

22 August 2023

The Director, Investigations 3  
Anti-Dumping Commission  
GPO Box 2013  
Canberra ACT 2601

**BY EMAIL:**  
**Investigations3@adcommission.gov.au**

Dear Director,

**Reinvestigation of certain findings in relation to *Continuation Inquiry No 601* concerning Steel Reinforcing Bar exported from Greece, the Republic of Indonesia, Spain (by Nervacero S.A), Taiwan (by Power Steel Co. Ltd) and the Kingdom of Thailand**

**AUSTRALIAN INDUSTRY SUBMISSION FOR CONSIDERATION IN  
THE PRELIMINARY REINVESTIGATION REPORT**

InfraBuild (Newcastle) Pty Ltd (**InfraBuild**), the applicant for the continuation of anti-dumping measures the subject of this reinvestigation request of Anti-dumping Review Panel (**ADRP**) Member Blumberg dated 3 July 2023 (**Reinvestigation Request**), provides the following comments and observations below concerning:

- *the finding that the expiration of the anti-dumping measures in respect of exports from Nervacero would lead, or would be likely to lead, to a continuation of, or recurrence of, the dumping having regard to its assessment of two factors:*
  - *import volumes and patterns of trade, and*
  - *likely future supply and demand conditions in the Australian market, and*
- *the finding that the expiration of the anti-dumping measures in respect of exports from Nervacero would lead, or would be likely to lead, to a continuation of, or recurrence of, the material injury only to the extent that the commission's assessment of the likely future supply and demand conditions in the Australian market affects this assessment.*<sup>1</sup>

**A. Summary**

On the question of the likelihood of dumping continuing or recurring following the expiration of the duties, the Commissioner did meet the standard required on the basis of positive evidence. Reference by the Commission in its *Report No. 601 (REP 601)* to a counterfactual assuming the existence or non-existence of duties did no more than test the likelihood of recurrence based on observed export prices and a verified ascertained normal value for the Spanish named exporter, Nervacero S.A..

Similarly, the Commissioner did rely on positive evidence led during the investigation on likely future supply and demand conditions in the Australian market. That evidence is identified below.

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<sup>1</sup> EPR No. 601/034, p. 1.

## B. Import volumes and patterns of trade

In her Reinvestigation Request, the ADRP Member expressed difficulty with the Commission's reasoning concerning 'the competitive advantage of sources of exports not subject to measures' and noted that this reason is directly linked to the existence of anti-dumping measures on Nervacero's exports. The ADRP Member considered that the Commission's reasoning 'would appear to be inconsistent with the requirement under Article 11.3 of the *Anti-dumping Agreement*<sup>2</sup> as articulated in the WTO Dispute Settlements Panel Report, *Pakistan – BOPP Film (UAE)*'.<sup>3</sup>

### 1. **WTO Jurisprudence cited**

The ADRP Member cited paragraph 7.608 of the report of the Panel of the Dispute Settlement Body (DSB) in *Pakistan – Anti-dumping measures on biaxially oriented polypropylene film from the United Arab Emirates (Pakistan – BOPP Film (UAE))*.<sup>4</sup>

For context, paragraph 7.608 of the DSB Panel's report related to consideration of the subject (National Tariff Commission of Pakistan) investigating authority's 'likelihood of injury determination', not its analysis of 'likelihood of continuation or recurrence of dumping'. Specifically, the cited paragraph 7.608 of the DSB Panel's report addressed the 'likely effects on market share' of the expiry of the duty.

Applied here, we understand Nervacero's complaint related to its belief that the Commission had made 'an assumption that if the lack of dumping and injury was the result of the measure, then "this suggests that dumping will resume if the Measures are not continued"'. Firstly, the reference to the DSB Panel Report both by the exporter and ADRP Member does not go to the question of an appropriate 'likelihood of dumping determination', but rather, a 'likelihood of injury determination'. Although the DSB Panel concluded that the investigating authority's 'likelihood of dumping determination' was inconsistent with Article 11.3, it was not for the reasons identified by the Panel Member when referencing paragraph 7.608. Although there is an obligation of the investigating authority to rely on positive evidence and to explain how the evidence it relied upon supported a conclusion that dumping was likely to continue or recur were necessary under Article 11.3, it does not follow that an analysis that, (a) takes into account the impact of dumping duties on prices of subject goods sold in the Australian market, and (b) makes the type of comparison the Commission did in REP 601 to the changes in those prices following the expiry of the duties, will necessarily fall foul of the type of analysis the DSB Panel warned against in *Pakistan – BOPP Film (UAE)*, namely, that analysis must rely on positive evidence:

'We therefore find that the NTC did not provide a reasoned and adequate explanation of why these developments were likely to occur, and not just possible.'<sup>5</sup>

With respect to the ADRP Member's Reinvestigation Request, it may not be said that the Commissioner failed to provide a reasoned and adequate explanation of why he considered that it was likely that dumping would recur if the duties expired. Although, part of his conclusion relied on

<sup>2</sup> *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*

<sup>3</sup> Reinvestigation Request, p. 6.

<sup>4</sup> WT/DS538/R, 18 January 2021.

<sup>5</sup> *Pakistan – BOPP Film (UAE)* at [7.608].

analysis by the Commission that took into account Nervacero's ability to compete in the Australian market both with and without the duties, this analysis was grounded in positive evidence, namely what export price the exporter would need to offer to compete in the Australian market, and an assessment as to whether that price would be dumped or undumped; given the named exporter's verified ascertained normal value. This level of analysis cannot be compared to the 'speculation' performed by the investigating authority assessed in *Pakistan – BOPP Film (UAE)*:

'The NTC found that after the imposition of anti-dumping duties, the market share of the domestic industry had increased, the market share of the dumped imports had decreased significantly, and the market share of imports from other sources had remained stable.[...] On that basis, the NTC concluded that expiry of the anti-dumping duties would likely lead to an increase in imports of the product under review and therefore in the market share of the dumped imports, and "therefore" would "likely affect adversely" the domestic industry's market share.'<sup>6</sup>

In contrast, the Commission's analysis concerning the likelihood of dumping determination was detailed. It considered positive evidence of Australian market conditions, such as the export prices of imports from all sources, selling prices by both importers and Australian industry into the rebar market and the exporter's ascertained normal value [emphasis added]:

'The commission's previous investigations and inquiries indicate that price is a major factor in customers' purchasing decisions.[...] As part of this inquiry, the commission analysed:

- landed duty paid prices of imports from all sources during the inquiry period
- changes in the patterns of trade prior to and following the measures.

'The commission identified that the majority of imports from all sources during the inquiry period were within a narrow price range. This demonstrates that the Australian market continues to be highly price sensitive.

'The commission's analysis also demonstrates that the measures have influenced patterns of trade in the Australian market. It appears that subject country exporters could only obtain significant sales volumes and market share in the Australian market when exporting at dumped prices.

'The commission considers that, to regain sales volumes and market share in such a price sensitive market, exports from Greece, Indonesia, Spain (Nervacero) and Taiwan (Power Steel) would likely be at prices that undercut existing prices of imported goods in the Australian market.'<sup>7</sup>

...

'The commission considers that the changes in the pattern of trade are a direct result of the price sensitivity in the Australian market. Exporters subject to measures have generally only exported significant volumes when at dumped prices, due to the price advantage from

<sup>6</sup> *Pakistan – BOPP Film (UAE)* at [7.605]

<sup>7</sup> REP 601, p. 13.

dumping. The fact that new supply sources have quickly emerged following measures indicates that Australia is an attractive market for exporters of rebar.

'The commission considers that if the measures were to expire, the subject country exporters would gain a price advantage from dumping currently prevented by the measures. Further, given the demonstrated ease at which supply sources have changed in the past, it is likely that import volumes for the subject countries would increase if the measures expired.<sup>8</sup>

...

'The commission considers that the measures had a dampening or restraining effect on imports. This is because the measures, in a highly price sensitive market, have lessened the competitive advantage that importers obtained from sourcing goods at dumped prices, incentivising importers to seek alternative, cheaper sources of supply.<sup>9</sup>

The mere mention by the Commission of the effect of duties in its expiry of duties counterfactual analysis does not place it in non-conformance with Article 11.3, in the same manner as the investigating authority in *Pakistan – BOPP Film (UAE)* may be said to be.

What may be taken from the DSB Panel's report as relevant to this reinvestigation is the standard of proof required of the investigating authority when considering Article 11.3. In relevant part, the provision requires that anti-dumping duties be terminated within five years, unless an investigating authority 'determine[s], in a review ... that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury' [*emphasis added*]. The Panel expressed the ordinary meaning of the key terms of the provisions as:

'The ordinary meaning of "determine" includes to "bring to an end a ... doubtful matter; to conclude, settle, decide, fix", to "conclude from reasoning, investigation", and to "ascertain definitely by observation, examination"<sup>[...]</sup>;

'...the ordinary meaning of "review" includes an "inspection, examination".<sup>[...]</sup>

'...the ordinary meaning of the word "likely" includes "having a high chance of occurring; probable", and "that looks as if it would happen, be realized, or prove to be what is alleged or suggested; probable".<sup>[...]</sup>

'Together, these terms indicate that a Member may not rely solely on assumption or speculation when conducting a likelihood analysis during a sunset proceeding but must, instead, conduct its examination on the basis of positive evidence so as to arrive at a reasoned determination, resting on a sufficient factual basis<sup>[...]</sup>, that dumping and injury are "likely" – i.e. probable and not merely possible<sup>[...]</sup> – to continue or recur.<sup>10</sup> [*emphasis added*]

Applied here, the Commission met the requisite standard of proof required in its likelihood of dumping determination.

<sup>8</sup> *ibid.*, p. 63.

<sup>9</sup> *ibid.*, p. 64.

<sup>10</sup> *Pakistan – BOPP Film (UAE)* at [7.543]

## **C. 'Likely future supply and demand conditions in the Australian market'**

### **1. *Commission's assessment***

In *Chapter 5* of REP 601, the Commission described the conditions of the Australian market during the inquiry period. In turn in *Section 8.4.3* of REP 601, the Commission described the 'Likely future supply and demand conditions in the Australian market'.

The Commission described an Australian domestic market for rebar that would 'moderate' with tightening 'monetary policy' settings leading to a 'decrease in building and construction activity', but that '[d]espite the likely moderation in demand for rebar', the Australian market for rebar remaining 'attractive... for exporters'.<sup>11</sup>

The Commission considered the supply factors affecting exports of rebar to Australia in terms of freight cost, describing an expectation that 'in the medium to long-term, freight costs would likely return to lower levels than those seen during the inquiry period', with the result that 'export supply will likely be as cost effective and timely as had been the case prior to the COVID-19 pandemic'. According to the Commission this means that '[w]ith supply constraints moderating... imports will continue to account for a significant portion of the Australian market.'<sup>12</sup>

The Commission concluded that combined, 'the conditions of competition in the Australian market are such that if the measures expired exports from the subject exporters would likely continue of recur'.<sup>13</sup>

### **2. *ADRP Member's concern***

In considering Nervacero's review grounds, the ADRP Member expressed concern with the Commission's assessment of the 'likely future supply and demand conditions in the Australian market' in the following terms:

'both analyses appear to be based on the ADC's own opinion and are somewhat speculative and without sufficient factual or documentary basis',<sup>14</sup> and

'there are no footnotes or references to any documentary evidence such as: published (or private) economic or industry reports, forecast or analyses (whether general to the building or steel industries or more specific to the rebar industry, or even to the Australian economy), that would allow the ADC to draw reasoned and adequate conclusions. It cannot be said to be based on "positive evidence"'.<sup>15</sup>

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<sup>11</sup> op cit., p. 65.

<sup>12</sup> ibid.

<sup>13</sup> ibid.

<sup>14</sup> *Reinvestigation Request*, p. 8 at [15].

<sup>15</sup> ibid., at [16].

### 3. *Evidence led by InfraBuild during the continuation inquiry*

While conducting its reinvestigation of this finding, InfraBuild reminds the Commission of the evidence it provided during the continuation inquiry:

- in its original lodged Form B600 (*Application for the continuation of a dumping and/or countervailing notice or continuation of an undertaking*) the subject of this *Continuation Inquiry No. 601*,
- at its industry verification visit, and
- during submissions.

a. *Original application for the continuation of a dumping and/or countervailing notice or continuation of an undertaking the subject of this inquiry*

In its response to the section titled 'Outlook' in the original lodged application the subject of this inquiry, InfraBuild provided the Commission with three reports containing economic conditions forecasting:

- the Federal Government's Mid-Year Economic and Fiscal Outlook 2021-22 (**MYEFO**) (originally, NON-CONFIDENTIAL ATTACHMENT 2.1.4.4);
- BIS Oxford Economics, Building Industry Prospects December 2021 (originally, CONFIDENTIAL ATTACHMENT 2.1.4.1); and
- BIS Oxford Economics, Engineering Construction in Australia, February 2022 (originally, CONFIDENTIAL ATTACHMENT 2.1.4.1).

These three reports were relied upon by InfraBuild to advance the proposition that:

'Overall, the Australian industry considers that this indicates that high levels of demand in the Australian rebar market will continue to be present from FY 2022 to FY 2025... .

'Based on the forecasts noted above, it is likely that the building and construction sector will experience sustained growth until at least until the middle of 2024. This in turn will have an impact on the future demand for rebar. Furthermore, it is reasonable to assume that a continued expansion in construction activity will grow the contestable rebar market in Australia, providing a stable and growing market for exporters of dumped rebar to continue or resume their distribution and supply links.'<sup>16</sup>

InfraBuild also provided the *Australian Bureau of Statistics (ABS) Value of Building Work Done by Sector, Australia* data series up to the September 2021 quarter in its original lodged application form B600 (originally, CONFIDENTIAL ATTACHMENT 2.1.4.3). Analysis of the data was provided in *Chart 2.1.4.1* and *Chart 2.1.4.2* to the completed application (Form B600). InfraBuild relied on the data and analysis in support of the following propositions:

'CHART 2.1.4.1, above, demonstrates that whilst the historical building and construction trend has generally been upward, the two most recent quarters have continued an increase in investment which begun during the inquiry period. Notably, the two most recent quarters

<sup>16</sup> EPR No. 601/001, pp 50 - 51.

have experienced above trend growth which has not been seen since the December 2019 quarter.<sup>17</sup>

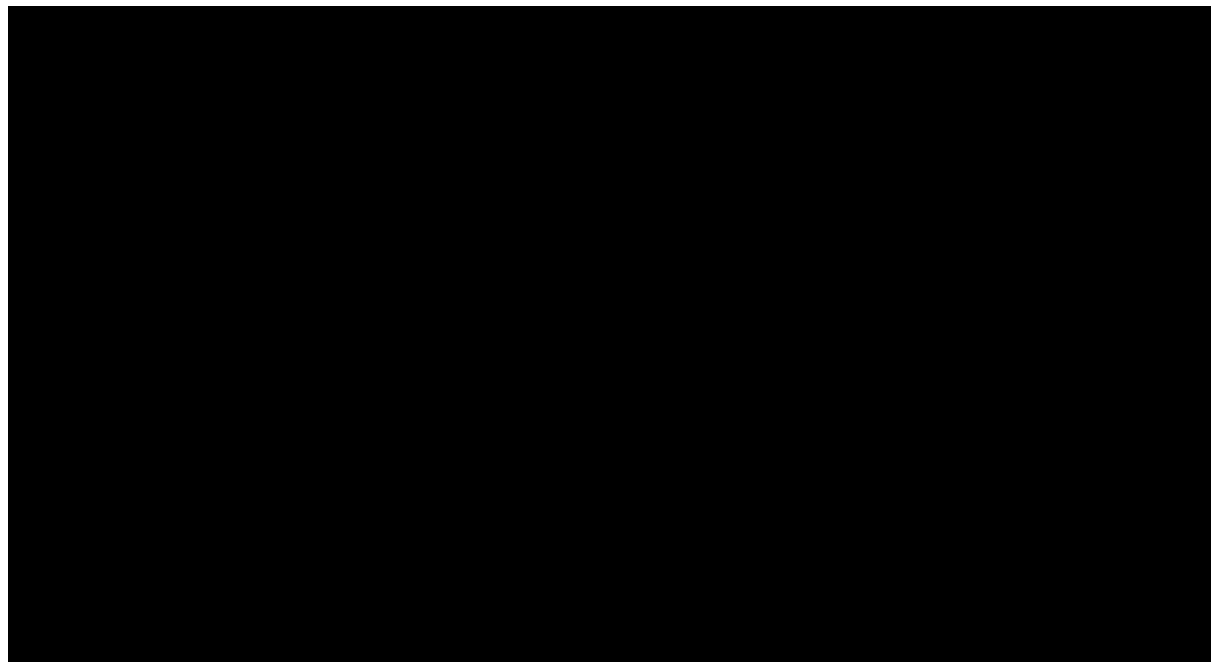
‘Growth in the value of building activity peaked during the 12-months ended 31 March 2019. Since that time the level of residential and non-residential building activity has been in decline until it reached its lowest point the 12-months ended 31 December 2020. Since then, the value of activity has continued to increase, with part of the proposed inquiry period experiencing the highest value of activity since the 12-months ended 30 September 2020. Overall, since the original investigation period (12-months ended 31 March 2017), the trend in the value of building activity has been upward, with the 12-months ended 30 September 2021 being at least 10% higher than the 12-months ended 31 March 2017 (the original investigation period).’<sup>18</sup>

*b. Verification of Australian industry (June 2022)*

Attached hereto is InfraBuild’s presentation materials supplied during its industry verification visit to the Commission (CONFIDENTIAL ATTACHMENT 1).

In response to verification meeting agenda item 12.3.2 (Factors influencing market performance), InfraBuild supplied extracts of forecast analysis by BIS Oxford Economics, specifically past and forecast ‘Building Commencements by sector’, showing stable growth in the residential, non-residential and attached dwellings sectors. The graphic extracted follows:

*[confidential graphic]*



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<sup>17</sup> *ibid.*, p. 47.

<sup>18</sup> *ibid.*, p. 48.

The graphic was accompanied by the following commentary:

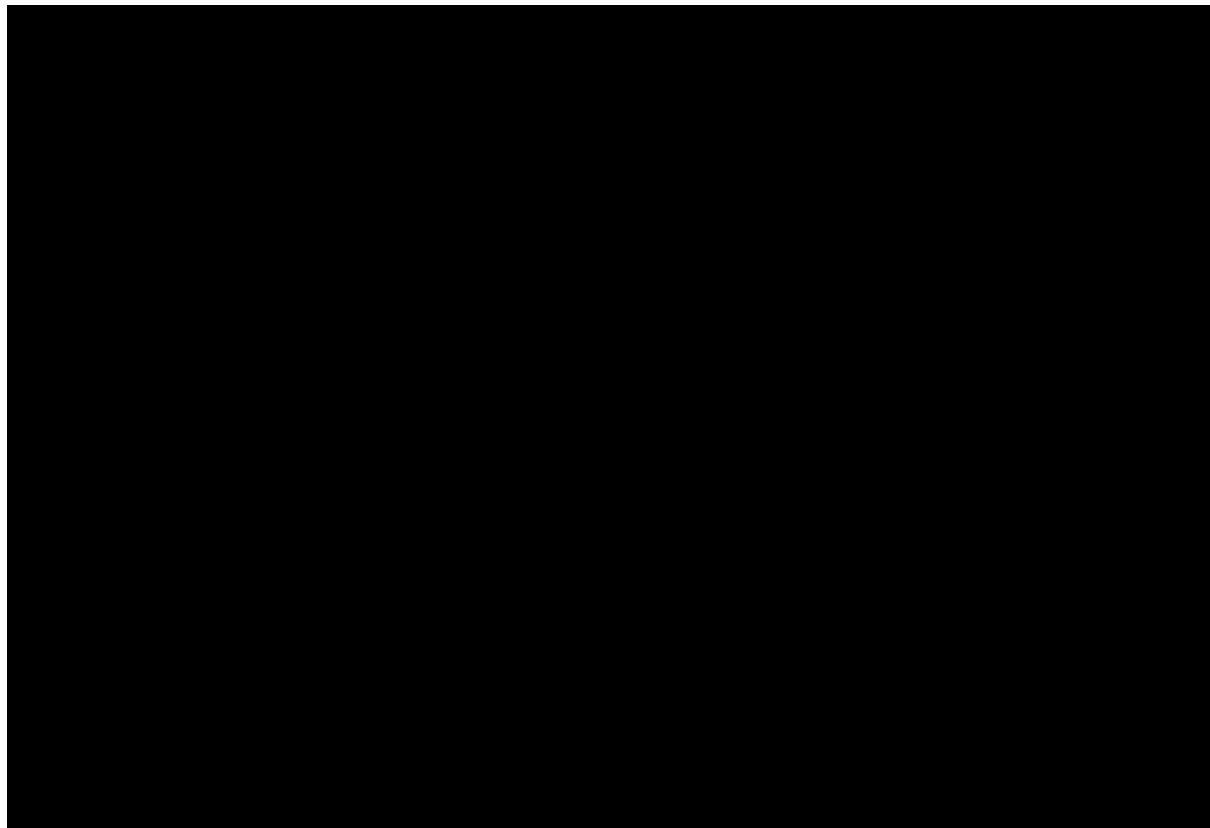
‘BIS Oxford Economics forecasts total building activity growth ...to persist in FY2022 (+1%) and FY2023 (+11%), lifting total building to a record \$142.93 billion.

**‘Specifically, in relation to non-residential building activity, BIS Oxford Economics forecasts ...growth to return in FY2022 (+2%) and FY2023 (+8%).**

‘Support will come from a sizeable pipeline of public projects including schools, train stations, hospitals, and quarantine centres. Overall, sustained improvement is anticipated in all segments of the building industry.’<sup>19</sup>

In response to verification meeting agenda item 12.5 (Outlook and direction of the industry), InfraBuild supplied extracts of forecast analysis by BIS Oxford Economics, specifically past and forecast ‘Total Construction Work Done’, showing growth in the engineering, residential and non-residential building sectors. The graphic extracted follows:

*[confidential graphic]*



The graphic was accompanied by the following commentary:

‘Overall, the Australian industry considers that this indicates that high levels of demand in the Australian rebar market will continue to be present from FY 2022 to FY 2025.

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<sup>19</sup> CONFIDENTIAL ATTACHMENT 1, Slide 8.



‘Based on the forecasts noted above, it is likely that the building and construction sector will experience sustained growth until at least until the middle of 2024.

‘This in turn will have an impact on the future demand for rebar.

‘Furthermore, it is reasonable to assume that a continued expansion in construction activity will grow the contestable rebar market in Australia, providing a stable and growing market for exporters of dumped rebar to continue or resume their distribution and supply links.’<sup>20</sup>

c. InfraBuild submission dated 21 December 2022: ‘Australian industry response to Nervacero S.A. submission’<sup>21</sup>

In this submission, InfraBuild provided evidence that likely formed the basis for the Commissioner’s conclusion in REP 601 that ‘[i]n terms of supply, the commission expects that in the medium to long-term, freight costs would likely return to lower levels than those seen during the inquiry period’.<sup>22</sup>

Specifically, InfraBuild supplied the following chart indicating changes in the Freightos Baltic Index (FBX), Global Container Freight Index since 7 October 2016 to 16 December 2022. A copy of *Figure 3* to that submission is extracted below:



**FIGURE 3: Freightos Baltic Index (FBX), Global Container Freight Index**

The accompanying commentary to Figure 3 was:

‘With respect to the freight costs that have been problematic for exporters in all regions, including Asia, in recent times, the latest global container freight price... indicates a rapidly falling trend towards pre-pandemic levels.’

<sup>20</sup> CONFIDENTIAL ATTACHMENT 1, Slide 10.

<sup>21</sup> EPR No. 601/029 (3 January 2023)

<sup>22</sup> REP 601, p. 65 at [8.4.3].

#### 4. ***Additional information and evidence to assist with this reinvestigation of certain findings***

To allow the Commissioner to fully reinvestigate certain areas that the Review Panel had requested, InfraBuild supplies additional information and evidence of the Australian market conditions for rebar.<sup>23</sup>

##### a. *Budget Paper No. 1 (2023 – 2024)*

Statement 2 (Economic Outlook) attached herein as NON-CONFIDENTIAL ATTACHMENT 2, provides the most contemporary economic outlook for the Australian economy by the Federal Government. In summary, it observes:

‘The outlook for business investment remains relatively positive, despite weakening domestic demand and the tightening in financial conditions... . A large pipeline of construction projects will underpin the near term, and strong business balance sheets and high levels of capacity utilisation will support investment over 2023-24 and 2024-25.

‘Investment is expected to grow by 3 per cent in 2022–23. As overall demand in the domestic and global economy softens, momentum is expected to ease in 2023–24 and 2024–25, growing by 2½ per cent and 2 per cent, respectively.’<sup>24</sup>

##### b. *Oxford Economics Australia: Engineering Construction in Australia (August 2023)*

The most recent report (CONFIDENTIAL ATTACHMENT 3) published indicates a robust pipeline of major infrastructure projects:

‘The government funded infrastructure boom continues to support engineering construction activity. Publicly funded transportation construction work done increased 13.1% to be \$28.7bn over the twelve months to March 2023, which is the highest recorded level of activity over a twelve-month period on record. We forecast government funded transportation work will reach a peak of \$32.9bn in FY25.’<sup>25</sup>

##### c. *Oxford Economics Australia: Research Briefing – Australia: Non-residential building major project outlook for 2023*

In REP 601, the Commissioner concluded that ‘Non-residential commercial construction is considered to be the main driver of demand’ in the Australian domestic market for rebar.

The outlook of Oxford Economics Australia for non-residential building contained in their Research Briefing report, *Non-residential building major project outlook for 2023* (CONFIDENTIAL ATTACHMENT 4) states:

‘The value of major non-residential building project commencements captured in our project tracking for 2023 totals \$14.67 billion, a level in line with the average of the past five years.’

<sup>23</sup> The practice of the Commission collecting additional information and evidence to assist the Commissioner to fully reinvestigate certain areas that the Review Panel had requested was recently applied in the REINVESTIGATION OF CERTAIN FINDINGS IN REPORT NO 590 (ADRP Review No. 156)

<sup>24</sup> NON-CONFIDENTIAL ATTACHMENT 2, p. 63.

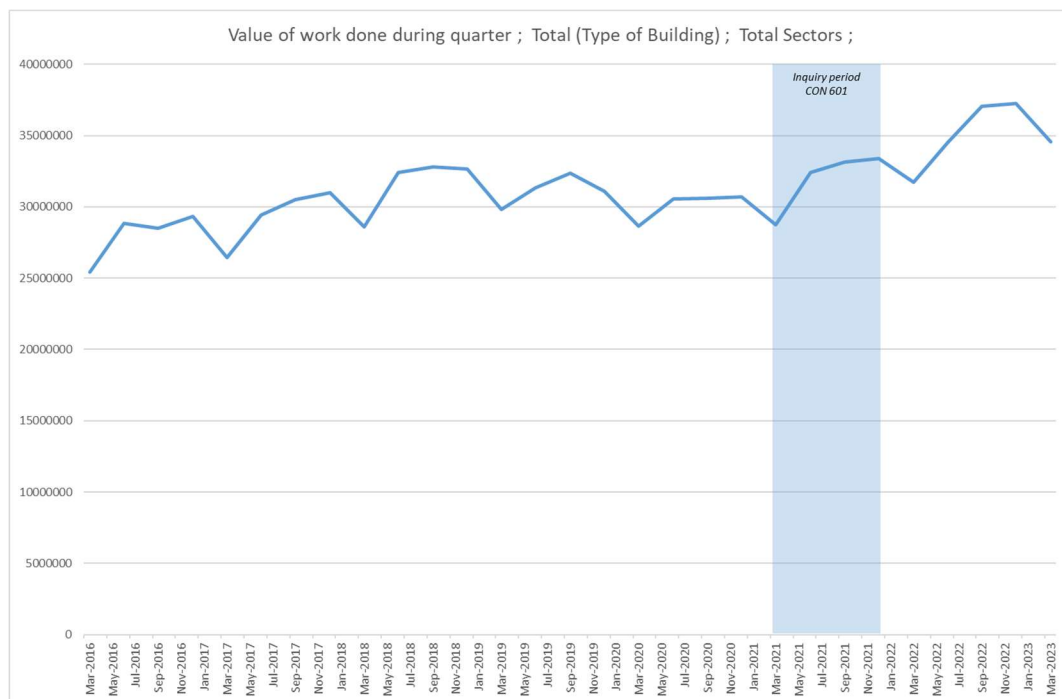
<sup>25</sup> CONFIDENTIAL ATTACHMENT 3, p. 5.

and

‘Commercial & industrial building is anticipated to hold up, totalling \$7.86 billion in 2023. The office sector is the largest contributor (\$2.28 billion)... Other commercial building (\$1.87 billion) is expected to provide a boost, driven by a surge in data centre development, while strong demand for industrial space and increased build form complexity sustains warehouse activity at a high base. Transport building is geared for a strong year, with train station building works across multiple cities to provide support. Accommodation is expected to remain subdued, below \$0.5 billion, with the sector’s full recovery from the pandemic to take some time.’<sup>26</sup>

d. ABS, Value of Building Work Done by Sector, Australia (March 2023 quarter)

Further to the ABS data series up to the September 2021 quarter supplied in its original lodged application form B600, as CONFIDENTIAL ATTACHMENT 2.1.4.3, therein, InfraBuild now supplies the most current series for this data, herein, as NON-CONFIDENTIAL ATTACHMENT 5. The following chart shows the dollar value movement since the end of the inquiry period:



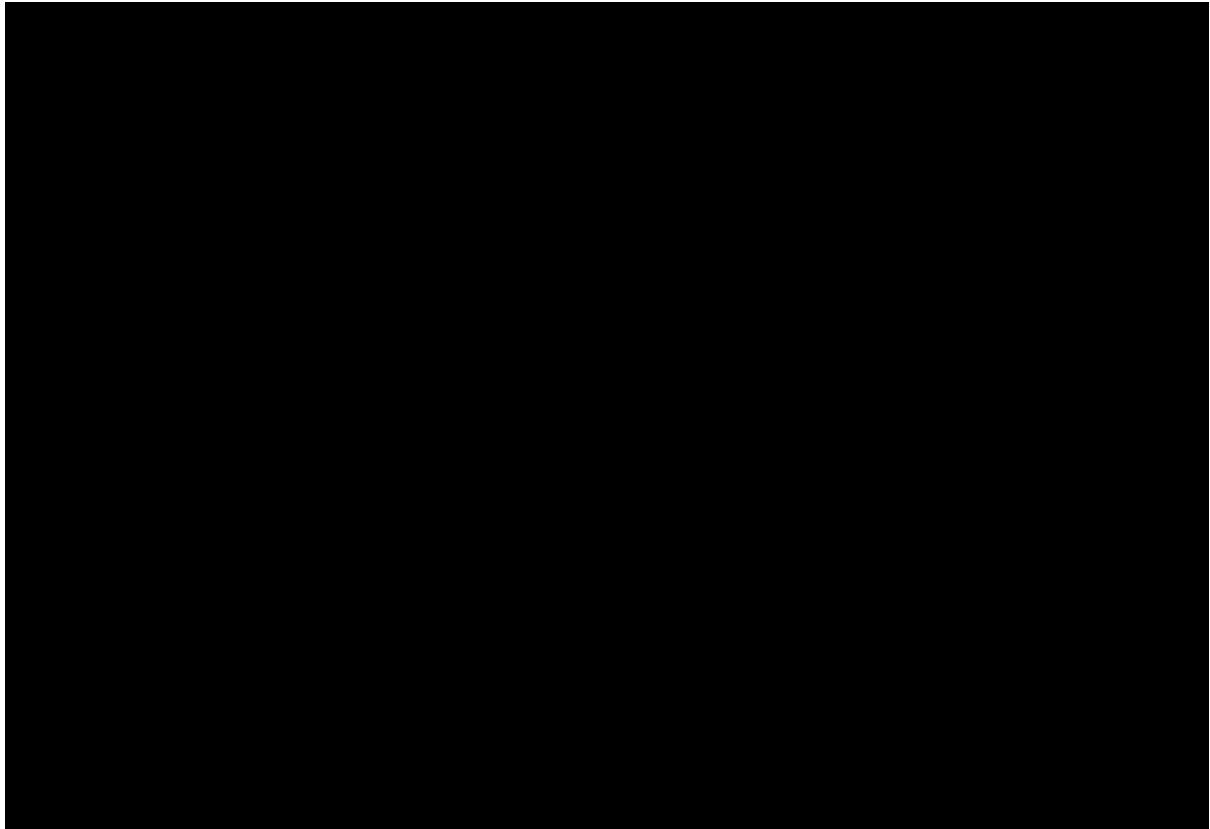
Source: NON-CONFIDENTIAL ATTACHMENT 5.

e. Freightos Baltic Index (FBX): Global container freight index

The FBX global ocean freight container pricing index measures 40' container prices. Current index ocean freight pricing is attached as CONFIDENTIAL ATTACHMENT 6, and reproduced in the following chart. It is observed that consistent with our submission dated 21 December 2022, ocean freight charges have reduced to pre-pandemic values.

<sup>26</sup> CONFIDENTIAL ATTACHMENT 4, p. 1.

[confidential graphic]



**D. Conclusion**

The Commissioner's recommendation to the Minister to continue the measures with respect to Nervacero was based on positive evidence, and his likelihood determinations were well reasoned and supported by facts.

Please do not hesitate to contact your InfraBuild representative on record with any questions.

FOR AND ON BEHALF OF THE

**AUSTRALIAN INDUSTRY APPLICANT**