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The Director
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Dear Director

Anti-Dumping Commission investigation into railway wheels imported from China and France

We refer to the Anti-Dumping Commission's (**Commission**) investigation into railway wheels imported from China and France.¹ The investigation follows the application (**Application**) made by Commonwealth Steel Company Pty Ltd (**Comsteel**) for anti-dumping duties and countervailing subsidies to be imposed on importers of iron ore railway wheels which meet the following description:

Forged and rolled steel, high hardness, nominal 38-inch (or 966 mm to 970 mm) diameter, railway wheels, whether or not including alloys.

Axles and other components are excluded from the goods coverage.

In its Preliminary Affirmative Determination dated 18 June 2018 (**PAD**), the Commission formed the view that Maanshan Iron and Steel Co Ltd (**Masteel**) and MG-Valdunes (**Valdunes**) had exported to Australia iron ore railway wheels, meeting this description, at dumped or subsidised prices causing material injury to Comsteel, the only Australian based manufacturer of iron ore railway wheels. The Commission also imposed interim securities on the goods exported to Australia pursuant to section 269TD of the *Customs Act* (**Securities**).

As a consumer of iron ore railway wheels, BHP has sought to assist the Commission with its investigation by providing relevant factual information to the Commission including by participating in a site visit and by confirming relevant facts by letter dated 2 August 2018 (enclosed for ease of reference). BHP has also reviewed the PAD, and submissions made by other parties, and considers the following submissions relevant to the investigation.

1. Summary

BHP respectfully submits that there is no sound legal or policy basis for imposing anti-dumping duties or countervailing subsidies in respect of iron ore railway wheels exported to Australia by Masteel and Valdunes.

Firstly, an analysis of Comsteel's application data indicates that it has experienced an estimated 500% increase in sales volumes and a 500% increase in sales revenue in respect of the iron ore railway wheels the subject of the Application.² In such circumstances, BHP considers that it cannot be concluded that this part of Comsteel's business is not profitable or is experiencing injury in any form.

¹ Investigation '466 Railway Wheels'.

² Application A-5.2

Secondly, BHP's view is that any decrease in profitability identified in the PAD has likely been caused by some extraneous factor, such as Comsteel's broader railway wheels or export business. This is again supported by Comsteel's application data, which indicates that in the relevant period, its export business experienced a 52% drop in sales volume.³

Thirdly, wheels BHP purchases from Masteel and Valdunes are not 'like goods' to the wheels purchased by BHP from Comsteel due to (amongst other things) differences in quality and functionality.

Imposing anti-dumping duties or countervailing subsidies would compensate Comsteel for the effects of competitive market dynamics impacting its overall business and would be contrary to Australia's international obligations and economic interests.

BHP strongly opposes the imposition of anti-dumping duties in cases where there is no justifiable economic need to do so. BHP, as one of the largest exporters of goods from Australia, benefits from and supports the principles of free trade. Australia's anti-dumping laws should not be used by domestic industries as a form of de facto tariff protection or to defend their domestic profit margins against international competition. Protectionist tariffs have long been contrary to Australia's trade policy. They are contrary to Australia's international obligations under the General Agreement on Tariffs and Trade and are damaging to the overall economy and prosperity.

BHP also strongly opposes the continuing imposition of Securities. From the extensive submissions received by the Commission so far, and those which now follow, it is BHP's view that there is no sound factual or legal basis to conclude that Securities are necessary to prevent material injury to Comsteel. Conversely, the imposition of Securities has placed significant burdens and expense on Australian end users and has commenced operating as a protectionist tariff.

2. Comsteel wheels and Masteel / Valdunes wheels are not 'like goods'

- (a) A threshold issue for the Commission in this investigation is whether or not the goods under consideration and the goods produced by the Australian industry are 'like goods'.
- (b) Each end user of iron ore railway wheels purchases wheels which meet its own specification, rather than a generic specification. Railway wheels manufactured to the specification of one end user are not interchangeable with railway wheels manufactured to the specification of another end user. Accordingly, the issue of whether or not imported iron ore railway wheels and domestically produced iron ore railway wheels are like goods can only be addressed by an end user in relation to wheels manufactured for it. BHP does not know whether, for example, iron ore railway wheels manufactured overseas and imported for use by Rio Tinto Limited (**Rio Tinto**) are identical to or closely resemble iron ore railway wheels manufactured domestically for use by Rio Tinto, as BHP has never purchased or used those goods. Additionally, those goods might closely resemble each other in the context of the Rio Tinto railway system but not the BHP railway system, as the railway systems may have different operational characteristics.
- (c) This reinforces the inherent problems, which arise from the Commission's approach of adopting a generic description of the goods under consideration to capture a series of 'bespoke' manufactured goods, each of which is only used in a specific railway system.
- (d) As generic wheels for use in a generic iron ore railway system do not exist, they should not be the goods under consideration for the purposes of an anti-dumping investigation. BHP's view is that this fundamental conceptual error constitutes a fatal flaw in the investigation, which justifies its termination.
- (e) BHP has also supplied a significant volume of factual material to the Commission which demonstrates that the iron ore railway wheels supplied to BHP by Comsteel are not identical to, and do not closely resemble, the iron ore railway wheels supplied to BHP by Masteel and

³ *ibid.*

Valdunes. In particular, BHP has provided the Commission with factual material which demonstrates that:

1. Masteel and Valdunes use a different production process (continuous casting) compared to Comsteel (ingot casting) to produce the relevant goods;
 2. the impact of the different production processes is that the Comsteel wheels have different physical characteristics to the Masteel/Valdunes wheels, in that they have a higher frequency of non-metallic inclusions (that is, they differ in terms of purity and chemical composition);
 3. the differences in physical characteristics results in the imported wheels being of a different quality to the domestic wheels; in particular, Comsteel wheels are more prone to cracking after a period of use in BHP's railway operations and do not meet the performance requirements mandated by BHP's specifications;
 4. the difference in quality means that the Comsteel wheels do not function in an identical manner to the Masteel/Valdunes wheels when used in BHP's railway operations, which has required BHP to implement costly mitigation measures to address the difference in functional performance; and
 5. as a consequence of these functional differences, BHP does not consider Comsteel wheels and Masteel/Valdunes wheels to be 'like' or comparable, [REDACTED]
[REDACTED]
[describes confidential operational recommendation and actions]
- (f) Each of the differences referred to above (production processes, physical characteristics, quality, functionality and commercial substitutability) is a matter which the Commission has specifically identified in section 2 of the *Dumping and Subsidy Manual* as being relevant to its determination of like goods. As BHP is the only user of the relevant wheels, it is the only party in a position to provide the Commission with reliable evidence as to their quality, functionality and commercial substitutability in the context of BHP's railway operations.
- (g) For these reasons, BHP considers that there is no reasonable factual basis upon which the Commission could conclude that the imported and domestic railway wheels produced for use in BHP's iron ore railway operations are like goods to those produced by the Australian industry. Whether or not this conclusion holds in relation to wheels manufactured to different specifications for different end users for use in different railway systems is an issue which BHP cannot comment on.
- (h) As Comsteel is the only Australian manufacturer of iron ore railway wheels supplied to BHP, there is no Australian industry manufacturing 'like goods' to the wheels manufactured for BHP by Masteel and Valdunes.
- (i) Legally, this is also the required conclusion. The *Customs Act* must be interpreted consistently with Australia's international obligations under the *General Agreement and Trade* and the *GATT Agreements* negotiated in 1979'.⁴ This is recognised by section 3.4 of the Anti-Dumping Commission Instructions and Guidelines for Applicants on the Examination of a Formally Lodged Application.⁵ An overly broad interpretation of 'like goods' to include goods that meet a high level, generic description, would permit the imposition of protectionist tariffs for one Australian industry contrary to international law and contrary to Australia's interests as a whole.

⁴ In *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564, 568, the Federal Court stated that the legislative provisions relating to anti-dumping 'reflect Australia's international rights and obligations in respect of anti-dumping and countervailing measures arising from Australia's membership of the General Agreement on Tariffs and Trade (GATT) and the GATT Agreements negotiated in 1979' (which include the Agreement on Implementation of Article VI of the GATT 1994); *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20;.

⁵ Anti-Dumping Commission, Instructions and Guidelines for Applicants on the Examination of a Formally Lodged Application December 2015, 7.

3. Comsteel has not suffered injury from the imported wheels

3.1 Comsteel has not established attributable material injury in the injury examination period

- (a) BHP considers that Comsteel has not established that it has experienced material injury and there is no reasonable factual basis for such a conclusion.
- (b) Based on the material provided in its Application, Comsteel has experienced an estimated increase in sales volumes of 500% and an increase in sales revenue of 500% in respect of its Australian iron ore wheels business during the injury examination period.⁶ Claims that it has suffered capacity under-utilisation, price suppression and decreased return on investment are not substantiated upon the evidence before the Commission, and are not substantiated as having been caused by wheels imported from Masteel and Valdunes.
- (c) If the Commission were to find that the industry had experienced decreased profitability for example, it is BHP's submission that this injury is not attributable to the imported iron ore railway wheels. In this respect, s 269TAE(2A) of the Customs Act 1901 (Cth) prevents injury being attributable to the imported goods when it is caused by other factors such as (amongst others):
 - (i) contractions in demand or changes in patterns of consumption;
 - (ii) developments in technology; and
 - (iii) the export performance and productivity of the Australian industry.
- (d) BHP submits that when the Commission analyses whether any injury has occurred and to what this injury can be attributed to, there will be no sound basis for attributing any alleged injury to imports of Masteel and Valdunes wheels at dumped or subsidised prices because:
 1. patterns of consumptions have changed amongst consumers of the goods due to quality differences between wheels manufactured by Comsteel and wheels manufactured by Masteel and Valdunes;
 2. Masteel and Valdunes have invested in superior technology which allows them to produce a higher quality product (and hence influencing changes in consumption); and
 3. Comsteel has experienced a dramatic decline in the performance of its export business in respect of iron ore railway wheels and other products and this aggregated data is relied upon by Comsteel to establish material injury to its Australian iron ore railway wheels business. This means that any asserted injury relying on this data cannot be attributed to the imported Masteel and Valdunes wheels because it is evidently injury unrelated to Comsteel's domestic iron ore railway wheels business, or not causally linked to the imported wheels the subject of this Application.⁷
- (e) The reasons for this are expanded on below and in BHP's letter dated 2 August 2018.

3.2 Claimed injury of loss of sales volumes and market share

- (a) At section 9.3 of PAD, the Commission concludes that Comsteel has suffered injury because while the overall market for iron ore railway wheels increased between 2016 and 2017, Comsteel lost sales volumes and market share at the expense of dumped wheels from China and France.
- (b) BHP's view is that this conclusion fails to consider the overall trends observable from the injury examination period. Such analysis shows that whilst Comsteel experienced a small contraction in market share, it has experienced a 500% increase in sales volumes since

⁶ Above n 2.

⁷ See Application A-5.2, A-8.2 and A-8.3.

2014 attributable solely to domestic sales of iron ore railway wheels⁸ In such circumstances, it cannot be said that there is a trend of or benchmark for material injury during the injury examination period due to a small contraction in market share.⁹ Imposition of dumping duties or countervailing subsidies in such circumstances would compensate Comsteel for the ebbs and flows of commerce and provide a form of protectionism.

- (c) The conclusion at section 9.3 of the PAD also fails to properly identify any causal link between alleged ‘dumping’ or subsidisation and Comsteel’s loss of sales volumes or market share. It only shows that some consumers purchased some of the goods from the subject countries instead of from Comsteel without explaining why this occurred. In this regard, Rio Tinto’s submissions published on 6 June 2018 and 6 September 2018 informed the Commission that there were a number of other factors limiting its purchases from Comsteel including: packaging and safety concerns; inferior wheel lifespan and wear rates; and shattered wheel rim events. BHP has also informed the Commission that quality concerns have informed its purchasing of wheels from Comsteel, Masteel and Valdunes.
- (d) Additionally, the data relied upon by Comsteel in its Application in respect of its sales of quantities is stated to include ‘sales of the goods sold separately and those included in “sets” (i.e with axles)’.¹⁰ The data supplied in relation to other imports is for ‘wheels, whether, or not fitted with axles, of railway or tramway locomotives or rolling stock’ and therefore it likely includes goods other than those the subject of the Application (i.e wheels for iron ore railways excluding axles).
- (e) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [describes confidential business information]
- (f) It is therefore not clear what the relevant variations in market share would have been if sales of wheel sets with axles or other locomotive wheels were excluded from the data. The Commission is not permitted to attribute impacts or injuries caused by other factors extraneous to the goods the subject of the Application and to the iron ore railway wheels imported by Masteel and Valdunes to those imported wheels.
- (g) BHP submits that there is no convincing evidence which establishes that the alleged dumping of imported wheels was the real driver of any loss of sales volumes or market share, as opposed to the other commercial matters raised above. In the absence of any such evidence, there is no sound basis for the Commission to attribute loss of sales volume to the alleged dumping.

3.3 Claimed price suppression

- (a) Section 9.4 of the PAD claims that wheels purchased from the subject countries in 2016 and 2017 were at prices significantly lower than Comsteel’s prices and Comsteel experienced pressure to maintain or reduce pricing at a time when it was experiencing rising unit costs.
- (b) However, the evidence before the Commission suggests that Comsteel would not have changed its price, regardless of movements in its unit cost to make and sell (CTMS). This is indicated by figure 3 of the PAD (reproduced below) which shows that since 2014, Comsteel has had a constant selling price despite changes in its unit CTMS. For example, in 2014 Comsteel had a significantly higher unit CTMS than in 2017 but at both points in time, it had the same selling price. Similarly in 2016 when Comsteel experienced its lowest unit CTMS

⁸ above n 2.

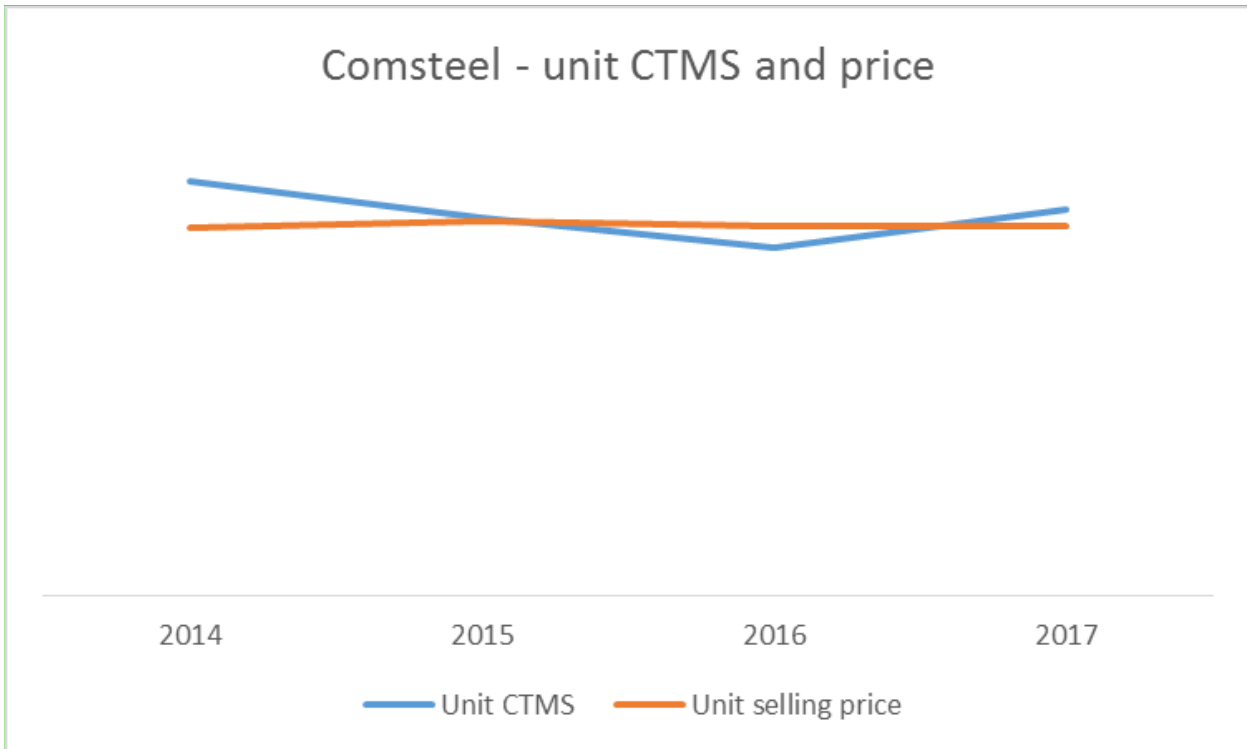
⁹ The Dumping and Subsidy Manual states at section 21.2 (page 125).

¹⁰ A-4.6.

for the injury examination period, its selling price was the same as the price in 2014 (when the CTMS was significantly higher).

- (c) In the Application¹¹, Comsteel states that its selling price for iron ore wheels has remained stable and that it has not changed its selling price to reflect its costs schedule. As Comsteel only claims to have commenced suffering damage from imported wheels from 2016, it cannot say that from that time on it would have changed prices in line with CTMS when it had not done so previously.

Figure 3 from the PAD



- (d) The evidence shows therefore that Comsteel's price did not move in accordance with costs, or even the usual dynamics of supply and demand (for example, most manufacturers are willing to decrease their selling price as the volume sold increases and / or as CTMS decreases and this did not occur in 2015 when Comsteel experienced its highest sales volumes for the injury examination period). If the Commission takes a counterfactual approach to pricing, it must conclude that Comsteel's pricing would have remained the same had the alleged dumping and subsidisation not occurred.
- (e) Further, Comsteel's Application states¹² that the CTMS data relied upon includes 'like goods that are sold domestically, (both individually and in wheel sets with an axle) and export sales'. The data therefore does not solely relate to the costs to make and sell domestically the wheels the subject of this Application. Accordingly, even if price suppression or depression could be established, such injury could not be attributed to the iron ore wheels exported to Australia by Masteel or Valdunes.
- (f) BHP is therefore of the view that there is no sound basis for the Commission to conclude that Comsteel has experienced price suppression, or, that any price suppression is attributable to wheels imported from Masteel and Valdunes.

¹¹ at (A.8.2).

¹² at A-8.2.

3.4 Profits and Profitability

- (a) At sections 8.4.1 and 9.5 of the PAD, the Commission concludes that as Comsteel lost volumes in 2016 and 2017 due to dumped goods and was unable to increase its prices in line with unit cost, there is a causal link between reduced profits and the dumped goods.
- (b) BHP is unable to ascertain why Comsteel made a loss in 2017 when it had experienced an overall increase in both sales volumes and sales revenue in respect of iron ore car wheels sold domestically of 500% as compared to 2014.¹³ No sound explanation has been given as to why Comsteel's unit costs have increased from a base level of 100 in 2014 when its sales volume was 100, to 103.3 in 2017 when its sales volume had increased to 571.95.¹⁴ Comsteel's fixed costs of producing iron ore railway wheels should have fallen substantially over the investigation period yet it complains of being unable to pass on increases in fixed costs in its Application. BHP also reiterates its comments above in respect of Comsteel's inability to establish any causal price suppression.
- (c) Additionally, BHP does not consider the evidence to demonstrate any correlation between Comsteel's claimed decreased profitability in 2016 and 2017 and the alleged dumped goods. For example, in 2015, when Comsteel had significantly higher market share than Masteel and Valdunes, Comsteel made a loss. In 2017, Comsteel had lower market share than the manufacturers in the subject countries and is said to have made a loss, but according to its Application, its revenue from domestic sales of iron ore railway wheels was approximately 250% higher than it was in 2015.¹⁵ There is therefore no observable correlation between the marginal decrease in revenue or sales volumes allegedly attributable to the dumped goods and Comsteel's profitability or profit.
- (d) BHP considers that the data submitted in Comsteel's Application indicates that any negative impact on profits and profitability are attributable to changes in sales volumes in respect of Comsteel's export business or its broader railways business. Additionally, this data is relied upon in support of the Application. For example:
1. at A.8.2 Comsteel's Application states that the index of production variations includes like goods that are sold domestically (both individually and in wheel sets with an axle) and export sales. (Emphasis added).
 2. at A.8.2 Comsteel's Application states that its 'profit figures were impacted by export volumes' and that its 'cost position has been impacted by the reduction in export volumes'.
 3. the data at A.5.2 indicates that whilst Comsteel's sales in relation to domestically sold railway wheels only fell by approximately 14% between 2016 and 2017, there was a 52% decrease in export sales during that period.
- (e) It is accordingly not clear what Comsteel's profit position would have been if export sales of railway wheels and the sales of wheel sets with an axle had been stable. The Commission is not permitted to attribute impacts or injuries caused by other factors extraneous to iron ore railway wheels imported by Masteel and Valdunes (such as loss of export sales and loss of sales of wheel sets with an axle).

3.5 Return on investment (ROI)

- (a) At sections 8.5.1 and 9.6 of the PAD, the Commission concludes that Comsteel has suffered injury in the form of reduced ROI. The Commission calculates ROI based on Comsteel's net profit or loss position and its sales volumes.
- (b) Firstly, BHP submits that the ROI in figure 5 of the PAD does not correlate with figures 1 or 8 of the PAD. Figure 5 suggests that in 2017 Comsteel suffered its lowest ROI since 2014 and

¹³ above n 2.

¹⁴ See table 'Index of cost variations' at pp 16 and 21 of Comsteel's Application.

¹⁵ above n 2.

this ROI was negative. Whereas figures 1 and 8 of the PAD show that since 2014, Comsteel has experienced an estimated increase of 500% in sales volumes and 500% in sales revenue from domestic sales of iron ore railway wheels. A ROI based on net profit and volumes should show therefore an overall increase since 2014. This is particularly so since Comsteel's CTMS unit price and its employment numbers have decreased since 2014 (with selling prices constant).

- (c) Secondly, Comsteel attributes the ROI injury to reduced profits as a result of price suppression. BHP submits that the sudden increase in investment contributed to weighing down of the ROI. Comparing the capex index in table 1 below (extracted from Comsteel's application) and the ROI PAD figure 5, it is evident that Comsteel's ROI bears an inverse relationship with its capex. For example, Comsteel's capex in 2016 was at its lowest for the injury examination period and its ROI was at its highest. Conversely, in 2017, Comsteel's capex was at its highest and its ROI at its lowest. **Table 1.**

Below is the index of Capital Expenditure taken from the Application.

Period	2014	2015	2016	2017
Index	100	96.5	92.2	117.8

PAD Figure 5.



- (d) However, Comsteel states in its Application that its capex relates to its 'broader wheel business (as distinct from the niche – iron ore railway wheels, which is the subject of this application)'.¹⁶ As noted at 3.1 above, the Commission is not permitted to attribute impacts or injuries caused by other factors extraneous to wheels imported by Masteel and Valdunes. So even if the Commission calculated ROI using Comsteel's capex data, this calculation could not be used in support of this Application as it relies on data not solely referable to Comsteel's iron ore railway wheels business.
- (e) There is, therefore, no sound basis for the Commission to conclude that Comsteel has suffered injury in the form of reduced ROI.

3.6 Capacity utilisation

- (a) At section 9.7 of the PAD, the Commission concludes that between 2014 to 2016, Comsteel's capacity was under-utilised, particularly between 2016 and 2017, and that this can be attributed to contracts lost at tender in 2016 and 2017. The Commission stated that as Comsteel is able to use its capacity to manufacture other wheels that are not the goods the subject of this investigation, it analysed volumes of the other wheels produced in the period. It is then said that the volume of these other goods remained stable while volumes of

¹⁶ at (A.8.3).

the wheels the subject of the Application declined. Accordingly, it is the loss of tenders to dumped imports which has caused injury to Comsteel in the form of reduced capacity utilisation.

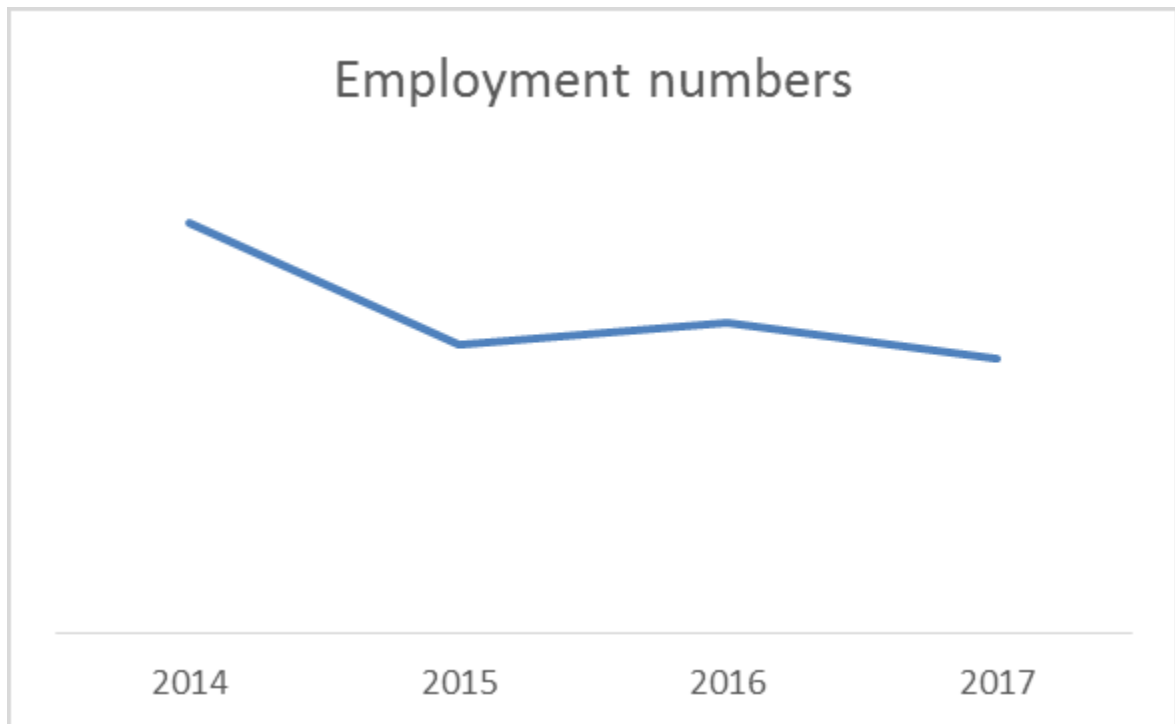
- (b) This conclusion fails to take into account Comsteel's own admissions in its application that its sales volumes of other goods have declined. In particular Comsteel's application shows that it experienced:
 - 1. a 100% decrease in export sales of railway wheels or "like goods"; and
 - 2. a 52% decrease in exports of other goods.¹⁷
- (c) This assertion is also entirely illogical, given that Comsteel's comparative sales volumes for the relevant goods were substantially lower in 2014 and 2015 (ie 100 and 220.04) than in 2016 and 2017 (ie 668.79 and 576.27). That is, the supply of iron ore railway wheels to the domestic market has overall had a significant positive effect on Comsteel's capacity utilisation between 2014 and 2017.
- (d) BHP submits that there is, therefore, no sound basis for concluding that Comsteel's capacity was 'under-utilised' or that the Australian market has suffered or been injured in the form of under utilisation as a result of allegedly dumped goods.

3.7 Reduction in employment

- (a) At section 9.8 of the PAD, the Commission concludes that the reduction in employment numbers during the injury period coincides with reduced capacity utilisation and production volumes in Comsteel's rail division. As the decline in wheel production is primarily attributable to a decline in production of the goods, the Australian industry suffered injury in the form of reduced employment numbers to allegedly dumped imports.
- (b) BHP considers that there is also no evidence to support this conclusion. Firstly, BHP reiterates that there is no sound basis for concluding that Comsteel's capacity was 'under-utilised' or that the Australian market has suffered or been injured in the form of under utilisation as a result of allegedly dumped goods.
- (c) Secondly, section 8.5.3 of the PAD states that 'reductions in employment numbers ... were due to retrenchments caused by reduced sales volumes resulting from loss of railway wheel contracts'. However, figure 6 of the PAD (re-produced below) shows that between 2014 and 2015 there was a sharp decline in employment numbers whilst Comsteel's revenue and market share significantly increased. Any decrease in employment in this period cannot therefore be attributed to dumped goods. Conversely, between 2015 and 2017 the period of allegedly dumped goods, employment numbers remained stable other than a small peak in 2016 whilst domestic sales volumes for iron ore railway wheels experienced an estimated 500% increase.

¹⁷ A.5-2.

Figure 6 from the PAD



- (d) Additionally, we believe that the Commission has not taken into account that the employment numbers presented by Comsteel includes number for assets and employees involved in producing items other than the goods the subject of this Application.¹⁸ Nor has the decline in sales volumes experienced in other parts of Comsteel's business, as explained above at 3.6(b), been taken into account.
- (e) We would submit that the only conclusion available to the Commission is that there is no discernable relationship between employment numbers and sales volumes for the goods the subject of this investigation.

3.8 BHP's preference for Masteel and Valdunes wheels is due to quality

- (a) As explained in BHP's letter dated 2 August 2018 at sections 4 and 5:
 - (i) BHP's preference for Masteel and Valdunes iron ore railway wheels is due to the superior quality of these wheels; and
 - (ii) without improvements to the quality of Comsteel's wheels, BHP would not re-approve Comsteel as a supplier of railway wheels.
- (b) Similarly, Rio Tinto has publicly stated that they have identified a number of quality and safety issues as having impacted its purchasing decisions.

¹⁸ Section 8.5.3 of the PAD.

3.9 Material injury going forward

- (a) The purpose of issuing a dumping duty notice is to prevent injury to Australian industry¹⁹. Where a dumping duty notice would not prevent injury, to issue a dumping duty notice would be contrary to the policy intent of the legislation.
- (b) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [describes confidential operational recommendation and activities]
- (c) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [describes confidential operational recommendation and activities]
- (d)

4. Claims regarding subsidisation

BHP has reviewed the submissions made by other parties, which highlight a number of concerns with the data relied upon by the Commission to form its preliminary affirmative determination that the imported wheels have been sold at dumped or subsidised prices, particularly in relation to whether there is evidence that the wheels exported by Masteel and Valdunes are sold at dumped or subsidised prices. BHP notes in particular, that some of the information relied upon to establish subsidisation of the wheels exported by Masteel, is up to seven years old. BHP respectfully submits that the integrity of Australia's regulatory institutions requires decisions to be based on sound and verified factual information. A failure to do so will result in damaging and unjustified interferences in free market dynamics.

5. Securities

- (a) By letter dated 2 August 2018, BHP requested that the Commission withdraw the Securities requirements. Section 269TD of the *Customs Act* allows the Commission to impose interim securities if considered 'necessary to prevent material injury to an Australian industry occurring whilst the investigation continues'.
- (b) It is BHP's view that, properly analysed, Comsteel's application does not provide a sound factual or legal basis for concluding that there is material injury to the Australian industry caused by iron ore railway wheels exported to Australia by Masteel and Valdunes. The submissions received by the Commission to date also require that conclusion. The imposition of Securities in such circumstances is, in effect, a protectionist tariff, contrary to Australia's international obligations and damaging to Australia's overall economy and prosperity.
- (c) BHP reiterates its request for withdrawal of the Securities requirement.

¹⁹ Section 269SM(1) Customs Act

6. Conclusion

As noted above, BHP considers that there is no sound legal or policy basis for the imposition of dumping duties or countervailing subsidies. In BHP's view, Comsteel's Application, when properly analysed, does not contain sufficient material to found a conclusion of material injury. What the application does show is that Comsteel's domestic iron ore railway wheels business has experienced incredible growth of approximately 500%.

In light of this, it is difficult to ascertain how any finding of material injury could reasonably be made when the Australian industry is viewed as a whole, rather than specific phenomena in isolation. As Lockhart J said in *Swan Portland Cement Ltd v Minister for Small Business & Customs* (1991) 28 FCR 135:

The determination of whether material injury to an Australian industry producing like goods has been, or is being caused, or is threatened, is not an exercise of counting heads of markets, production or distribution centres or things of this kind. It is essentially a practical exercise designed to achieve the objective of determining whether, when viewed as a whole, the relevant Australian industry is suffering material injury from the dumping of goods.²⁰

Additionally, any claims to decreased profitability, decreased ROI or capacity under-utilisation are attributable to decreases in demand due to quality concerns with Comsteel's domestically sold iron ore railway wheels or in other aspects of Comsteel's business. The imposition of dumping duties or countervailing subsidies would therefore be compensating Comsteel for losses attributable to the normal ebbs and flows of commerce at the expense of other Australian industries, would be damaging to other Australian industries, including the mining industry, and, contrary to Australia's international obligations.

Appropriately, the April 2012 Ministerial Direction on Material Injury emphasises that findings of "material injury" must be made in a way that is consistent with Australia's international obligations. This requires that the Commission be satisfied on the basis of cogent evidence and analysis that an Australian Industry has suffered or is at risk of suffering material injury as result of the like goods. This cannot be the case here where, from BHP's perspective, there is no Australian industry producing 'like goods', Comsteel's iron ore railway wheel's business has experienced significant growth and should be reporting great profits and concerns have been raised that the Commission is relying upon old and unverified market data.

Yours sincerely

BHP

²⁰ *Swan Portland Cement Ltd v Minister for Small Business & Customs* (1991) 28 FCR 135, 144.