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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 and the Statement of Essential Facts published by the Commission on 11 October 2018 (**SEF**).[1]

BHP is disappointed with the conclusions reached by the Commission in the SEF and its recommendation that dumping duties be imposed. BHP's view, which has been articulated in its previous submissions, is that Australia obtains significant benefits from free trade and that the Commission's processes should not be used as a de facto means of imposing protectionist tariffs. The Commission should only recommend the imposition of dumping duties where there is unequivocal evidence of dumping which has led to material injury, and where it is clear that the relevant Australian industry and the broader economy will benefit from those duties being imposed.

In summary, BHP considers that the Commission has failed to convincingly demonstrate that railway wheels produced by Masteel have been sold in Australia at less than their normal value, has reached conclusions concerning material injury suffered by Comsteel which are not supported by proper evidence, and has failed to give sufficient weight to submissions by parties other than Comsteel (including BHP) concerning non-price factors that have affected Comsteel's business. The result is that the Commission's recommendation that dumping duties be imposed, if adopted by the Minister, will only lead to increased costs for Australian end-users of iron ore railway wheels without providing any corresponding benefit to the Australian economy. Given this, BHP requests that the Commission reconsider its conclusions and the recommendation it has made in the SEF.

Some of the key objections BHP has to the SEF are explained in more detail below. However, this should not be taken to be a comprehensive list of BHP's objections.

1. 'Normal value' for Masteel's goods

(a) The Commission has concluded in the SEF[2] that Masteel did not sell like goods to the goods under consideration in China in the investigation period. As a result, the Commission's view is that the normal value of exports from China should be established under subsection 269TAC(2)(c) of the *Customs Act 1901* (the **Act**), being the sum of:

(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and

[1] Investigation 466 'Railway Wheels'.
[2] At p.22

(ii) on the assumption that the goods had been sold for home consumption rather than export, such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale.

(b) Regulation 43(2) of the *Customs (International Obligations) Regulation 2015* requires the cost of production or manufacture of like goods in a country of export to be determined by using information set out in the exporter's records, if the records:

(i) are in accordance with generally accepted accounting principles in the country of export; and

(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods.

(c) The Commission has formed the view that 'costs relating to the purchase of the steel raw material for railway wheels during the investigation period contained in Masteel's records do not reasonably reflect competitive market costs'[3]. Non-Confidential Annexure 2 to the SEF sets out the Commission's analysis in this regard. In short, the Commission has concluded that domestic steel billet prices in China have been distorted by the influence of the Government of China in the steel industry. Given this, the Commission has used the steel billet price paid by Valdunes in France to determine the normal value of the goods exported by Masteel, presumably in substitution for all of Masteel's costs of production up to that point in the manufacturing process.

(d) Section 269TAC(9) of the Act states that:

> *where the normal value of goods to be exported to Australia is to be ascertained in accordance with paragraph (2)(c) or 4(e)* [of section 269]*, the Minister must make such adjustments, in determining the costs to be determined under that paragraph, as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods.*

(e) That is, the overarching purpose of the exercise identified in the legislation is to construct a normal value which properly reflects the costs of production of the relevant exporter (inclusive of any adjustments necessary to reflect costs which are not reasonably competitive market costs), which can then be compared against the export price to determine an accurate dumping margin. The purpose is not to construct an unrealistic or artificial normal value which cannot properly be compared with the export price of the goods, as this will give rise to unrealistic dumping margins.

(f) In the present case, BHP has significant doubts that the Commission's approach has in fact resulted in the determination of a normal value which can properly be compared to the export price for railway wheels produced by Masteel.

(g) In particular, BHP notes the following matters:

(i) Masteel is an integrated producer of steel products. Steel billet acquired from third parties is not an input into its production processes, as is the case for Valdunes. The Commission has expressly noted4 that 'the only known exporter of railway wheels to Australia from China [ie Masteel] does not purchase steel billet for the production of railway wheels'. Therefore the price of steel billet as a separately purchased input into the cost of production of railway wheels by Masteel is irrelevant.

(ii) Masteel is a large-scale, highly efficient producer of steel products. BHP understands that Masteel has made significant investments to modernise its steel production

[3] SEF, p.23
[4] At p.101

facilities. It is logical to conclude that these economies of scale and modern production processes result in low costs compared to smaller and less efficient enterprises. That is, Masteel can be expected to be at the bottom of the cost curve for the production of steel billet, rather than at the top of the cost curve (where the market price is set).

(iii) Chinese manufacturers have the benefit of lower costs for various inputs to the production of railway wheels (eg labour) as compared to manufacturers in more developed countries. Therefore, it is to be expected that prices for steel billet in China will be lower than prices in France (or alternatively, that they will contain a higher profit component if sold at the same price). This is supported by the Commission's finding that the dumping margin was 37% for Valdunes versus 19% for Masteel when steel billet prices were equalised, indicating that Valdunes' non-steel billet costs are significantly higher than Masteel's non-steel billet costs.

(h) These factors have been raised in various submissions during the course of this investigation. While the Commission has given some limited consideration to these arguments in the SEF[5], it has failed to make any adjustments to reflect Masteel's circumstances, apparently in reliance on judicial statements that it is not mandatory for it to do so[6]. The fact that there is some judicial guidance that it is not mandatory to make adjustments in all circumstances cannot be interpreted as a licence to adopt inadequate methods of constructing a properly comparable normal value. BHP considers that the SEF does not demonstrate in any convincing way that the substitution of French steel billet prices into Masteel's cost structure properly and fairly reflects its position as a highly efficient, large scale, vertically integrated manufacturer of steel products based in China. Instead, it is an unrealistic assumption which is likely to lead to a flawed conclusion.

(i) Section 9.3 of the Commission's *Dumping and Subsidy Manual* provides that the 'cost to make' includes all:

(i) material costs;

(ii) labour costs; and

(iii) fixed and variable manufacturing overhead costs.

(j) BHP's view is that to determine a properly comparable normal value for railway wheels produced by Masteel, the Commission should have:

(i) separately assessed whether Masteel's material, labour and overhead costs are reasonably competitive market costs; and

(ii) where they are not, and the potential impact is material, made any necessary adjustments to those costs (eg by adjusting them to appropriate benchmarks) so that they reflect competitive market costs.

(k) In the case of steel billet, the major material costs are iron ore and coking coal. The SEF contains an analysis of the price paid by Masteel for coking coal[7], and the Commission has concluded that while the price is subsidised by the Government of China, the value of the subsidy (together with all other countervailable subsidies) is negligible[8]. The SEF does not contain any information concerning the price paid by Masteel for iron ore. However, it would be a simple matter to compare the prices paid by Masteel with a reliable external benchmark, such as the price of iron ore exported to China from Australia. It is not clear from the SEF whether or not the Commission has undertaken this exercise.

[5] Eg at pp.23-24
[6] At p.24
[7] At pp.101-102
[8] At p.36

(l) In respect of labour and overheads, BHP notes that the SEF does not contain any detail concerning which of Masteel's costs are alleged to be non-competitive market costs, or any indication as to the materiality of the alleged distortion in costs brought about by Government of China involvement in the steel industry. Again, BHP notes that the Commission has concluded that Masteel obtains a negligible benefit from countervailable subsidies, so direct subsidisation by the Government of China is not a relevant factor. BHP also notes that the Commission appears to have accepted Masteel's recorded costs as being appropriate for the purposes of determining the normal value of the goods produced by it, except in relation to the production of steel billet[9]. No explanation has been given as to why Masteel's recorded costs are acceptable in relation to some of its activities but not others, bearing in mind that it is a vertically integrated manufacturer.

(m) Given the foregoing, BHP urges the Commission to undertake further analysis of Masteel's costs and the extent to which those costs do not reasonably reflect competitive market costs, to enable it to determine a normal value which is properly comparable with the export price for the railway wheels sold by Masteel in Australia. This is necessary to ensure that public confidence in the Commission's processes is maintained and that Australia complies with its international obligations. The Commission should be mindful that its decisions will have significant cost implications for end-users of the goods in Australia, such as BHP, who have limited visibility concerning the Commission's analysis and the information it is relying on (given the confidentiality of much of the underlying information provided by Comsteel and Masteel). Additional costs should not be imposed on Australian end-users unless a thorough analysis has been undertaken and the Commission can clearly demonstrate the robustness of its conclusions.

2. Injury analysis

(a) Firstly, BHP repeats the submissions made at sections 3.1 to 3.7 of submission 049 published on 17 September 2018 (**Submission 049**), and requests the Commission to re-consider the issues there raised.

(b) In particular, BHP requests the Commission to reconsider its determinations that its analysis of Comsteel's data relates only to domestic sales of railway wheels[10] and/or that the examples at sections 3.2(d), 3.3(e), 3.4(d), 3.5 (d), 3.6 (b) and (c) and 3.7(d) of Submission 049 have not impacted Comsteel's reported sales volumes and market share, CTMS, profits and profitability, return on investment, capacity utilisation and employment considering the following:

(i) these determinations are at odds with the data provided in Comsteel's Application;

(ii) the Commission has expressly acknowledged the mixed nature of the data it has reviewed in relation to some items but not others – for example, paragraph 10.7.4 of the SEF states that 'The Commissioner reviewed sales in the injury analysis period and found that reduced capacity utilisation was partly due to the reduced export volumes, and partly due to reduced sales volumes in the domestic market'; and

(iii) no additional data has been published which would provide a basis for contradicting the data relied upon in Comsteel's Application, or for affected parties to make reasonably informed submissions on market injury using the same data as the Commission.

[9] At p.24, paragraph 3
[10] At p.37

(c) Secondly, as the Commission has noted in the SEF[11], the market for railway wheels was subdued over 2014 and 2015, and then experienced significant growth in 2016 and 2017. That is, there have been wide swings in the state of the market over the injury analysis period. This has been reflected in Comsteel's performance over the same period of time, which was relatively unfavourable in 2014 and 2015, favourable in 2016 (the only year in which it was profitable) and then somewhat less favourable in 2017 (but still significantly more favourable in most respects than in 2014 and 2015).

(d) The Commission's injury analysis is contained in section 10 of the SEF. In summary, the Commission's view appears to be that, of the four widely fluctuating years during the injury analysis period, the high watermark year of 2016 is to be taken as to base level for the purposes of injury analysis. As a consequence, adverse movements between 2016 and 2017 are taken to be evidence of injury, but improvements between 2014/2015 and 2017 are not taken to be evidence of a lack of injury.

(e) This is reflected in, for example, the Commission's findings concerning injury due to loss of market share. Comsteel's market share has fluctuated significantly over the injury analysis period, from a low level in 2014, to a very high level in 2015, and then to a more moderate level in 2016 and 2017 (with a small decline between those years, but still at a level substantially above 2014). The Commission has chosen to disregard the overall rise in Comsteel's market share since 2014 and instead has focused on the decline between 2015/2016 and 2017 as being evidence of injury.

(f) The Commission has taken a similar approach in relation to Comsteel's sales volumes and revenues. The Commission has dismissed the comparison of 2017 sales volumes and revenues against 2014/2015 sales volumes and revenues (which were much lower) and instead focused on a decline between 2016 and 2017 as evidence of injury.

(g) The Commission's findings have, in BHP's view, led to conclusions that are not supported by the evidence. For example, no cogent explanation has been given as to why the Commission has concluded that Comsteel has suffered material injury in the form of reduced capacity utilisation and reduced employment over the injury analysis period when its sales of railway wheels have increased over 5-fold since 2014 (while its sales of other products have fallen). Nor is there any cogent explanation as to why Comsteel has moved from a profit position in 2015 to a loss in 2017 despite the increase in its sales of the goods under consideration, and why that loss is due to the alleged dumping of like goods and not to other business or economic factors.

(h) As a consequence, BHP does not agree with the Commission's analysis. The reality is that the market has been in a state of significant flux and change over the injury analysis period, with large swings in volumes, market shares and profitability over that period. There is no reasonable basis for the Commission to conclude that Comsteel has suffered **material** injury in 2017 simply because its performance was slightly less favourable when compared to 2016, due to it being unsuccessful in a small number of tenders. The current situation is a perfect example of the ordinary ebb and flow of business in the resources sector which is inherently cyclical.

3. Quality as a relevant factor in purchasing decisions

(a) During the course of this investigation, BHP and Rio Tinto have provided extensive information to the Commission concerning quality issues with the railway wheels produced by Comsteel. Both end-users of the railway wheels have confirmed to the Commission that

[11] At p.39

these quality issues were a relevant factor in making purchasing decisions during the investigation period.

(b) In the SEF[12], the Commission has concluded that there is ‘a lack of evidence to support the claim that quality concerns were the cause of injury suffered by the Australian industry in the investigation period’, apparently on the basis that it was not provided with ‘contemporaneous evidence, if necessary in the form of internal communications or records, demonstrating that the wheel failures had influenced their purchasing decisions’.

(c) BHP objects to the Commission’s conclusion in this regard. BHP has confirmed to the Commission on a number of occasions that Comsteel’s wheel quality influenced its purchasing decisions in 2017. BHP does not create ‘contemporaneous evidence’ detailing every aspect of its procurement decisions in the expectation that it will be called upon to justify those decisions to third parties at a later time. If Comsteel’s price was not competitive, then there is no reason for BHP to create documentary evidence recording that it would not have chosen Comsteel as a supplier in any event because of quality concerns. Due to its apparent unwillingness to consider anything other than contemporaneous documentary evidence, the Commission has simply disregarded the evidence available to it, without providing any reason why it considers that evidence to be unreliable.

(d) To ensure that there is no doubt, BHP again confirms the accuracy of the information previously given to the Commission in relation to the relevance of its views on Comsteel’s wheel quality to its procurement decisions during the investigation period, and requests that the Commission reconsider its conclusions.

If you have any questions concerning this submission, please contact Richard Nicholls.

Yours sincerely

BHP

[12] At pp.62-63