

**Non-Confidential**

Telephone: +61(0) 425 221 036

Email: Andrew.percival@percivallegal.com.au

Date: 4 October 2018

**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.

There are number of issues that need to be addressed. They are set out below.

**1. Price Discrimination**

As you know, dumping is all about price discrimination. That is the difference between export prices and domestic prices for like goods with appropriate adjustments.

This raises several issues.

A “price” for a good raises the question of what the “price” of a good actually means in terms of a purchase. Does it purchase the same good as a “like good” and as antidumping legislation recognises, there must be adjustments to ensure a like-for-like comparison to take account of differences in export prices and domestic prices. In other words, what needs to be identified is what is being purchased for the “purchase price” in order for there to be a comparison of like-with-like.

Also, the “purchase price” for a good will vary not only due to the physical differences but also according to the terms and conditions of sale including different market it is being sold into – i.e. an export market as opposed to a domestic market. Different competitive conditions exist in different markets, both domestic markets and international markets.

These differences must be taken into account to ensure a like-for-like comparison between ‘like goods’ being sold under different competitive conditions into different markets and between exports, imports and domestically produced products.

A failure to do so means that prices being compared are not being compared according to similar market conditions that, amongst other things, will affect prices and what is being purchased and their terms and conditions of purchase in those different markets. It would be neither an appropriate nor proper comparison.

## 2 Tender Dumping

As you would be aware, the Anti-Dumping Authority considered the issue of so-called “tender dumping”. A copy of its report is attached. I draw your attention to section 2.3 of that report. This section notes, inter alia, the Anti-Dumping Authority’s conclusion that:

*“... the injury (the loss of the work of constructing the transformer) was suffered by the industry at the time the contract with the overseas supplier was signed; and imposition of a duty months or years later is merely punitive and does nothing to relieve that injury.”*

The inability of anti-dumping measures to remediate injury to an industry was further highlighted by the Australian Productivity Commission in its Report No. 48, 2009, into Australia’s Anti-dumping and Countervailing System where on page 192 it made the observation that:

*“... large shipment of goods supplied under tender, once a binding contract has been signed, it will be impossible to avert injury to the local industry, even if dumping duties are subsequently imposed. “*

It is self-evident from that report that any injury to Australian industrial industry occurs, if it occurs, when the tender is awarded and at no time subsequently.

Consequently, no imposition of securities or antidumping measures can rectify that injury. It has occurred, whether from dumping or otherwise. Injury occurs at a particular point in time. Once it has been incurred for whatever reason it cannot be rectified.

The conclusion reached by the Anti-Dumping Authority, after a comprehensive inquiry, as to when injury occurs in a tender process was signed of by the then relevant Minister, the Hon David Beddall, Minister for Small Business, Construction and Customs. To our knowledge this conclusion has not be overturned by any subsequent legislative change or Ministerial Direction. If the Commission is of a different view as to when injury to the Australian domestic industry is incurred in the awarding of a tender and how it can be rectified by the imposition of securities and antidumping measures please advise under what authority the Commission is able to override the conclusion of its predecessor and Minister..

Also what effect such measures will have on stakeholders, including the global competitiveness of the Australian industry, importers, exporters, end-users, consumers and the Australian economy generally. Has this been taken into account? If not, why not? Are these not relevant economic factors to be taken into account?

### 3. *Miscellaneous*

I note that the Commission is proposing the following:

*“The Commission’s view at this stage of the investigation is that Masteel’s records do not reasonably reflect competitive market costs. As such, the Commission’s draft calculations have followed the methodology of replacing Masteel’s steel ingot costs with the verified ingot costs of the French producer, MG-Valdunes.*

As previously submitted, it is unclear to us what are “competitive market costs”. Would you please advise what that “market” is and what criteria the Commission uses to determine whether the “costs” in that market are “competitive”. Also on what grounds that Masteel’s records do not “reasonably” reflect competitive market costs and what, in the Commission’s view, would regard as records “reasonably reflecting competitive costs” and what criteria it uses in this regard to make such a finding? Grateful for your advice prior to the SEF.

Also, Australia is under an international obligation to comply with WTO rules and jurisprudence. In *EU – Biodiesel*, the WTO Appellate Body has ruled unambiguously that investigating authorities must use the production costs actually incurred by producers or exporters for the calculation of a constructed normal value, even though the costs are considered to be “distorted”.<sup>1</sup> Under Article 2.2.1.1 of the WTO Anti-Dumping Agreement, the relevant test is whether producers’ costs “reasonably reflect the costs associated with the production and sale of the product under consideration.” The Appellate Body has ruled that the Reasonably Reflecting Test is confined to an assessment of whether the records suitably and sufficiently reflect the actual costs incurred and does not allow for consideration of the reasonableness of the costs themselves.<sup>2</sup> Accordingly, the Appellate Body ruled against the EU’s replacement of the costs of soybeans actually incurred by Argentine producers on the ground that these costs were distorted and artificially lowered.<sup>3</sup> Thus, the Commission’s decision to replace costs that in its view do not reflect ‘competitive market costs’ completely ignores Australia’s WTO obligations. The Commission’s investigation in A4 Copy Paper has been challenged at the WTO leading to an ongoing dispute. If the Commission continues to apply the irrational and unsupported ‘competitive market costs’ approach its decision in this investigation may well drag Australia into another WTO dispute, not only undercutting Australia’s reputation globally but also causing Australian taxpayers to pay for the litigation cost at the WTO.

Further, such an approach by the Commission completely ignores the Australian Government’s recognition in April 2005 of China as a Market Economy. In a Media Release

---

<sup>1</sup> Appellate Body Report, *Union—Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted 26 October 2016.

<sup>2</sup> *Id.*, paras. 6.37-6.56.

<sup>3</sup> *Id.*, para. 6.55.

on Wednesday, 19 April 2005 (MVT30/2005) the then Minister for Trade, the Hon. Mark Vaile, confirmed that:

*“The Australian Government has agreed to treat China as a market economy, which means that Australia will treat China the same as other WTO members for the purpose of anti-dumping.”*

The Commission’s continued use of a ‘competitive market costs’ approach is a circumvention of the Australian Government’s commitment to treat China as a market economy. Such an approach merely acts to artificially inflate any dumping margin and act as a protective mechanism for the Australian industry contrary to Australia’s obligations under its membership of the WTO.

In addition, why has the Commission substituted Valdune’s steel ingot prices in the normal value calculation when the only issue that the Commission had was with Masteel’s coking coal purchases? As the Commission is aware and has verified, Masteel manufactures its own steel from raw materials purchased from overseas as well as in China and that it uses various grades of coking coal in its manufacturing process.

It, therefore, is unclear why the Commission would substitute Valdune’s steel ingot prices in these circumstances. If the Commission insists on substituting cost, which we strongly disagree with, then it should only substitute the relevant coking coal cost with appropriate adjustments. Would you please clarify, prior to publication of the Statement of Essential Facts, why the Commission has adopted this methodology.

Finally, as previously submitted. Valdune’s costs will be significantly different and higher than similar costs in China. The Commission has recognised this in its email to me. While we dispute that there should be any substitution of costs for the reasons set out above, as an investigative body, the Commission should investigate what adjustments are required.

As it has verified information from Valdune and Masteel, the Commission has more than sufficient information to make the appropriate adjustments to the normal value for Masteel. If you are of a different view please let me know prior to publication of the Statement of Essential Facts so that I can respond. The Commission’s current advice that it will set out the details of the Commission’s assessment of these matters in the Statement of Essential Facts is a denial of procedural fairness.

Please place this memo on the public file.

Best

Andrew Percival

T: +61 (0) 425 221 036

E: [andrew.percival@percivallegal.com.au](mailto:andrew.percival@percivallegal.com.au)

W: [www.percivallegal.com.au](http://www.percivallegal.com.au)