

Non-Confidential

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By Email

**Mr Dale Seymour
Anti-Dumping Commissioner
Anti-Dumping Commission
55 Collins Street
Melbourne VIC 3000**

Dear Commissioner

RE: Dumping and Subsidy Investigation – Exports of Certain Railway Wheels from the People’s Republic of China – Preliminary Affirmative Determination

Thank you for your 11 July 2018 letter in response to my letter of 2 July 2018.

I apologise for the incorrect email address mentioned in my letter. I note that your contact details are not include in the Anti-Dumping Commission’s website or even on your letter to me. It is unclear to me why you are reluctant to disclose your contact details, whereas personnel in the Commission have no such problem. It obviously would be helpful if your contact details could be provided on the Anti-Dumping Commission’s website and your correspondence just as mine are on my correspondence.

In your letter to me you state that:

“As set out in Anti-Dumping Notice (ADN) No.2018/99, I was satisfied that there appeared to be sufficient grounds for the publication of a dumping duty notice in relation to the railway wheels exported to Australia from China and France. The reasons for my satisfaction are set out in that notice. Having made the PAD, I was satisfied that it was necessary to require and take securities under section 42 of the Customs Act 1901 to prevent material injury to the Australian industry occurring while the investigation continues.

Please note that the PAD did not involve a finding that the situation in the market of China is such that the price paid or payable for like goods sold in the country of export was not suitable for use in determining a normal value.

For the purposes of the PAD, I considered that Masteel’s records did not reasonably reflect competitive market costs associated with the production or manufacture of like goods. This was based on the Anti-Dumping Commission’s understanding of the Chinese steel industry

based on previous investigations recent analysis of the Chinese steel market undertaken by other jurisdictions.” (underlining added)

As your legal advisors would no doubt have advised, there is considerable legal precedent that in order for a government official to be “*satisfied*” as to any particular matter there are legal and factual requirements that must be met. These are not disclosed in the PAD. Merely stating that you were “*satisfied*” or “*not satisfied*” as to certain matters does not mean that you have met these factual and legal requirements and nothing in the PAD suggests that you have.

Rather, the PAD evidences that you have not met these factual and legal requirements. Sections 7.2 and 7.3 of the PAD are inconsistent in relation whether there is a “*particular market situation*” in China in relation to the production of steel and/or railway wheels. That is, whether there is a “*particular market situation*” in China in relation to steel production in China and how this is relevant to this investigation. That is, how it applies to the production of railway wheels and, in particular, those produced by Masteel. This not explained in the PAD.

As has been disclosed by Masteel, it produces steel internally for its own requirements, including the manufacture of railway wheels. It does not purchase steel billets or any other steel in China for the production of railway wheels. It sources its inputs to manufacture steel primarily from overseas markets including Australia for its own manufacturing processes. This was disclosed in its response to the exporter questionnaire and is apparent from its website. Do “*particular market situations*” exist in these overseas markets, including Australia, and, if so, please provide details.

Your letter refers to your view that previous investigations indicate that a “*particular market situation*” exists in the China steel industry. However, there is no analysis or evidence of any factual or legal basis in your letter in this regard or its application to this investigation. It is merely an assumption and speculation with no factual or legal basis, which obviously is of concern.

Accordingly, your statements in your letter to me regarding the Chinese steel industry and the existence of a “*particular market situation*” is irrelevant. This means that your decisions in relation to dumping, injury and causation are based on taking into account irrelevant considerations.

I am satisfied that there is no factual or legal basis for you to be legally or factually “*satisfied*” as to the matters set out in the above extract from your PAD.

Also, you claim that Masteel’s production costs do not reflect “*competitive market costs*”. It is unclear to me what is a “*competitive market cost*”. There is no such thing as a “*competitive market cost*” as there is no “*market*” for “*costs*”. There are only “*markets*” for “*prices*”, which, depending on what is being purchased may be accounted for as a “*cost*” but that is an accounting treatment and has nothing to do with whether the “*price*” is a “*competitive price*” or not.

In this respect, the “*cost*” is the “*price*” for an input to manufacture. As advised, such inputs to manufacture for Masteel’s steel production requirements are principally sourced from overseas, including Australia and that it uses those inputs to manufacture internally to produce steel for its own requirements, including the production of railway wheels. This means that there is no relevant

“market” in China for Masteel’s production of steel and/or railway wheels. If you are of a different view, please provide details of what that “market” is and how it relates to this investigation and to Masteel.

Also, as you would no doubt be aware, a “price” for a product, or for that matter a service, takes into account a variety of factors, including product specifications, quality, delivery, warranties, performance of the product, etc.

You mention that “price” was a key factor in purchasing decisions. You have not provided any details or evidence why “price” was a key factor and why “price” was not related to other factors relevant to the purchasing decision, such as quality of products, delivery of products, etc., as set out above. These would seem to be key factors in a “price” in a purchasing decision and how do they compare to Comsteel’s prices for its railway wheels, including concerns about their performance by mining companies and potential for failures and the economic consequences on the mining companies operations. Has this been investigated by the Commission and, if not, why not?

Your reference to “price” being a key in purchasing decisions would suggest, for example, that the Australian Federal Government in purchasing fighter aircraft, submarines and navy frigates are based solely or primarily on “price” and not on the defence capabilities of the defence equipment being purchased and other relevant defence capabilities, maintenance, etc and such factors are not incorporated in the “price” and are not relevant to Australia’s defence and are not factored into the “price” and are not assessed by the relevant Federal Government Departments.

Would not companies make similar rational commercial decisions as to what is included in the “price” of a product. If not, why would they purchase principally or solely on “price” and what does a “price” represent for a product if not the various characteristics of the products and the terms of their supply to the purchaser? This does not seem to have been taken not account in the PAD and avoids a ‘fair comparison’ between “prices”.

Similarly, when a consumer goes to a shop to buy a product, would his/her purchasing decision be based on purchasing the product at a higher price with lesser quality or at a lower price with a higher quality. If purchasing decisions were made solely or principally on “price”, what would be the point of “product differentiation” and what does a “price” actually represent? What is incorporated in a “price” for a product?

This has not been addressed in the PAD and, presumably, appropriate adjustments would need to be made to reflect differences in the goods under consideration and the domestic like goods and their supply to ensure a fair comparison in pricing. This has not been addressed in the PAD.

Are Comsteel’s railway wheels in any way different in product quality and performance from those of Masteel, including terms and conditions of supply, warranties, insurance, transport costs, performance, etc? It would seem that there has been no recognition of any differences in this regard that would obviously affect “pricing”. Why not?

Graphs displaying differences in “prices” between imported products and domestic products in the Consideration and PAD are meaningless without taking these factors into account. There is no like-for-like comparison. This is a significant deficiency. Consequently, without taking the factors incorporated into account in a “price” of a product, assertions of price undercutting and similar price effects are simply assertions with no commercial factual or legal basis.

Wikipedia has some explanation on “pricing”: <https://en.wikipedia.org/wiki/Price> If you require further information on how products are priced, please let me know.

On injury and the imposition of securities to prevent injury while the investigation continues, you have stated in your letter to me that:

“I do not accept your submission that the imposition of securities is not justified on the basis that any injury that might occur has already occurred, or because price might not be the sole or primary factor upon which tenders are awarded. In my view, the commercial arrangements present in the Australian market for railway wheels do not preclude the prospect of the securities being effective in preventing injury to the Australian industry producing like goods. Also, the available evidence indicated to me that price was a key factor in the purchasing decisions of the iron ore mining companies and, therefore, that securities could be effective in preventing injury to the Australian industry while the investigation continues.” (underlining added)

It is unclear to me what “evidence” that you are referring to in the above statement and I would be grateful for your clarification.

Similarly, the issue of “price” being a key factor in purchasing decisions has been addressed earlier above and, in this context, it is unclear what a “price” represents in a “purchasing decision” when there are a multitude of products in the market being supplied on a variety of terms and conditions. Would you please elaborate on this statement as it is unclear to me?

It also is unclear how a documentary security could prevent any injury from occurring while the investigation continues assuming dumping is causing injury to the domestic industry, which is debatable both as to the existence of dumping, causation and material injury. It also raises the question of what injury would be remedied through the imposition of antidumping measures and how in this investigation. This has not been addressed in the PAD. Why?

Would you please explain how a documentary security could prevent injury occurring to the Australian industry including precisely what injury to the Australian industry is being caused by allegedly dumped imports from China given the commercial arrangements for the supply of railway wheels to the four mining companies in the Pilbara in question and their concerns about problems with railway wheel performance that may affect their operations and consequent adverse economic consequences. This does not seem to have been addressed in the PAD.

In my view there are a number of issues in light of your statement as outlined above and include:

- what are the “commercial arrangements” that you refer to;

- why would those “*commercial arrangements*” not preclude injury from being prevented from the imposition of securities;
- what injury would or could be prevented by the imposition of securities while the investigation continues – what is that “injury” being caused by “dumping”;
- specifically, how does a documentary security prevent injury and what injury it could conceivably prevent caused by dumping assuming dumping to be occurring;
- your reference to the “*prospect*” of injury from being prevented by the imposition of securities demonstrates that you do not know whether the imposition of securities will prevent injury, whatever that injury may be, and absent evidence that the imposition of securities actually will prevent injury, the imposition of securities, as you would no doubt agree, is not lawfully justified.

Why are these details not set out in the PAD?

Grateful for your response on these issues.

Would you please place this memo on the Commission’s public file. Thank you.

Kind regards

A handwritten signature in black ink, appearing to read 'Andrew Percival', with a large, stylized initial 'A' at the start.

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- cc. Senator the Honourable Kim Carr Shadow Assistant Minister for Innovation, Industry Science and Research