumping, leading to a flawed determination as to material injury.

5.19 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 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.[78]

5.20 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 actual movements and not consider price suppression as a result as occurs in relation to the price analysis at the domestic level.[79]

5.21 The Commission also has not adequately considered and analysed the impact of the reduced demand for Q&T steel plate globally. For example:

(a) MMAL submitted that "decreases in prices in Q&T steel plate exported to Australia is evidence of world-wide decline in demand for Q&T steel plate rather than evidence of dumping".[80]

(b) The Japanese Mills submission illustrated that "the significant decline in demand, and the indicia of 'injury' that is complained of by the applicant, is consistent with demand pressures" experienced by Q&T steel plate producers globally.[81]

(c) MMAL noted that "capital expenditure on mining projects declined from USD 110 billion to USD 85-90 billion from 2012 to 2014".[82]

(d) The Australian Bureau of Resources and Energy Economics Report 2014 stated that "the current state of commodity markets is not supportive of further investment in resources and energy projects".[83]

5.22 The Commission has not considered the scale and impact of the "structural changes in the market"[84] both in Australia and globally when analysing causation. Nor has it considered that the current Australian market is in a state of "transition", and that this transition occurred

[76] REP 234 section 8.8.2 page 70.
[77] REP 234 section 8.8.2 pages 70-71.
[78] REP 234 section 8.8.3 page 72
[79] REP 234 section 8.8.5 page 73.
[80] MMAL Submission Public Record document 087 page 10, paragraph 4.17.
[81] Japanese Mills Submission Public Record document 086 page 1.
[82] MMAL Submission Public Record document 087 page 11, paragraph 4.28.
[83] As cited in Japanese Mills Submission Public Record document 086 page 2.
[84] Japanese Mills Submission Public Record document 086 page 4.

throughout the period of investigation.[85] The above points support that the Commission has not adequately addressed these factors in its assessment in REP 234,[86] and has therefore erred in its deduction that material injury has been caused from any dumping.

5.23 It is not clear exactly what injury and pricing data the Commission considered. However, its approach may have been 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. The Commission noted that in conducting the price undercutting analysis it compared free into store (***FIS***) prices sold by importers and Bisalloy weighted average FIS prices.[87] 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. 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.

5.24 It would have been 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.[88] The Commission also noted the Chairman's address for the Bisalloy Steel Group in 2013 where it was 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".[89] To find that there was excess stock which partly caused volume injury which was not caused by dumped products, but to then not conclude that lower prices were also in large part caused by clearing of excess stock, is illogical and not preferred given the evidence of the Bisalloy Chairman.

5.25 The natural conclusion is 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, Total Steel's general business model cannot cause injury to Bisalloy.

5.26 The Commission's pricing conclusion is also inconsistent with its finding (at page 69 of REP 234) 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.

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[85] Japanese Mills Submission Public Record document 086 page 3.
[86] See REP 234 section 8.8.2 pages 67-71.
[87] REP 234 section 8.5.2 page 59.
[88] REP 234 section 8.8.2 page 70.
[89] REP 234 section 8.8.2 page 68.

5.27 For the reasons explained above, the preferable decision is that any injury sustained by the Australian industry was not caused by dumping.

6. Ground 6: Errors in assessing whether JFE TMCP steel plate is included as goods under consideration

6.1 The Commission made errors in assessing whether JFE TMCP steel plate is included as goods under consideration because the Commission appears to have taken an inconsistent approach in assessing the JFE goods compared to other exporters.

6.2 For the purpose of the investigation, the Commission defined TMCP steel plate:

as that 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. The desired mechanical properties of the plate are achieved through the combination of alloying chemistry and rolling processes.[90]

6.3 The Commission found that TMCP steel plate:

(a) was not manufactured by the Australian industry;[91] and

(b) "as sold by cooperating exporters"[92] (of which JFE was one), did not constitute the goods under consideration for the investigation and are not like goods and asserted that the Commission did not include TMCP steel plate in the Commission's dumping margin calculations.[93]

6.4 Given the Commission's findings on TMCP steel plate described above, the Commission's approach to JFE produced TMCP steel plate and other comments on TMCP do not make sense. As a starting point, it is unclear from REP 234 whether TMCP produced by JFE falls within the scope of goods identified for the investigation. Total Steel understands based on footnote 10 that product that JFE identified as TMCP was:

(a) assessed by the Commission as a form of direct quenching and tempering; and

(b) assessed by the Commission to be Q&T steel plate and included as the goods under consideration.[94]

Total Steel's comments below assume this to be the Commission's intended meaning.

6.5 In contrast to the treatment of JFE TMCP steel plate, while it is again unclear, footnote 10 seems to imply that Ruukki produced steel plate which was also produced using direct quenching and was recognised by the Commission as special form of TMCP (and therefore was not included within the scope of goods). The Commission does not indicate that Ruukki's direct quenching was also seen as sufficiently like the goods under consideration. The Commission does not suggest that direct tempering noted in respect of JFE's TMCP was a distinguishing feature. The language used in footnote 10 is inconsistent with the Commission's finding stated above that "the Commission is satisfied that ...TMCP steel plate (as sold by cooperating exporters) are not the goods...".[95]

[90] REP 234 section 3.6 page 18.
[91] REP 234 section 3.6 page 21.
[92] REP 234 section 3.6 page 21.
[93] REP 234 section 3.6, page 21.
[94] REP 234 footnote 10, page 18.
[95] REP 234 section 3.6 page 21.

6.6 Footnote 10 suggests that Ruukki's TMCP was in fact excluded from being "the goods", even though the footnote refers to Ruukki's process also being direct quenching and as a special case of TMCP. If that is so and Ruukki's process also used direct quenching, why was Ruukki's TMCP excluded, but JFE's included? REP 234 does not answer this question.

6.7 REP 234 does not adequately address whether the Commission in its treatment of TMCP steel plate:

(a) acted consistently in identifying TMCP steel plate;

(b) applied a consistent approach towards JFE and other cooperating exporters as it said it had; and

(c) sought to obtain sufficient evidence to satisfy itself of the manufacturing process for what JFE called TMCP.

6.8 A possible explanation for the Commission's approach is that the Commission has taken an erroneously limited view of JFE's TMCP process. Total Steel understands that the Commission was advised that JFE's TMCP steel plate was produced at the Fukiyama works and was invited to make a site visit to that facility. The Commission did not do so.

6.9 On the material that was before the Commission, there is no justification for:

(a) differentiating between TMCP processes; and

(b) treating differently exporters who both use direct quenching.

6.10 Such a differential process impacts:

(a) upon the normal values determined for each exporter;

(b) dumping margins applied to each exporter; and

(c) the exporters' competitive relationship after application of a dumping duty.

6.11 Such a differential process also 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 Commission's decision to cumulate in assessing material injury was itself flawed by reason of a failure to give sufficient consideration to the differing attributes of all TMCP product.

Concluding comments

Thank you for considering Total Steel's application. Total Steel would be pleased to respond to any queries that the Review Panel may have.