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Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

Mr Scott Ellis
Panel Member, Anti-Dumping Review Panel
c/o- ADRP Secretariat

By e-mail: ADRP@industry.gov.au

Dear Mr Ellis

Alloy round bar exported from the People's Republic of China

I write with regard to the notice under section 269ZZI of the *Customs Act 1901* (the Act) published on 26 April 2019, advising of your intention to review the decision of the Minister for Industry, Science and Technology (the Minister) to publish a notice under section 269TL(1) of the Act (the Reviewable Decision). The notice was published on the website of the Anti-Dumping Commission (the Commission) on 18 March 2019, as Anti-Dumping Notice No. 2019/17.

I understand that the Commission has provided you with the information that was requested of me in your correspondence of 26 April 2019, that is:

1. confidential attachments to the Statement of Essential Facts (SEF) relevant to the grounds of the review application;
2. submissions to the Commission, commenting on the SEF including confidential attachments relevant to the grounds of the application for review;
3. confidential attachments to the Final Report; and
4. any other relevant information (as defined in section 269ZZK(6) of the Act) pertinent to the grounds of review.

I have considered the application submitted by OneSteel Manufacturing Pty Ltd for a review of the Reviewable Decision and make submissions, pursuant to section 269ZZJ(aa) of the Act, in response. Please find my submissions enclosed as **Attachment A**.

The Commission remains at your disposal to assist you in this matter, and would be happy to participate in a conference if you consider it appropriate to do so.

Yours sincerely

Dale Seymour
Commissioner
Anti-Dumping Commission

24 May 2019

Attachment A

Background

1. On 15 November 2016, OneSteel Manufacturing Pty Ltd (OneSteel) lodged an application under section 269TB(1) of the *Customs Act 1901* (the Act)[1] for the publication of a dumping duty notice in respect of alloy round bar that has been imported into Australia from the People's Republic of China (the goods).[2]

2. The Commissioner of the Anti-Dumping Commission (the Commissioner) subsequently initiated an investigation on 10 January 2017.[3]

3. On 27 October 2017, the Commissioner terminated the investigation in so far as it related to Jiangsu Yonggang Group Co Ltd.[4] The Commissioner then terminated the remainder of the investigation on 25 January 2018.[5] This termination was made on the basis that any injury suffered by Australian industry due to dumped goods was negligible, pursuant to section 269TDA(13).

4. Following an application for review by OneSteel, the Anti-Dumping Review Panel (the ADRP) revoked the termination decision dated 25 January 2018.[6]

5. The investigation into the goods by the Commission was then resumed (the resumed investigation) on 2 May 2018.[7]

6. On 18 March 2019, the Anti-Dumping Commission (the Commission) published a noticed signed by the Minister for Industry, Science and Technology (the Minister) in which she decided not to declare the goods, or like goods, to be goods to which section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies (the Reviewable Decision).[8] This notice was published pursuant to section 269TL(1).

7. In the Reviewable Decision, the Minister stated that she made the Reviewable Decision following consideration, and acceptance of, recommendations made by the Commissioner on 6 February 2019, as set out in *Anti-Dumping Commission Report No. 384a* (REP 384a).[9] This report outlined the Commissioner's investigations, material findings of fact and law on which his recommendations were based and evidence relied upon to support those findings.

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[1] All legislative references in this submission are to the *Customs Act 1901* unless otherwise indicated.

[2] OneSteel's non-confidential application is available on the electronic public record (EPR) for case 384 (document 1), available on the Commission website.

[3] Document 3 on EPR 384 refers.

[4] Document 48 on EPR 384, Anti-Dumping Notice (ADN) No. 2017/152 refers.

[5] Document 62 on EPR 384, ADN No. 2018/17 refers.

[6] ADRP Decision No. 75, *Alloy Round Bar exported from the People's Republic of China*. The revocation decision was published on 27 April 2018.

[7] Document 63 on EPR 384, ADN No. 2018/73 refers.

[8] Document 80 on EPR 384, ADN No. 2019/17 refers.

[9] Document 81 on EPR 384 refers.

8. OneSteel applied for review of the Reviewable Decision by the ADRP On 17 April 2019.[10] The Commission understands that this application was made pursuant to section 269ZZ(1)(b).

Ground 1: Application of section 269TDA(13)

9. In its application, OneSteel submitted that the Minister's Reviewable Decision, and the Commissioner's recommendation upon which it was based, was not authorised by the Act because there was no requirement for the Commissioner to provide a report to the Minister. OneSteel explained that, because the Commissioner was satisfied that any injury that has been or may be suffered by the Australian industry was negligible, he was obliged to terminate the investigation into the goods, pursuant to section 269TDA(13).[11]

10. OneSteel continued that the Commissioner's failure to comply with this obligation resulted in OneSteel being denied its right to make an application for review to the ADRP pursuant to section 269ZZN.[12]

Termination pursuant to section 269TDA(13)

11. The Commissioner disagrees with OneSteel's arguments.

12. Section 269TDA(13) provides that where an application is made for a dumping duty notice and, if during the course of the investigation relating to that application, the Commissioner is satisfied that any injury to Australian industry caused by the exported goods has been or may be negligible, the Commissioner must terminate the investigation as far as it relates to that country.

13. In this case, the Commissioner did not reach the state of satisfaction required by section 269TDA(13), and gave no indication that he had.

14. OneSteel refers to REP 384a in which the Commissioner stated he was 'not satisfied that material injury, is being caused, or is threatened, to the Australian industry producing like goods due to the dumped goods'.[13] The Commissioner notes that REP 384a made clear the distinction between his findings concerning the investigation period and regarding the prospects of future injury.[14] In any event, the Commissioner submits that this statement does not amount to a statement that he was satisfied any injury was *negligible*, as required by section 269TDA(13).[15]

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[10] OneSteel's application is available on the ADRP website.

[11] OneSteel application to the ADRP, Part C, question 9, paragraph 1.

[12] Ibid, Appendix B, paragraph 3.

[13] Ibid, Appendix B, paragraph 1.

[14] REP 384a, page 91 refers.

[15] *Guardian Industries Corp Ltd v Attorney-General* [2013] FCA 780, [79] (Jagot J) ('*Guardian Industries'*).

Consequence of any breach of section 269TDA(13)

15. In the alternative, the Commissioner submits that if a breach of section 269TDA(13) did occur, it was not the legislative purpose of the Act that such a breach would have the consequence of invalidating all subsequent actions taken, including his recommendations to the Minister and the Reviewable Decision made by the Minister.[16]

16. This view is consistent with *Guardian Industries.* In that case, Justice Jagot found that the failure of the Chief Executive Officer (CEO) to discharge their duty associated with section 269TDA(13) did not have the consequence of invalidating subsequent steps taken under the Act and that the legislative scheme disclosed a contrary purpose.[17]

17. Referring to *Project Blue Sky*, Justice Jagot considered the following factors in coming to this conclusion:[18]

    a) the mandatory language of section 269TDA(13) is relevant, but not determinative,[19]

    b) the subject matter of the duty in section 269TDA(13) is highly evaluative and may be analysed in a multiplicity of ways which may lead to conflicting results,[20]

    c) it is not the case that a dumping duty notice and investigation by the CEO was the only path to the publication of a duty notice. Further, the Minister's power to publish a duty notice was not pre-conditioned on an investigation or recommendations by the CEO,[21]

    d) terminating an investigation remains an interim step and the Minister's power to publish a duty notice is not pre-conditioned on the CEO having complied with all of the CEO's duties,[22]

    e) any decision of the Minister to publish or not publish a dumping duty notice was itself reviewable by the [then] Trade Measures Review Officer (TMRO),[23] and

    f) a person in Guardian Industries' position had the opportunity to apply for a review of the dumping duty notice, consistent with section 269ZA(2).[24]

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[16] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, [91] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

[17] *Guardian Industries* [74] (Jagot J). At the time of the decision, the conduct of anti-dumping investigations and the provision of recommendations to the Minister was a function undertaken by the CEO of Customs.

[18] Ibid [71].

[19] Ibid [75] .

[20] Ibid [76].

[21] Ibid [77].

[22] Ibid [78].

[23] Ibid [80]. At the time of the decision, the review function was undertaken by the TMRO.

[24] Ibid [81]. The Commission considers that this factor is unlikely to assist the ADRP in this case.

18. Justice Jagot further commented that she did not accept the fact that the Minister and TMRO relied on the CEO's report as the foundation for their decisions resulted in their decisions being infected by the CEO's breach.[25] Justice Jagot explained that the TMRO and Minister were not subject to the duty provided for in section 269TDA(13) and their reliance did not have any consequences otherwise for the validity of their decisions.[26]

19. The Commissioner also considers that any breach of section 269TDA(13) did not deprive Onesteel of its substantive review rights. Although OneSteel may have been denied the opportunity to seek a review by the ADRP under section 269ZNN, OneSteel was provided opportunity to seek a review under section 269ZZA. Accordingly, any denial would be technical in nature.

Ground 2: Correct or preferable interpretation of section 269TL(1)

20. In its application, OneSteel submitted that the Reviewable Decision, and the Commissioner's recommendation upon which it was based, was also not authorised by the Act because section 269TL(1) does not authorise the Minister to make a declaration that purported to apply to all of the goods subject to the application.[27] OneSteel stated that the Minister's power under section 269TL(1) was limited to specifying particular goods that fall within the class of goods described as the goods subject to the application.[28]

21. OneSteel explained that it appeared the Commissioner took the view that section 269TL(1) provided an alternative mechanism for determining whether a dumping duty notice should apply to the goods subject of the application and the fulfilment of this purpose was achieved by section 269TDA.[29]

22. The Commissioner disagrees with OneSteel's interpretation of section 269TL(1). The Commissioner considers that an interpretation of that section which would best achieve the purpose of the Act is one that does not prevent the Minister in making a declaration with respect to all of the goods subject of the investigation.[30]

23. Section 269TL(1), amongst other things, requires the Minister to give public notice of any decision to not declare that section 8 of the Dumping Duty Act applies to 'particular goods, or goods of a like kind to particular goods' following a recommendation from the Commissioner with respect to the imposition of duty on those goods.

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[25] Ibid [83].

[26] Ibid [83].

[27] OneSteel's application to the ADRP, Part C, question 9, paragraph 2.

[28] Ibid.

[29] Ibid, Appendix B, paragraph 6.

[30] See *Acts Interpretation Act 1901* (Cth), section 15AA.

24. Statutory interpretation requires the Commissioner to give the 'primary and natural significance' of legislative provisions unless there is sufficient indication of another meaning.[31] A phrase or word in a provision may be given a narrower meaning if the plain English meaning would produce a result which was incongruous,[32] contrary to the objects,[33] or capricious and irrational.[34] The High Court has also stated that it is always less difficult to show that a word has a wider meaning than it is to establish a specialised use.[35]

25. 'Particular' is defined in the dictionary as meaning 'relating to some one person, thing, group, class; occasional, etc. rather than to others or all; special, not general'.[36] The Commissioner considers that this meaning requires the Minister to nominate a certain class of goods for the purposes of section 269TL(1) but does not prevent her from nominating *all* of the goods that were the subject ot the investigation.

26. The Commissioner considers this is the preferable interpretation of section 269TL(1) because to artificially narrow the meaning in the way suggested by OneSteel is inconsistent with the usage of the term 'particular goods' in the Act.

27. Principles of statutory interpretation require that the same meaning is given to the same words appearing in different parts of a statute unless there is a reason to do so otherwise.[37]

28. For the purposes of this case, the Commisisoner draws the ADRP's attention to the use of the term 'particular goods' in section 269TG(3). A narrow interpretation of 'particular goods' in this section would result in the Minister being prevented from stating the variable factors for all of the goods subject of the investigation under section 269TG(1) or to all 'like goods in relation to goods of a particular kind' under section 269TG(2) in the relevant notice. The Commissioner considers this would lead to a manifestly absurd or unreasonable result[38] because the Commissioner is required to calculate a single dumping margin, and therefore single variable factors, for particular exports in respect of the goods subject of the investigation and like goods.[39] A similar result would also occur if a narrow interpretation of 'particular goods' was taken with repsect to sections 269T(1) as it relates to *affected party*, 269T(4D) and 269TAACA.

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[31] *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629, 647 to 648 (Dixon J).

[32] *Cooper Brooks (Wollongong Pty Ltd v Federal Commission of Taxation* (1981) 35 ALR 151, 157 (Gibbs CJ).

[33] Ibid 161-162 (Stephen J).

[34] Ibid 170 (Mason and Wilcox JJ).

[35] *Herbert Adams Pty Ltd v Federal Commissioner for Taxation* (1932) 47 CLR 222 at 228-9 (Dixon J).

[36] *Macquarie Dictionary* (Macquarie Dictionary Publishes, 7th ed, 2017).

[37] *Registrar of Titles* (WA) v Franzon (1975 7 ALR 383, 387 (Mason J).

[38] See *Acts Interpretation Act 1901* (Cth), section 15AB(1)(b).

[39] *Panasia Aluminium (China) Limited v Attorney-General* [2013] FCA 780, [152] (Nicholas J).

29. In addition, the Minister would be prevented from reflecting the exercise of her discretion to not impose measures through the publication of a notice if a narrow reading of section 269TL(1) was taken. The only action open to the Minister to exercise her discretion would have been to simply not issue a public notice under section 269TG(2) or otherwise. This approach would result in no right of review to the ADRP by interested parties.[40] The Commissioner considers that this result would be incongruous with accountable and transparent administrative decision-making and such an intention is not discernible within the statutory scheme.

30. Contrary to the claims made by OneSteel, section 269TDA does not fulfil this purpose.

31. In this case, the Commissioner was satisfied that material injury had been caused to the Australian industry in the investigation period but recommended the Minister exercise her discretion to not impose measures, in accordance with section 269TG(2). Section 269TDA does not provide for the exercise of the Minister's powers or discretion in any other way.

32. For these reasons, the Commissioner submits that the primary and natural interpretation of section 269TL(1), which best achieves the purpose of the Act, permits the Minister to nominate either a subset of the goods subject to the investigation or all of those goods as the 'particular goods' for the purposes of that section.

Ground 3: Insufficient evidence to support determination of no injury / no threat of injury

33. For the purposes of determining whether or not material injury is threatened to an Australian industry because of the exportation of goods into Australia, section 269TAE(2B) require the Minister to take into account only such changes in circumstances as would make that injury foreseeable and imminent unless measures were imposed.

34. In undertaking this task, the Commissioner considers that it is useful to draw a distinction between:

    a) 'future' injury, which is injury reasonably predicted to continue if current injury is established; and

    b) the *threat* of injury, which is an assessment of foreseeable and imminent injury in circumstances where material injury is not yet evident.[41]

[40] *Customs Act 1901* (Cth), section 269ZZA.

[41] See TMRO decision on *Linear Low Density Polyethylene from Canada, Korea and the USA* (2 May 2011), paragraph 81.

35. OneSteel notes correctly that a determination of injury (including threat of injury) for the purposes of section 269TG must be based on facts and not merely allegations, conjecture or remote possibilities.[42] The Commissioner notes the need to take special care when making a determination on the threat of injury, and that

> "a determination of threat of material injury is thus subject to stringent tests. A totality of factors must lead to the conclusion that dumped exports are imminent, and that, unless action is taken, material injury would occur."[43]

36. In this case, the Commissioner submits that there was insufficient positive evidence upon which to make a finding that material injury to Australian industry was foreseeable and imminent unless measures were imposed.

37. The Commissioner found that the Australian industry suffered material injury caused by dumping during the investigation period.[44] However, the substantial change in circumstances in the Australian market means that those findings do not support the publication of a notice under section 269TG(2). As set out in chapter 9.6 of REP 384a, the Commissioner concluded that there was *insufficient* evidence (based on the facts available) to support a recommendation to impose anti-dumping measures.

38. OneSteel's evidence was relied on by the Commissioner to conclude that OneSteel had largely ceased to supply Donhad Pty Ltd (Donhad) with alloy round bar of any kind. Further, OneSteel's evidence demonstrated a substantial decline in the toll rolling of grinding grades of alloy round bar by Commonwealth Steel Company Pty Ltd trading as Moly-Cop (Moly-Cop) for OneSteel after November 2017, though the toll rolling of other (i.e. non-grinding) grades had continued at similar levels.[45] The Commissioner's view is that OneSteel's evidence does not show that OneSteel is capable of producing *grinding grades* of alloy round bar using its own rolling mills. These findings were set out in REP 384a at chapter 9.6.

39. With respect to paragraph 12 of OneSteel's application to the ADRP, the Commissioner notes that Donhad's prior purchases of alloy round bar from OneSteel were for grinding grades of bar derived from *OneSteel-produced billet* that was then toll rolled by Moly-Cop. Donhad's trialling process relates to grinding grades of bar derived from *Moly-Cop-produced billet* that is then also rolled by Moly-Cop (i.e. with no tolling arrangement necessary). The Commissioner's understanding is that the trial relates to ensuring the correct steel chemistry to achieve Donhad's desired performance outcomes (and which was the subject of an earlier dispute between Donhad and OneSteel due to quality concerns).

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[42] Section 269TAE(2AA) refers.

[43] Chapter 9.7.1 of REP 384a refers. The language is identical to that used in Chapter 4 of the *Dumping & Subsidy Manual*, page 23, which is derived from Articles 3.4, 3.7 and 3.8 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the Anti-Dumping Agreement).

[44] As was acknowledged in chapter 8 of REP 384a.

[45] *Confidential Attachment 3* to document 72 on the EPR refers.

40. The Commissioner notes OneSteel's preferred outcome (i.e. that the Minister ought to impose measures anyway and allow interested parties to seek a later revocation of those measures). The Commissioner considers that there was insufficient evidence before him to conclude that material injury to the Australian industry was threatened because of dumped alloy round bar, and therefore it would not be open to the Minister to impose the measures sought.

Ground 4: REP 384a does not adequately consider threat of injury in sectors other than grinding bar

41. Contrary to OneSteel's application to the ADRP, the Commission did not ignore the non-grinding sectors of the market in its analysis. Chapter 9.7.1 of REP 384a shows that the Commission undertook an analysis of relevant features of that part of the market for the purpose of assessing the threat of material injury.

42. Further, the Commissioner notes that the actual injury experienced in the non-grinding sectors of the market was negligible *even when the Australian industry only included OneSteel and Milltech*. In the absence of a sharp increase in import volumes or a sudden switch towards that part of the market (i.e. away from grinding grades of alloy round bar), neither of which occurred (as demonstrated by OneSteel's evidence and the Commission's analysis)[46], the Commissioner does not consider there was any sufficient basis on which to find the existence of a threat of material injury in this part of the market.

43. In chapter 9.7 of REP 384a the Commission observed that Moly-Cop claimed that the prices between those parties are set by reference to global indices and were inclusive of a margin. These comments were made in response to OneSteel's submission that:

> "[a]s a large proportion of the alloy round bar market transitions to work in progress for the grinding media market, the effect of this is to increase the materiality of the injury suffered by both OneSteel and Milltech in the other alloy round bar segments, i.e. the engineering, spring and strata bar markets."

44. The Commissioner went on to observe that "integrated steel manufacturers in Australia make sales to related party entities and, provided these sales can be comparably benchmarked to their sales to unrelated party entities, the Commission generally treats these transactions as sales that enter the relevant market." The Commissioner notes that OneSteel also makes sales to related party entities in a range of other product categories, and that the Commissioner has treated these sales as "entering the market" for the purpose of those investigations. There was no evidence before the Commissioner which would suggest that sales between Moly-Cop and Donhad were not on an arms length basis, and in the absence of such evidence the Commissioner is unclear why the sales between Moly-Cop and Donhad ought to be treated differently.

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[46] Respectively, *Confidential Attachment 3* to document 72 on the EPR and *Confidential Attachment 13* to REP 384a refer.

45. Whether the transactions between Moly-Cop and Donhad are arms length or not is largely irrelevant to the issue examined in chapter 9 of REP 384a, which relates to the materiality of injury being experienced by the Australian industry producing like goods. Given the Commissioner's earlier position on the treatment of captive production in defining the scope of the Australian industry *producing* like goods (chapters 4 and 5 of REP 384a refer), even non-arms length transactions between those parties are relevant to considering the materiality of the injury experienced.

46. Finally, to be clear, the Commissioner does not consider the sales between Moly-Cop and Donhad to have been "captive production" or "work in progress", as appears to have been contended by OneSteel.