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Telephone: +61(0) 425 221 036

Email:

Andrew.percival@percivallegal.com.au

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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 the many submissions Comsteel lodged with the Commission throughout this investigation, including the latest ones dated 15 October and 1 November 2018. I do not intend to address each of the issues raised in these submissions again as they have been addressed in my previous submissions lodged on behalf of my clients and in submissions by other interested parties.

The Commission’s findings are flawed in many respects, the main two being:

1. The incorrect calculation of a dumping margin for Masteel: and
2. The incorrect finding that the investigation is about the price of imported goods.

1. Dumping Margin

The Commission has based its dumping margin calculation for Masteel on irrelevant considerations. This has previously addressed in submissions by Masteel. That is Masteel itself produces steel for its railway wheels from raw materials sourced from China, Brazil and Australia and, in particular, iron ore from Australia. It does not purchase “steel billets”.

Accordingly, Masteel’s normal value should be based on its own actual production costs consistent with Australian legislation and the WTO Antidumping Agreement and associated jurisprudence and not some substituted costs that simply serve to produce an artificial and inflated dumping margin. It is unclear why the Commission should adopt such an approach that has no commercial basis and is contrary to Australian legislation and WTO Antidumping rules and jurisprudence.

2. The investigation is not about the price

While this has also been addressed in our response to the SEF, the Commission’s focus on irrelevant considerations and failure to include relevant essential facts in its SEF warrants further comment.

The Commission in its SEF has ignored the relevant facts contained in submissions by end-users that this investigation is not about price but the quality and concerns over the packaging safety of the Australian industry’s products and the significant economic consequences that those products may have on the end users’ businesses and the Australian

economy should the end user's not be able to fulfil their contractual export commitments. The issue of railway wheel quality and safety is evidenced in numerous previous submissions, in particular those by BHP and Rio Tinto have been ignored.

At what price would a customer purchase a substandard, inferior and potentially defective product? As an investigative authority it is reasonable expectation that the Commission would investigate these issues. In particular, as evidenced in submissions by the end users (Comsteel customers), it obviously would be too expensive at any price because of the economic and potentially legal consequences for the end user's businesses. This does not seem to have been taken into account by the Commission.

As the quality and safety issues are essential facts for the Commission to base its recommendations to the Minister which have not been correctly addressed in the SEF the publication of a revised SEF is required.

The issue of railway wheel quality and safety has not been raised by my clients but by Comsteel's customers in their respective submissions. Accordingly, this investigation is not about the price of imported products but about the quality and safety issues of railway wheels produced by the Australian industry that are substandard and inferior and potentially defective that would entail the end-users incurring unnecessary and substantial costs to their respective businesses. This is evidenced in the numerous submissions, in particular by BHP and Rio Tinto. This is the matter at issue not price.

These relevant facts are pivotal to the injury and causation analysis by the Commission. However, the Commission in its injury and causation analysis and SEF has dismissed these relevant facts as submitted by the end users and instead, despite being contradicted by evidence, came to the view, based on an irrelevant consideration, that price is the causal link to the alleged dumping and injury. As the quality and safety issues are essential facts for the Commission to base its recommendations to the Minister which have not been correctly addressed in the SEF the publication of a revised SEF is required.

In Section 11.1 of the SEF, the Commission has stated that:

"... the Commissioner is satisfied that the procurement decisions by Comsteel's customers were predominantly based on price. ..."

The evidence as presented in submissions by several interested parties contradicts the Commissioner's view. Throughout the injury analysis the Commissioner consistently ignored the relevant consideration of the issue relating to concerns of the quality of Comsteel's wheels raised by several interested parties. As a result the Commissioner's analysis of injury caused by price effect is an irrelevant consideration.

For example, in Section 11.12.2 of the SEF, a reference to a MOFCOM of 26 July 2018 that stated:

"... it struggled to see how an allegation of injury and causation could be made against the importers based on the alleged price of the imports, when Comsteel appears to have been unwilling to achieve the better efficiencies and product quality that the customers demand."

The Commissioner incorrectly interpreted this as an argument that:

"... an Australian industry is not entitled to a remedy for material injury caused by dumping if it has not conformed to its customers' requests to achieve greater efficiencies and lower pricing." (underlining added)

MOFCOM's submission referred to better 'product quality'. However, the Commissioner somehow interrupted this as a reference to 'lower pricing' and omitted to recognise the relevant fact of 'product quality'.

Also in Section 11.12.4 of the SEF, a reference to a Rio Tinto submission of 5 September 2018 that stated:

"... the non-price issues, including the Comsteel wheel failures, were legitimate factors that contributed significantly to Rio Tinto's decision to purchase railway wheels from an alternative supplier. It stated that these factors were relevant to the ultimate tender outcome and remained relevant to Rio Tinto's ongoing procurement decision-making and that these issues were, therefore, material causes of injury to the Australian industry not related to dumping or subsidisation."

Further in Section 11.12.4 of the SEF, in reference to a BHP submission of 25 July 2018 the Commissioner stated:

"The Commission asked BHP if the wheel failures were a factor in the decision to not award the tendered wheel volumes to Comsteel. Following the Commission's visit to BHP, the company clarified that quality and the wheel failures had not been a key consideration in its 2017 tender process only because Comsteel were not in contention for the award, because their pricing was not competitive. BHP further revised its advice on this point in a submission dated 25 July 2018 but advised that this clarification was confidential."

The claim that the clarification was confidential is surprising as the Commission's Electronic Public Record No. 32, BHP's submission dated 25 July 2018 goes on to state after where the above statement in the SEF stops to state that:

"However, if they [Comsteel] were competitive on price, BHP would not have continued to purchase wheels which it then considered to contain significant quality defects."

This is another relevant consideration that the Commissioner has failed to address in the SEF.

In Section 12 of the SEF, the Commission has stated that:

"The Commission's analysis of tender documentation has demonstrated that procurement decisions are based predominantly on price (in comparison with dumped imports), causing Australian industry to suffer injury in a growing market. In the absence of duties, it is expected that Australian industry will continue to suffer injury through loss of tenders in comparison with dumped import."

This statement is contrary to submissions from end-users. For example. I refer to section 3 of BHP's submission of 31 October 2018. This submission from BHP, and that of Rio Tinto, that this investigation is not about price in purchasing decisions by end-users but is about the quality and safety concerns of the Australian industry's products are being ignored by the Commission.

It is unclear why this is being underrated by the Commission and considered not to be a relevant consideration. Further, it is unclear why the Commission has concluded that injury is being caused on price discrimination when end-users have stated the purchasing decisions are based on product quality and safety and not price.

I also note that the Commission has not responded to my previous submissions nor fully addressed them in the Statement of Essential Facts, which does not contain any findings of fact. Again why?

Where the Commission addressed an issue that we submitted, for example, regarding any alleged injury having occurred at the time the tender contract was awarded it has completely misinterpreted our submission when expressing its own opinion of our submission. It has misconstrued that any injury would not have been incurred on the awarding of a tender if the tender was awarded on price. However, as submissions from end-users have submitted price was not the criterion for awarding of tenders but product quality and safety concerns. Further, the Commission's predecessor, the Anti-Dumping Authority, in its report to the then Minister on Tender Dumping concluded that injury occurred at the time a tender is awarded and the imposition of anti-dumping measures could not remedy the situation.

The imposition of protective tariffs in the form of antidumping measures will not address these quality issues of the Australian product nor make them globally competitive but will have the opposite effect to the detriment of end-users, consumers and the Australian economy generally.

Hence the need for the publication of a revised SEF that correctly and fully addresses these issues and one that is based on relevant facts and concludes that this investigation should be terminated.

Best

Andrew Percival

T: +61 (0) 425 221 036

E: andrew.percival@percivallegal.com.au

W: www.percivallegal.com.au