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Non-Confidential

Masteel
Continuation Inquiry 632
Submissions Statement of Essential Facts

Please see below Masteel's submissions in response to Statement of Essential Facts 632 (**SEF**).

1. Initial observations - WTO Panel Report

The imposition of anti-dumping measures following the original investigation, namely, Investigation 466, has been the subject of appeal by the Government of China under the WTO Understanding on Rules on Procedures Governing the Settlement of Disputes.

In that dispute, '*Australia – Anti-Dumping and Countervailing Duty Measures on Certain Products from China*' (WT/DS603/R)(26 March 2024), the Panel found that Australia's anti-dumping measures determined in relation to exports of railway wheels by Baowu Group Masteel Rail Transit Materials Technology Company Limited (hereinafter also referred to as "Masteel" or "MTM") from China were inconsistent with its obligations under the WTO Anti-Dumping Agreement.

Specifically, in summary the Panel found that:

(i) with respect to AD claim 3, in the original investigation, the Commission acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it had no basis for departing from using Masteel's record costs of production when constructing normal value;

(ii) with respect to AD claim 1, in the original investigation, the Commission acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by failing to provide a reasoned and adequate explanation as to why the uplifted costs, without any adjustments to adapt such uplifted costs to Masteel's circumstances in China (other than SG&A), represented a cost of production in China for Masteel;

(iii) with respect to AD claim 5.d, it was unnecessary to consider that claim under Articles 2.1, 2.2, and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because the claim was already effectively addressed under AD claims 1 and 3; with respect to AD claim 6.a, having already found violations of Articles 2.2 and 2.2.1.1, it was unnecessary to examine further whether the

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Commission also failed to conduct a fair comparison under Article 2.4 by failing to make any adjustments linked to such use of surrogate costs in constructing normal value;

(iv) with respect to AD claim 7.b, in the original investigation the Commission acted inconsistently with Article 2.2.2(i) of the Anti-Dumping Agreement by failing to calculate profit on the basis of the actual amounts incurred and realized by Masteel in respect of "sales in the domestic market of the country of origin". The Commission also acted inconsistently with Article 2.2.2(i) of the Anti-Dumping Agreement by using surrogate costs of production in its profit determination; and

(v) with respect to AD claim 8, to the extent that the Commission acted inconsistently with the provisions of Article 2 of the Anti-Dumping Agreement in the original investigation, the Commission also acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

These findings are relevant to the Continuation Inquiry 632 including the Commission's preliminary findings in the Statement of Essential Facts (**SEF**). Those inconsistences have been replicated in this continuation inquiry, especially as regards the determination and calculation of the dumping margin for Masteel's exports. This is addressed later below.

However, as a preliminary matter, it is evident that:

(i) the imposition of anti-dumping measures in the original investigation were inconsistent with Australia's international legal obligations under the WTO Anti-Dumping Agreement and, by extension, under Australia's anti-dumping legislation that give effect to those international legal obligations; and

(ii) hence Australia's principle obligation is to bring those measures into conformity with those international legal obligations before considering whether those presently non-compliant measures should be continued for a further five years; and

(iii) consideration be given to compensating interested parties, in particular, Masteel and its Australian customers (e.g., Rio Tinto, BHP, etc.) for the loss and damage they have incurred from the unlawful imposition of anti-dumping measures.

Until these matters are addressed, it is contended that it is inappropriate to consider whether the current non-conforming anti-dumping measures should be continued for a further five years. That would perpetuate the wrongs of the past without addressing the wrongful imposition of anti-

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dumping measures following Investigation 466 and consequences flowing from that unlawful imposition of measures.

Inconsistencies replicated in preliminary findings in the SEF

The inconsistencies of the anti-dumping measures imposed in the original investigation have been replicated in this continuation inquiry, especially as regards the determination and calculation of the dumping margin for Masteel's exports

For example, the Commission found in Appendix A of the SEF that:

> *"... the conditions in the Chinese steel and steel input markets directly affected the domestic market for railway wheels in China. The situation affected the Chinese market for the goods, primarily through the distortion of steel billet costs, the principal raw material input for the goods.*
>
> *MTM's steel billet purchase prices were not reflective of ordinary market conditions because, based on the available evidence, they were not the result of properly functioning profit and price signals."* (Section A6 of the SEF)

Here, again, the Commission is confusing whether steel billet prices in China reflected competitive market conditions. In doing so, the Commission has findings are inconsistent with the requirements of Article 2.2.2.1 of the WTO Anti-Dumping Agreement as discussed by the Panel:

> "*Again, the assessment of whether costs "reasonably reflect competitive market conditions", in our opinion, is different than whether costs "reasonably reflect the costs associated with the production and sale of the product under consideration". As indicated in the paragraph immediately above, the Commission rejected Masteel's relevant costs based on the former inquiry, rather than the latter. On this basis, we find that, in rejecting Masteel's costs because they did not reflect competitive market costs, the Commission did not make a finding under the second condition of Article 2.2.1.1.*" (at page 91 of the Panel Report)

Similarly, the Commission sought to set a benchmark for steel billet prices in the SEF. Its justification in selecting steel billet prices in Türkiye as a suitable substitute are set out in Appendix B to the SEF. The reasons proffered by the Commission were not materially different to those in the

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original investigation where the Commission used steel billet prices of a French company as a suitable substitute. The WTO Panel's finding was:

> *"... that the Commission did not reasonably demonstrate that the surrogate costs represented costs of production in China. The costs were taken from a producer in a different country, and the only adjustment made was related to Masteel being a vertically integrated producer of steel billet. There is no explanation in the Commission's findings as to why a French company's cost of purchasing steel billet would meaningfully represent a Chinese company's cost of producing steel billet in China."* (at page 94 of the Panel Report)

In substituting an adjusted Türkiye steel billet price, the Commission also did not address why an entity such as Masteel would purchase that steel billet at that adjusted price, as opposed to any other steel billet from another source. The focus of the Commission presumably is in obtaining a market price for steel billet negotiated in arms length negotiations between the buyer and seller. What is not evident is how or why the adjusted Türkiye steel billet price represents a market price negotiated at arms length between a seller and buyer in China or why Masteel would purchase steel billet from a supplier in Türkiye.

Specifically, no consideration was given by the Commission why an entity in China such as Masteel would purchase steel billet at that adjusted Türkiye steel billet price as opposed to purchasing steel billet from another overseas supplier at a different price on different terms negotiated at arms length. Ultimately it is a commercial decision of the purchaser from whom it purchases its requirements and at what price and on what terms.

This has not been considered by the Commission in its adoption and use of an adjusted Türkiye steel billet price. Consequently, it cannot be claimed that a constructed normal value using an adjusted Türkiye steel billet price represents the cost of production of the subject railway wheels in China.

Finally, the WTO Panel's finding at paragraph (iv) above that the Commission acted inconsistently by "*failing to calculate profit on the basis of the actual amounts incurred and realized by Masteel in respect of "sales in the domestic market of the country of origin*" would also seem relevant here. Specifically, the reasons why the Commission rejected Masteel's domestic sales in determining profit should be challenged for the reasons set out later below.

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This also should include the Commission's assertion that Masteel's domestic sales represented sales in '*unusual circumstances*'. It is not set out in the Commission's reasons what constituted sales in '*usual circumstances*' or what would constitute sales in '*usual circumstances*' for sales by Masteel. In other words, what was the criteria for assessing was is '*usual*' and, therefore, what is '*unusual*' for sales by Masteel in the domestic market? This is not addressed by the Commission.

On the actual determination of profit, the Commission has selected low volume sales and disregarded high volume sales on the basis, presumably, that low volume sales were more representative or consistent with the volume of domestic sales of the relevant railway wheels. However, if, as claimed by the Commission, the '*purpose of the constructed normal value is to estimate as closely as possible, using costs and profit, what the price of the exported goods would have been had they been sold in the ordinary course of trade in the exporter's domestic market*', then more than the volume of goods sold needs to be taken into account. Volume is not the only determinant of profit as the Commission itself acknowledged in its analysis.

Specifically, Regulation 45(3)(a) requires that profit be determined by '*identifying the actual amounts realized by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export*'. The Regulation does not permit the Commission to arbitrarily expand or narrow the scope of the '*general category of goods*' to one that the Commission is more representative based on sales volume or some other arbitrary criteria. The '*general category of goods*' here is railway wheels or freight railway wheels. The volume at which that 'general category of goods' is sold is irrelevant.

In conclusion, therefore, the inconsistences of the imposition of the anti-dumping measures following the original investigation requires rectification, amongst other matters, prior to the consideration of the continuation of those non-conforming measures for a further five years. This is also to ensure that the inconsistences identified by the Panel are not replicated in consideration of the continuation of the measures, which already appears to be evident from the preliminary findings in the SEF.

2. Normal Value should be determined based on Masteel's domestic sales to [redacted] because the transactions between Masteel and [redacted] are at 'arms length' price.

2.1 <u>Masteel and [redacted] are independent market players.</u>

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In the SEF the Commission expressed the following opinion in Confidential Appendix-E:

"[redacted]

[redacted]."

[Confidential information concerning MTM's sales with domestic customers redacted]

It must be noted that the Commission did not find as a question of fact supported by evidence that the price at which Masteel sold railway wheels to [redacted] appeared to be influenced by the relationship between the parties being [redacted] or the nature and extent of that influence or, for that matter, what commercial or other objective would be served by prices being so 'influenced'. It merely formed an opinion concerning the appearance of such influence due to the relationship between the parties.

[redacted]

[Confidential information concerning commercial arrangements for supply of railway wheels redacted]

Despite Masteel and [redacted] both being SOEs, both companies are acting following the market rules which are not influenced by governmental interference or any other relationship.

2.2 *The agreement between Masteel and [redacted] is reached following market rules and Masteel's [redacted] do not conflict with competitive market rules.*

In the SEF the Commission made the following preliminary determination:

"[redacted]

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[redacted].

[redacted]. ”

[Confidential information concerning MTM's sales with domestic customers redacted]

This reasoning is not persuasive. [redacted]

[redacted].

It is not clear why the arrangement was not and/or could not be [redacted]. This conclusion was not explained by the Commission in SEF. It would seem that the arrangement was of mutual benefit to Masteel and [redacted], whereas for [redacted].

[Confidential information concerning MTM's sales with domestic customers redacted]

Strict compliance with contractual arrangements is not a necessary or, indeed common feature in most countries including Australia, where practice often departs from strict compliance with contractual terms for a variety of reasons regardless of whether the parties are related or not. Indeed, it also is a common feature in the administration of contracts entered into by governments, including the Australian Government. For example, so-called 'cost blow outs', that is, of the agreed contract price being significantly increased for any number of reasons is a common, well-publicized feature of contracts entered into with the Federal Government, especially defence contracts. Strict compliance is not a common practice in the administration of such contracts by Government Departments and agencies. It seems inconsistent for the Commission to insist on strict compliance with contractual terms when the Australian Federal Government itself does not.

Further, as the Commission would be aware judicial rulings, such as by the Federal Court in administrative law matters often depart from strict application of legislative provisions for a variety of reasons. It could not be said that the relationship between the parties influenced such departure from the strict application of the legislation in question.

Rather, regard must be had to the substance of the departure and the reasons for it. There is no suggestion that the arrangements between Masteel and [redacted] were not mutually beneficial, including profitable, for both. It is not indicative

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that the transactions were not at arms length. Indeed, the Commission provided no evidence that such flexibility did not occur in transactions negotiated at arms length.

It also needs to be mentioned that it is not an uncommon feature in many countries that, culturally, strict compliance with contractual terms is not paramount but the relationship but that transactions between parties, whether related or unrelated, are to their mutual benefit. Accordingly, transactions are managed in a manner for the parties mutual benefit regardless of the application of the strict contractual terms. Here, the exception taken by the Commission is that [redacted]. To act to the detriment of the other party in transactions would seem particularly commercially shortsighted and, ultimately, to one's own disadvantage as there would be no reason for the disadvantaged party to be a party to such transactions. This does not appear to have figured in the Commission's reasoning.

[Confidential information concerning MTM's sales with domestic customers redacted]

Specifically, the Commission does not address why not strictly applying contractual terms but managing transactions between the parties to their respective commercial, including profitable, short and long terms benefit does not reflect [redacted]. That is, it does not address why a win/win paradigm does not reflect [redacted], but a win/lose paradigm does reflect 'conditions of genuine competitive bargaining and selling between independent parties'. Presumably the Commission would have found a similarly flexible approach between Masteel and its Australian customers to ensure that contractual arrangements are managed to the parties respective mutual benefit. To do otherwise would make no commercial sense for either party.

[Confidential information concerning MTM's sales with domestic customers redacted]

Finally, it is noted that the Commission states that it has not assessed whether Masteel's pricing policies and/or, presumably, practices are compliant with domestic revenue laws in China. This presumably is reference to compliance with transfer pricing arrangements for taxation purposes. Regardless of whether Masteel's are compliant with such revenue laws, nevertheless in complying with such laws through appropriate transfer pricing arrangements, the resultant transfer prices, including after application of rebates, would reflect market prices. In this respect there has been no

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suggestion by the Commission that Masteel's domestic selling prices to [redacted] do not reflect market prices. A 'market price' in turn would reflect a price negotiated at arm's length between a buyer and seller in an open market. By not making that assessment, how could the Commission conclude what a price negotiated at arm's length in an open market would be?

Regardless of whether the processes used to determine prices comply with revenue laws in China, those arrangements between Masteel and [redacted] for the supply of railway wheels did in fact reflect [redacted] and were administered and managed in practice to the mutual benefit of both parties consistent with prudent commercial practice. Both parties profited from the transactions both in the short and long term – in other words, it was to their respective mutual commercial benefit. There is no evidence to contrary.

[Confidential information concerning MTM's sales with domestic customers redacted]

3. **Masteel's purchase price of the steel billet used to manufacture the goods should be adopted to construct the cost of railway wheels. MIS's sales of steel billets to Masteel were [redacted].**

[redacted]

[Confidential information concerning MTM's purchase of steel billets from MIS redacted]

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4. The Commission should deduct a premium of 2% from the constructed cost of steel billets to reflect the true cost of the steel billet used to manufacture the goods.

The Commission has made adjustments to the steel billet benchmark to reflect the grade of billet used to manufacture the goods,

> *"The commission found that each of these three methodologies identified that there was a premium for the grade of steel used to manufacture railway wheels compared to the identified benchmark price. The commission further found that each of the identified premiums were broadly consistent, each being within 1% to 2% of each other.*
>
> *Based on this analysis, the commission made an adjustment to the Turkish steel billet benchmark to reflect the premium for the grade of steel used to manufacture the goods. The adjustment was based on the highest identified premium identified, which was the premium between differences in Chinese steel billet grade prices."*

Following the same logic, the Commission should have deducted a premium of 2% from the constructed cost of steel billets to reflect the true cost of the steel billet used to manufacture the goods.

5. The profit of 31.3% adopted by the Commission is not accurate to construct the cost of railway wheels based on the adjusted constructed cost of steel billets.

5.1 <u>The Commission cannot calculate the profit based on the models with diameter of [redacted] mm because these railway wheels are not within the scope of the goods.</u>

In calculating profit, the Commission used the profit based on railway wheels that were not within the scope of the subject goods:

> *"The goods subject to the anti-dumping measures and this inquiry are:*
>
> *'Forged and rolled steel, high hardness, nominal 38-inch (or 966 mm to 970 mm) diameter, railway wheels, whether or not including alloys.'"*

The Commission has not given adverse opinion regarding the definition of the goods. Moreover, to respond to the exporter questionnaire, Masteel has provided full and complete information regarding the CTMS as well as sales listing of the goods. However, given the fact that Masteel has made profitable

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domestic sales of the goods to [redacted] during the inquiry period, the Commission has calculated the profit based on [redacted] models including [redacted] with the diameter of [redacted] mm which obviously fell out of the scope of the goods. It is not reasonable.

5.2 The Commission should use the constructed costs of steel billets to calculate the profit of railway wheels as the Commission did for constructing normal value.

When calculating the cost of wheels under investigation, the Commission has constructed the cost of steel billet AAR-C+ based on (MIS's production cost of steel billet + SGA + PROFIT + transportation fee). Masteel claims the Commission should adopts same constructed methodology to calculate profit of domestic sales of wheels instead of direct use of purchase cost. Masteel has recalculated the CTMS of the wheels with diameter 970mm sold on domestic market using the same cost replacement method.

Masteel has recalculated the dumping margin using the constructed cost of railway wheels along with the three models of the goods. [See **Confidential Attachment-I**]

6. Masteel claims there is deficiency in choosing Türkiye to determine the benchmark.

In calculating a constructed normal value, the Commission has rejected the price paid by Masteel for steel billet it purchased from MIS because it considered that the price paid was influenced by the relationship between the parties. Specifically that Masteel purchased steel billet from MIS at 'below cost in transactions that were not at arm's length': refer Section B3.1 of Appendix B to the SEF.

Further, for reasons that are not apparent, the Commission determined the cost of steel billet for the purposes of calculating a constructed normal value in the manner set out in Section B3.2 of Appendix 2 of the SEF. Specifically it used a 'benchmark' price for steel billet from Turkiye because *"Having considered these relevant factors, the commission has preliminarily found that Turkish domestic prices provide a suitable representative benchmark that is indicative of the cost of production in China unaffected by the distortions identified in the Chinese steel market"*: refer to Section B4.4 of Appendix 4 to the SEF. It then made various adjustments to the benchmark price to reflect the cost of production in China.

To that cost of production was added SG&A and an amount for profit, which amounts were determined as set out in Sections 10.2.2 and 10.2.3 of the draft verification report.

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The principal issues with the calculation of the constructed normal value are:

- whether the use of domestic selling prices of steel billet in Turkiye is an appropriate 'benchmark';

- whether the terms and conditions in which the Turkiye steel billet 'benchmark' were pursuant to long terms supply contracts for use in the production of railway wheels or similar product(s) as this would materially affect prices as compared with steel billet purchased on short term or spot contracts;

- the appropriateness of the adjustments made to the Turkiye steel billet 'benchmark' price, both in terms of reasons for the adjustment and the amount of each such adjustment, so as to reflect cost of production of steel billet in China.

It is difficult to properly address these and other issues concerning the calculation of the constructed normal value because insufficient information has been provided. Nevertheless, it is difficult to conceive how prices for steel billet in Turkiye could provide a 'suitable representative benchmark' for steel billet prices in China.

As noted earlier above, the WTO Panel reached a similar conclusion regarding the use of steel billet prices of a French company in the original investigation.

Specifically, there does not appear from the information in Appendix B to the SEF any assessment (i.e., benchmarking) of the cost to make and sell steel billet against that in China or elsewhere, such as sources for and cost of raw materials and other inputs to manufacture, the scale of manufacturing operations and the like as compared with those in China, nor of market conditions in Turkiye or of the terms and conditions pursuant to which steel billet is supplied for the production of products like railway wheels.

Nor did the Commission seek to obtain expert advice on such benchmarking, although from its experience in A4 Copy Paper it would or should be aware of firms who provide such expert advice and whose benchmarking methodologies are available on their websites such as Fastmarkets: Commodity price data, forecasts, insights and events - Fastmarkets and Methodology - Fastmarkets The benchmarking and related services provided by such firms not only includes pricing but extends to benchmarking production processes and markets for the products in questions, both being relevant to pricing of the relevant products. No doubt there are firms that provide similar expert advice on steel production and prices, including benchmarking prices, although Fastmarkets does cover the steel products.

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Attached is a report (Research Report on the Chinese Steel Billet Market) from such an expert, namely, SteelHome [see **Confidential Attachment-II**] The Commission's attention is drawn to the conclusions set out in that report, recognizing that those conclusions are of independent expert. No advice on such issues has been either sought or obtained by the Commission from an independent expert has been obtained on the Chinese steel billet market, nor has the Commission referred to its personnel having the qualifications, expertise and experience to provide such expert advice.

In addition, a problem with such a comparison is that China produces approximately 715 million MT of steel per annum, whereas the next closest producing country, India, produces only approximately 92 million MT per annum and Türkiye only produces 22 million MT per annum primarily from scrap steel imported from the USA: The Turkish steel market at the center of a shifting world (arcgis.com)This was the problem referred to by the WTO Panel in its recent decision concerning the consistency Australia's anti-dumping measures on, amongst other goods, railway wheels with its obligations under the WTO Ant-Dumping Agreement.

Hence the issue of whether the substitution of steel billet prices in Türkiye is appropriate. That is, why a Türkiye company's cost of purchasing steel billet could meaningfully represent a Chinese company's cost of producing steel billet in China is not explained by the Commission. In addition, the Commission's analysis did not take into account the effect of geopolitical events such as the war in Ukraine, the earthquake in Türkiye on the production and cost of steel in Türkiye. These events and the Government of Türkiye's response materially affected steel prices in Türkiye, but this does not seem to have been taken into account by the Commission. Further information on this can be obtained from: SteelOrbis (e.g., Billet prices in Turkey rise amid lack of availability with strong demand expectations (steelorbis.com)) and Steel Radar (e.g., Scrap, billet and rebar prices have increased in Turkey (steelradar.com)) and MetalMiner (e.g, Turkey steel exports become more attractive, country adds capacity (agmetalminer.com)) and especially Fastmarkets (Metals methodology - Fastmarkets).

Since most of the appendices to the SEF are confidential, Masteel cannot check the appropriateness and accuracy of the steel billet benchmark determined based on Türkiye. Masteel requests for more information to make further comment.

7. **The Commission's own findings in the SEF do not support the continuation of the anti-dumping measures.**

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The Commission's preliminary findings in the SEF do not support the continuation of the anti-dumping measures. That is, they do not support the proposition that the expiry of the anti-dumping measures would lead or be likely to lead to the continuation or recurrence of the material injury that the measures are intended to prevent, namely, material injury caused or threatened by dumping.

Figure 5 at Section 5.5 of the SEF sets out the profit and profitability of Comsteel, the sole producer of freight railway wheels in Australia as follows:

Figure 5 charts Comsteel's profit and profitability as a percentage of revenue over the analysis period.

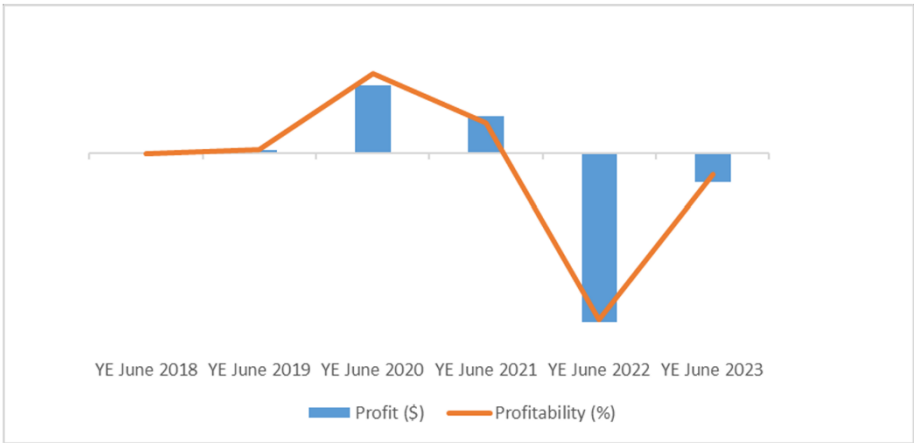

Figure 5: Profit and profitability

[Source: Statement of Essential Facts, p.34]

It is evident that Comsteel's sales of freight railway wheels was profitable until YE June 2022 when it was unprofitable and continued to be unprofitable in the following YE to June 2023. This despite an increase in sales volumes from YE June 2018 to YE June 2023; refer Figure of the SEF (page 32 of the SEF).

The apparent reason for the significant fall in profitability in YE June 2022 was a material increase in Comsteel's Cost to make and sell (CTMS) that commenced in YE June 2021 and continued to YE June 2023 but was only matched by an increase in prices in YE June 2023: refer Figure 4 of the SEF (page 33 of the SEF). Hence the fall in profitability.

Significantly, since the imposition of the anti-dumping measures were imposed, Comsteel's sales volumes have progressively increased but its market share has remained stable at around 30%. This would indicate a stable market share in a growing market reflected in its increase in sales volumes.

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Of course anti-dumping measures applied to exports of Masteel's freight railway wheels throughout this period having been imposed on 16 July 2019. Accordingly, since 16 July 2019 interim dumping duties would have been payable and paid by Masteel's customers on imports of freight railway wheels exported to Australia by Masteel at the dumping duty rate of 17.4% applied to the export price of such exports.

In other words, Masteel's Australian customers (e.g., BHP, Rio Tinto, etc.) would effectively have been purchasing those freight railway wheels at un-dumped prices with the interim dumping duty payable thereon. This would include paying interim dumping duty in excess of the dumping duty properly payable on exports at least during the inquiry period (i.e., 1 July 2022 to 30 June 2023) when the Commission has preliminary determined the dumping margin for Masteel's exports to be 13.3%, as well as for other exporters.

As such, any injury incurred by Comsteel such as the lack of profitability in YE June 2022 and thereafter cannot be attributed to dumping of exports by Masteel. Its exports were entering into the commerce of Australia at un-dumped prices due to the payment of interim dumping duty. Indeed, they were likely entering into the commerce of Australia at prices that exceeded un-dumped prices due to the rate of interim dumping duty payable exceeding that which was properly payable.

Clearly injury incurred by Comsteel could not have been caused by Masteel's exports entering into the commerce of Australia at dumped prices because they were not. Any such injury must have been being caused by other factors such as an increase in Comsteel's CTMS that it did not recover in increased prices. That Comsteel was not able to recover such increase in its CTMS cannot be attributed to suppression caused by dumping of exports by Masteel because as noted, Masteel's exports of railway freight wheels were entering into the commerce of Australia at prices that were un-dumped due to the payment of interim dumping duty on them probably in excess of that which was properly payable.

Of concern is the absence of such analysis by the Commission in the SEF that one would expect of an '*objective investigating authority*', to use the words of the Panel as extracted earlier above.

At any rate, it is evident that the Commission's own preliminary findings do not support the proposition that the expiration of the anti-dumping measures would lead or be likely to lead to the continuation or recurrence of the material injury that the measures are intended to prevent. Rather, those

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preliminary findings confirm the submissions made by BHP and Rio Tinto that their respective purchasing decisions were based on a variety of considerations and not solely or principally price.

Indeed it supports the contention by a supplier that it competes with its competitors solely or principally on price that the supplier is likely, if not certainly, to be uncompetitive both domestically and globally if that is the only basis on which it can compete, especially in the case of elaborately manufactured goods. This has effectively been borne out be research within the Office of the Chief Economist at the Department of Industry. No doubt the Commission is aware of such research as being within the same Department as it.

8. Continuation of the anti-dumping measures will not be in Australia's national interest.

Continuation of the anti-dumping measures would not be in Australia's national interest. Indeed, neither the continuation of the anti-dumping measures nor their imposition following the original investigation would seem a sound and sensible industry policy.

The export of minerals and, in particular, iron ore is major contributor to the Australian economy. Adding costs to that industry without a corresponding benefit would not seem to be a sensible industry policy. Further and more importantly, seeking to persuade mining companies to purchase freight railway wheels based principally or solely on price as opposed to quality considerations would seem to be contrary to the national interest because of the risk that it potentially poses for the shipment of iron from mines to ports for export. Failures in such freight railway wheels obviously can have material financial and other adverse effects.

While price would be an important consideration in the purchase of railway wheels, other considerations would seem to outweigh price. Railway wheels that do not at a minimum do not meet the specifications of the mining companies as a minimum would seem too expensive at any price cost because of the potential risks that it poses to the supply chain. The entities best placed to assess those risks are the mining companies themselves.

It seems strange for the Commission and, therefore, the Australian Government to seek to persuade the mining companies to purchase railway wheels by imposing a protective tariff on imports. As is evident from the preceding section of this submission, purchasing decisions are not influenced by price.

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That is, the imposition of anti-dumping measures has not affected the purchasing decisions of mining companies. Sales of railway wheels by both Comsteel and Masteel have maintained their respective market share and, consequently, sales volumes in an apparent growing market despite the imposition of the anti-dumping measures in 2019. Clearly pricing is not relevant or, at least, determinative of purchasing decisions by the mining companies. There is no evidence that this would change upon the expiration of the anti-dumping measures. Indeed, the evidence, as reflected by the Commission's preliminary findings in the SEF, is to the contrary – that is, purchasing decisions would continue to be governed and made on a variety of considerations as outlined above.

It would not seem to be in the national interest, nor a sensible industry policy, for the Australian Government to intervene and seek to influence purchasing decisions of the mining companies in the purchase of freight railway wheels by interfering in pricing through the imposition of a tariff in the form of dumping duties.

It also is noted that the Anti-Dumping Revie Panel (ADRP) recently expressed the view that whether the imposition of anti-dumping measures or their continuation was in the national interest was not a relevant consideration for the Minister:

"*The national interest is a broad concept which invariably requires a balance between potentially conflicting interests. In the present case, by not expressly legislating for the application of a public interest test, it would appear the government has suggested that it would be appropriate to have regard to industry policy objectives in preference to other competing economic or financial outcomes which are said to be in the national interest. As there is was no express requirement that the Minister address national interest considerations it cannot be said that the Minister erred in that regard*." (ADRP Report 153, page 14, para 33)

However, the view expressed in the last sentence of the extract is not correct. This is because the reason why the Federal Government did not expressly legislate for a national interest test was because the national interest was a relevant consideration for the Minister to take into account in exercising his/her statutory discretion in deciding whether to impose anti-dumping measures. It, therefore, was unnecessary to expressly legislate for what was already permitted by the legislation.

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This was reflected in the Federal Government's response to the Productivity Commission's review of Australia's anti-dumping regime, which recommended an express public interest test, namely, '*Streamlining Australia's anti-dumping system; An effective anti-dumping and countervailing system for Australia*' (AGPS) (June 2011) In that response The Australian Government stated that:

> "*The Minister currently has an unfettered discretion not to impose measures. The Government believes this is adequate for the Minister to take account of the public interest when circumstances warrant broader matters be considered, subject to the changes outlined in 6.2. As indicated in 6.1, the Minister has an unfettered discretion not to impose measures. In reporting its findings to the Minister, the Branch will now include an assessment of the expected effect that any measures might have on the Australian market for the goods subject to those measures, and like goods manufactured in Australia, and in particular any potential for significant impacts on this market*." (Sections 6.1 & 6.2, page 26)

Further, the reason why the decision as to whether to impose, vary or continue anti-dumping measures is vested in the Minister and as a statutory decision is to ensure that the national interest is taken into account. That is the role of Ministers in the Federal Government and consistent with the Westminster system of government, namely, to take into account and make decisions in the national interest. That is what they were elected to do or, as Minister of the current Federal Government including the Prime Minister have stated, it is part of a Minister's job description.

Whether interested parties believe a decision to impose, vary or continue anti-dumping measures is or is not in the national interest, ultimately that it's a matter for the Minister to decide. In addition, as the Productivity Commission has recently stated:

> "*Overall, given the implications for resource allocation, there is likely to be an economy-wide net cost associated with any system of anti-dumping measures. While the scale of the cost to Australia is unclear, it would be determined by the size and scope of such measures. Yet, such costs persist. While WTO rules stipulate that anti-dumping measures are to be implemented for a set duration, the Anti-Dumping Commission has approved extensions in several instances. As such, anti-dumping measures represent an ongoing source of protection to relatively few firms and an ongoing economy-wide net cost. Moreover, there is no exit plan: the protections carries no expectation that firms will implement strategies to improve their competitiveness; nor has there been an*

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indication from government that such measures are part of a broader plan to facilitate structural adjustment." (Productivity Commission, '5-year Productivity Inquiry: A competitive, dynamic and sustainable future', Volume 3,(Report no. 100 – 7 February 2023) page 82)

Hence for these reasons as well, the continuation of the anti-dumping measures would not be in the national interest.

9. Conclusion

In summary, Masteel submits that the dumping margin calculated for Masteel is not accurate which should be corrected in the following proceedings. The Commission's own findings in the SEF do not support the continuation of the anti-dumping measures and continuation of the anti-dumping measures will not be in Australia's national interest.