

By Email

Mr Mick Kenna
Assistant Director
Investigations 4
Anti-Dumping Commission 55 Collins Street
Melbourne VIC 3000

Dear Mr Kenna

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

As you know, I act for CCCME, amongst others, in relation to this investigation.

I refer to our meeting with representatives of CCCME and Masteel and our discussions on injury. I also refer to Comsteel’s recent submission dated 31 August 2018.

1. Comsteel submission 31 August 2018

This Comsteel submission proceeds on the fallacy that inputs to manufacture are artificially low due to the Government of China influencing the prices of inputs to manufacture, namely steel billets. It would seem that Comsteel has not read information provided to and verified by the Commission that Masteel manufactures steel for its own use from raw materials sourced from overseas including Australia, which also is apparent from its website. It does not purchase steel billets in China to manufacture its products.

It is of concern that Comsteel is making allegations regarding Masteel based on historical findings in past investigations conducted by the Commission without any supporting evidence of the actual circumstances applying in this case. Also of concern is that the Commission accepted the Application and initiated an investigation where the dumping allegations are based solely on simple assertion, unsubstantiated by relevant evidence.

As the Commission is aware and has verified, the major raw materials, such as iron ore and coking coke, are sourced from overseas including Australia as well as from China in varying grades.

Comsteel’s submission on a “*particular market situation*” and its reasoning for alleging dumping, has no basis in fact in this investigation unless the acquisition of raw material by Masteel from entities overseas are not at market prices, and there is no evidence that that is the case.

Previous investigations that address a “*particular market situation*” in China for certain products are irrelevant to this investigation. The facts are different.

I also draw attention to the following statement:

“Any economic system has to have rules and regulations; it has to operate within a legal framework, there are many different such frameworks and each as consequences for distribution as well as growth.” (“The Price of Inequality”, Joseph E Stiglitz, Penguin Books)

In other words, the legal framework established by a government influences how businesses operate without exception and this affects and influences their CTMS and prices. Consequently, a “*particular market situation*” applies to every market because every market is influenced by a government one way or another as well as by third parties, such as unions. There is no such thing as a “*perfect*” market uninfluenced by government intervention in one way or another.

This includes the Australian market in terms of access to raw materials, labour costs, energy costs, etc, and regulation of pricing by the ACCC. Any injury analysis must take into account these economic factors affecting production costs and pricing for the Australian industry and how these economic factors and its monopoly position have artificially inflated its prices rendering it internationally uncompetitive., as is evident from its Application. Failure to undertake such an analysis/assessment means the Commission has not undertaken a fair injury analysis and not discharged its investigative obligations.

Comsteel further suggests that Masteel’s records do not reflect “*competitive market costs*”. I note that the Commissioner in a letter to me dated 11 July 2018 has expressed a similar view.

The Commissioner expressed the following view:

“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 and recent analysis of the Chinese steel market undertaken by other jurisdictions.”

This is illogical. In other words, the Commission’s “*understanding*” was based on prior and other investigations but not on facts and evidence relevant to this investigation. That is, it was mere speculation based on false assumptions that have no basis in fact or evidence.

This a major failure for an investigative authority and gives rise to breach of a number of administrative law principles, such as taking into irrelevant considerations, failure to take into account relevant considerations, making a decision based on no evidence and giving rise to a reasonable suspicion of bias. This calls into question the Commission’s ability to carry out its functions in accordance with the law.

2 Major raw material costs

The product under consideration is made from blank wheel which is produced by Masteel using steel billet made by Masteel from iron ore purchased from suppliers, including from Australia and Brazil. Information regarding raw materials, suppliers and purchases in the IP is provided in confidential spreadsheet 13-Raw Materials Purchase.

To the extent that it sources coking coal in China, these are a variety of grades and thereby at different prices for each grade of coking coal. No evidence has been provided that each such grade of coking coal has not been purchased at market prices. If you are of different view, please provide us with details and evidence supporting such a different view.

Similarly, comparing Masteel's purchase of the various grades of coking coal with coking coal exports from China must take into account the different grades of coking coal exported from China and how this is comparable to Masteel's purchases. Please advise whether this analysis has been undertaken and, if so, please provide details, and if not, why not.

Also, there is no "market" for "costs". Markets exist to buy and sell goods and services for a "price," not for "costs". Evidence has been provided that Masteel purchases of raw materials that it uses to manufacture steel for its railway wheels are purchased at competitive market prices from domestic and overseas suppliers, including in Australia, and these are accurately reflected in its records and these are reflected as "costs" in its accounts. These facts seem to have been ignored.

We request the Commission to advise what it considers to be a "competitive market cost". In particular, what is the "market" for "costs" and how it is determined whether they are "competitive" in that "market", if there is such a "market".

Further, as Masteel submitted, and the verification team confirmed. Masteel does not manufacture "like goods" for the Chinese domestic market. This fact also seems to have been ignored.

While the Commission's understanding of the Chinese steel industry from previous investigations may be of interest, assuming that understanding to be well founded, the question is what relevance it has to this investigation when Masteel produces steel for its own use from imported raw materials, including from Australia, as has been submitted and verified by the Commission. Again, this fact seems to have been ignored in the PAD. Why?

As an investigating authority, it would seem reasonable for the Commission to confine itself to the facts and evidence of this particular investigation.

Also, the Commissioner's letter to me does not identify precisely what injury would or could be prevented by the taking of securities and how any such injury could be prevented by the taking of securities. This should have been addressed in the Preliminary Affirmative Determination but was not. Would you please advise what injury, if any, would or could be prevented during the investigation by the taking of securities and how.

Finally, in calculating a constructed normal value, the Commission must confine itself to the appropriate regulations and the facts that have been provided to it and verified. Previous investigations, while of interest, have no relevance to this investigation as the facts are quite different and should be disregarded.

The constructed normal value, in accordance with 2.2.1.1 of Article 2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, should be based on Masteel's CTMS as recorded in its accounting records with a profit margin based on domestic sales as set out in the verification report. There is no reason to depart from this. If you are of a different view, please let us know and provide us with details for such a different view.

3. Comsteel's submission – 4 September 2018

As with its previous submission, this submission by Comsteel fails to recognise that Masteel manufactures steel for its own use, including the production of railway wheels, from raw material it purchases both in China and overseas and does not purchase steel billets. Comments by Comsteel in this regard are irrelevant to this investigation.

Previous investigations by the Commission into whether a particular market situation exists in relation to steel production also are irrelevant to this investigation.

What Comsteel's submission does not address is why an end-user, such as the mining companies in the Pilbara, should pay higher prices, artificially inflated by Comsteel's historical monopoly position plus Australian government policies and regulations, for a product that has acknowledged deficiencies and defects that adversely impact on their operations and add additional costs to their operations. Please refer to the recent submission from Rio Tinto amongst others and the matters discussed with your meeting with the CCCME.

If Comsteel wishes to compete in a global market, then it must change its manufacturing processes and instead of relying on scrap metal, develop the capability to produce railway wheels based on metal alloys, as Masteel does, to provide railway wheels with increased performance, as set out in the Rio Tinto submission.

Absent such changes to its manufacturing processes, Comsteel will never be competitive regardless of price because of the implications substandard railway wheels will have to the mining companies in question.

It is not the role of antidumping regimes to protect producers of inferior products at artificially high prices. This is a relevant consideration in a dumping investigation.

4. Occupational Health & Safety

As the Commission would be aware, end-users such as Rio Tinto and BHP Billiton are required to comply with OH&S legislation in WA, namely the *Occupational Health & Safety Act 1984 (WA)*. Specifically, they must comply with section 19 of that Act, amongst other things:

http://www5.austlii.edu.au/au/legis/wa/consol_act/osaha1984273/s19.html

As the submissions from Rio Tinto and BHP Billiton indicate there are issues with railway wheel wheels supplied by Comsteel in terms of wear and failures. It is legally incumbent on these companies to address this under *Occupational Health & Safety Act 1984 (WA)* and hence switching to a supplier or suppliers that do not pose such an OH&S risk. Nothing to do with dumping. No doubt the Commission will investigate this.

These companies also must comply with the relevant mining legislation in Western Australia such as the *Mining Act 1978 (WA)*.

No doubt the Commission will investigate this.

5. All "other exporters"

It has been the practice of the Commission to impose antidumping measures on so-called "all other exporters". Would you please advise what statutory provision in Part XVB of the *Customs Act 1901* permits or authorises such imposition of antidumping measures on so-called "all other exporters" (i.e. entities that have not actually exported the goods under consideration to Australia) if the Commission proposes to do so and how this is consistent with Article 9.2 of the WTO Anti-Dumping Agreement given that there is only one exporter of railway wheels from China. I assume and expect that the Commission will comply with the Australian Government's international legal obligations in this regard. That is, if any antidumping measures are to be imposed, they may be imposed only on known exporters consistent with Article 9.2 of the WTO Anti-Dumping Agreement. If you are of a different view, please let me know.

Please contact me if you have any questions.

Kind regards

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

Andrew Percival

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cc. Ms Karen Andrews MP, The Honourable Minister for Industry, Science and Technology