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22 May 2016

The Director
Operations 2
Anti-Dumping Commission
55 Collins Street
Melbourne
Victoria 3000

By email

Dear Director

Chememan Co., Ltd
Alleged dumping of quicklime from Malaysia, Thailand and Vietnam

We act on behalf of Chememan Co., Ltd and its related companies in relation to this investigation.

Could you please provide us with evidence that the application purportedly made to the Anti-Dumping Commission ("the Commission") by Cockburn Cement Limited ("the applicant") complies with Section 269TB(4) of the *Customs Act 1901* ("the Act").

If the formal requirements of the Act have been met in that regard, we ask the Commission to consider the following submissions regarding the insufficiency of the injury allegations made in the application, and generally. If not, the investigation is technically misconceived and should be terminated.[1]

A The claims in the application are uncorroborated and contradicted

The applicant, Cockburn Cement alleges that it is a member of an Australian industry that has been "materially injured" by imports. Subsidiary information suggests that that is not the case, and that the applicant intends to re-run the empty, anti-competitive arguments that were firmly discredited and dismissed by the Commission on the previous occasion that these matters were investigated.[2]

Adelaide Brighton's 2015 Annual Report ("the Annual Report"),[3] applicable to the exact same period as the investigation period, states that:

> *Lime sales increased during the year as demand from the gold sector improved, sales to the alumina sector remained stable and the return to normal operations of a customer impacted by a site disruption in the first half of 2014.*[4]

The Annual Report acknowledges that quicklime sales have been inhibited:

> *Lime volume growth has been inhibited in recent years by the non-alumina sector but the*

[1] The focus of this submission on injury issues does not admit or suggest that our client group has engaged in alleged "dumping". Our client group continues to compile and organise the data required to respond to the Exporter Questionnaires in respect of its exports from Thailand and Vietnam.

[2] See *Public Record for Investigation - Case 179 - Quicklime Exported from Thailand*, at http://www.adcommission.gov.au/cases/Pages/ArchivedCases/EPR179.aspx

[3] See Attachment to this letter. This document is accessible at http://adbri.com.au/-/adbri/lib/pdfs/2016/reports/FINAL%202015%20Annual%20Report%20(low%20res).pdf

[4] Annual Report, page 2.

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> *sector appears to be improving, with increased demand from gold projects.*[5]

However no mention is made of import competition or of dumping. Rather, it is the turndown in demand that is highlighted, a situation which the Annual Report advises has been reversed and is now improving.

Moreover, the Annual Report demonstrates that the willingness and incentive of the Australian industry to invest is strong:

> *Given possible refinery expansions, there is also potential for growth in the alumina sector that should increase demand for lime in Western Australia by around 15% in the medium to longer term.*[6]

The CEO's report refers to higher cement and lime volumes and improved prices in the investigation period:

> *Our total revenue of $1,413.1 million was 5.6% higher than in 2014, and once again a record. It was assisted by higher cement and lime volumes, improved prices and the first full year contribution from acquisitions completed in 2014.*
>
> …
>
> *Lime sales increased 2.3% as demand from gold producers recovered, while alumina volumes were stable. As an established low cost producer, the Company is well placed to take advantage of a recovery in the resources sector.*[7]

The financial statements in the Annual Report disclose that Adelaide Brighton's group profit was significantly higher in 2015 as compared to 2014:[8]

Income statement

For the year ended 31 December 2015 — *Consolidated*

($ Million)	Notes	2015	2014
Revenue from continuing operations	3	**1,413.1**	1,337.8
Cost of sales		**(884.1)**	(823.5)
Freight and distribution costs		**(211.2)**	(217.0)
Gross profit		**317.8**	297.3
Other income	3	**51.4**	26.1
Marketing costs		**(20.7)**	(20.2)
Administration costs		**(68.1)**	(75.6)
Finance costs	4	**(14.7)**	(16.8)
Share of net profits of joint ventures and associate accounted for using the equity method	10(a)	**19.9**	21.7
Profit before income tax		**285.6**	232.5
Income tax expense	5(a)	**(77.8)**	(59.9)
Profit for the year		**207.8**	172.6
Profit attributable to:			
Owners of the Company		**207.9**	172.7
Non-controlling interests		**(0.1)**	(0.1)
		207.8	172.6

5 *Ibid.*, page 3.
6 *Ibid.*
7 *Ibid.*, page 4.
8 *Ibid.*, page 58.

We recognise that these statements are at the consolidated level. Nonetheless, there is every indication that Adelaide Brighton's "lime business" is a key part of the group's financial position. Adelaide Brighton's CEO advises that:

> *The financial performance of your Company has continued to improve during the past year, due not only to healthy market conditions but also, the ongoing benefits of Adelaide Brighton's strategy of operational improvement, growth in our lime business and vertical integration.*[9] [underlining supplied]

The Annual Report advises shareholders (and the general public) that the future is rosy:

> *Adelaide Brighton's Western Australian lime business is underpinned by low cost, long term raw material reserves secured by State Agreement and statutory approvals. Long term demand growth is driven by the state's globally competitive resources sector.*
>
> *The two lime kilns at our Munster plant are among the largest globally and are currently operating at 80% capacity. Operating margins are expected to improve in 2016 due to the Munster plant's low cost operation and the lower cost of gas in Western Australia.*[10]

The inhibition of demand in the non-alumina sector, to which reference has been made above, is receding:

> *Lime volume growth has been held back in recent years by the non-alumina sector, which represents about 30% of Western Australia's lime demand and achieves higher selling prices. The sector appears to be improving, with increased demand from gold projects in particular.*[11]

But it is not all "plain sailing":

> *Lime sales volumes are expected to be slightly higher and average realised prices are likely to increase. The weaker Australian Dollar reduces the competitiveness of imports relative to Adelaide Brighton's low cost operations, however the threat of small scale lime imports in Western Australia and the Northern Territory remains.*[12] [underlining supplied]

So, according to the Annual Report, there is a threat of small scale lime imports – a proposition that conflicts markedly with the application, which is expressly *"based on actual material injury experienced by Cockburn Cement"* and not threat.[13]

The applicant does have a concern about the participation of imports in the market, admitting that the prices of imports have increased. The problem from the applicant's perspective, it seems, is that even though the import prices are increasing, the imports just won't go away:

> *Average lime prices increased at approximately CPI. Despite the devaluation of the Australian Dollar which increases the cost of competing imported products, competition from imported lime activity continues.*[14]

What does the reader gain from this review of the Annual Report? In summary, a picture is painted of a strongly performing and improving lime business. It is a business underpinned by State licence, statutory protections, high capacity utilisation and low costs. It is a business that enjoyed *"higher… lime volumes"* and *"improved prices"* in the investigation period.

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9 *Ibid.*, page 4.
10 *Ibid.*, page 7.
11 *Ibid.*
12 *Ibid.*
13 Application, page 39.
14 Annual Report, page 35.

The Annual Report advises that the lime business was affected by *"a customer impacted by a site disruption in the first half of 2014"*. Also, the applicant's energy costs *"increased by $3.5 million due to a short term (now resolved) interruption to coal supply"*.[15] It was also impacted by reduced demand from the gold industry - demand that the Annual Report proclaims was recovering in the investigation period and now continues to improve.

Moreover, the future heralds:

- a reduction in energy costs in Western Australia in 2016 as coal supply returns to normal;
- the benefit of a lower market price from a new gas contract effective 1 January 2016;
- possible refinery expansions; and
- the potential for growth in the alumina sector that should increase demand by around 15% in the medium to longer term.

From the perspective of this investigation, there is a lot that is wrong about the picture painted by the Annual Report. It says nothing about dumping or of injury caused by imports. Imports are mentioned in the Annual Report as being of a small scale, at prices that increased over the investigation period. They are a possible future "threat". Indeed, the import volumes shown on page 9 of the Consideration Report are a small sliver on the graphs there presented.

Evidently, the applicant does not like competition, does not want to see any competition, and does not want to have to put up with any competition, and that is why it has lodged the application with the Commission. The applicant believes that imports are a bad thing, even if they are small in their volume. However, the Annual Report expresses completely different facts and sentiments to those in the application. The Annual Report makes no mention of the impact of imports on price. The applicant explains in its Annual Report that its lime business is performing well, and that if there are things that have deleteriously impacted on its business, they are things *other than the price of imports*.

In its application, the applicant "colours" its positive financial performance in the following way:

> *Cockburn Cement's sales of "Like Goods" decreased by approximately 6 per cent in 2014 and recovered 2.5 per cent in 2015, but remain almost 4 per cent below the levels of 2013.*[16]

However the increase in sales in 2015 as compared to 2014 is an indication that material injury was *not* caused. The decrease occurring in 2014 as compared to 2013, when neither period is a period in which dumping is either alleged or to be tested, must rationally be irrelevant.

The applicant has been for a very long time, and continues to be, the dominant local producer and seller of quicklime. Its financial results and its opinions about those results oppose the proposition that it has been caused material injury, let alone that the entire Australian industry has been caused material injury.

Our client is very concerned, as should be the Commission, that the applicant can profess to have been caused material injury by allegedly dumped imports, and sign off on applications to that effect, when it reports to its shareholders, and its corporate and financial stakeholders, and the public, in contrary terms. Accordingly, it must be plain to the Commission that the application is uncorroborated and indeed is contradicted by the audited, critical, and legally significant information that its parent company has placed into the public domain.

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15 *Ibid.*, page 12.

16 Application, page 14.

B Improper legal theory of "injury"

A closer dissection of the applicant's claim gives us further cause for disquiet.

The evidence that the Commission has relied on to reach its *prima facie* finding (for the purposes of initiation) that there appear to be reasonable grounds to support the claim that the Australian industry has experienced material injury appears to be specific to the Western Australian market for quicklime. The applicant does say, in its application, that

> *…the impact of the dumped imports on the total Australian market for quicklime has been material.*[17]

However, that claim cannot mask the fact that the evidence presented by the applicant focuses on sales into the non-alumina sector, and specifically the impact on the applicant's manufacturing plant located in Dongara, in respect of which *"[a]ll of the [ ] production is assigned to non-alumina applications"*.[18] As reported by the Commission, the applicant claims that the Australian quicklime market is geographically segmented with Western Australia being a discrete region demarcated from eastern Australia by freight costs.[19] The applicant claims that the alleged material injury (injury that must be to the Australian industry overall) exists in, and only emanates from, the performance of only one of its two facilities and only in Western Australian and only in the non-alumina market.[20]

We accept that evidence of regional injury may be taken into account when determining whether there has been material injury to an Australian industry. We note in this respect that Ministerial Direction No 2012/24 directs that where an industry's vulnerability to dumped or subsidised imports is confined to a specific region of Australia, it is possible to take such regional injury into account when determining whether there has been material injury to the industry as a whole.[21]

We do not accept however that the Western Australian quicklime industry can be considered an "Australian industry" for the purposes of Section 269TG. The law is perfectly clear on the meaning of the expression "Australian industry" in that context:

> *The expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria.*[22]

In *Re Swan Portland Cement Limited and Cockburn Cement Limited*[23] the Australian industry applicants submitted that Western Australia was to be regarded for the purposes of the clinker industry as a separate market and separate industry. The Federal Court rejected this argument, holding that the term "Australian industry" is not ambiguous in its referral to the entire Australian industry.[24]

We refer in particular to Lockhart J's comments that the term "industry" on its plain meaning *"does not have any geographical connotations and it certainly does not equate with the term 'market'"*.[25] There is no doubt that the relevant market for the purposes of the alleged dumping of quicklime is the market in Western Australia. It does not follow that the Western Australian market can be considered in isolation to determine whether there has been material injury to the "Australian industry" for the

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17 *Ibid.,* page 23.
18 *Ibid.*, page 22.
19 Consideration Report 348, page 10.
20 *Ibid,* page 19.
21 *Ministerial Direction on Material Injury No.2012/24*, page 3.
22 *Re Swan Portland Cement Limited and Cockburn Cement Limited v the Minister of Small Business and Customs and the Anti-Dumping Authority* [1991] FCA 49, paragraph 39. See also *GM Holden Limited v Commissioner of the Anti-Dumping Commission* [2014] FCA 708 and *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838.
23 *Ibid.*
24 *Ibid.*, paragraph 48.
25 *Ibid.*, paragraph 42.

purposes of s 269TAE, and the applicant itself does not constitute the totality of the Australian industry.

We also refer to Article 3.1 of the WTO *Anti-Dumping Agreement* which requires that determinations of injury involve an *"objective examination of… the impact of [imports] on domestic producers"*. The Appellate Body has held that an examination of only certain parts of a domestic industry *"does not ensure a proper evaluation of the state of the domestic industry as a whole"*, and therefore does not satisfy the requirements of objectivity.[26]

On the basis of the above authorities we do not accept that evidence of material injury (if there be any such evidence) arising only out of the Western Australian non-alumina market suffices to meet the requirement in Section 269TG of material injury to an Australian industry. The applicant's submission is that it is *only* in the Western Australian non-alumina market that it has suffered material injury.[27] Thus the claim that the Australian *industry* has suffered material injury caused by the alleged dumping of quicklime is unsupported by the evidence provided.[28]

More broadly, we note that for injury to be material is must be of some significant impact and not merely something that could arise or that does arise in a manner that is consistent with the ebb and flow of business. In our respectful opinion the evidence referred to in Consideration Report 348 – especially when it is viewed in the context of the "unaffected" statements made in the Annual Report - does not come anywhere near the conclusion that the applicant or the Australian industry as a whole has suffered material injury.

We request the Commission's confirmation that it has sought data, or will be seeking data, from other Australian quicklime producers, and will verify that data, to see whether the applicant's experience is corroborated and to assess the financial performance of the Australian industry in the holistic way that is required by the legislation.

C Conclusion

To conclude:

- The applicant's 2015 Annual Report, covering the very same period as the investigation period in this case, demonstrates improved and improving profitability.
- That Annual Report offers reasons as to why the applicant's profitability was not higher, none of which include price competition from dumped imports.
- On the evidence of that Annual Report, the applicant holds the view that imports are a *future threat*, should those imports increase, and not that they have caused material injury.
- Competition itself is not actionable under the anti-dumping provisions of the *Customs Act* 1901.
- The question of whether material injury has been caused to the Australian industry by reason of "dumped" imports – if there are any dumped imports – cannot be myopically isolated to (a) one facility of (b) one company in (c) one region of Australia amongst (d) only one category of its customers.
- The Commission is duty bound, in its capacity as an investigative body, to make inquiries of the wider Australian industry as to their experience comparative to that of the applicant, and to assess the overall experience of the Australian industry.

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26 *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* WT/DS184/AB/R, 24 July 2001, paragraphs 204-206.

27 Consideration Report 348, page 19.

28 *Ibid.*, page 2.

With respect, on the basis of all of the above we must again doubt the adequacy and the veracity of the applicant's claim for the purposes of the initiation of this investigation. Our client expressed similar concerns to the then Australian Customs and Border Protection Service when it initiated the first such investigation concerning this product in 2011.

In summary, we submit that the injury grounds that would be necessary for the imposition of dumping measures against imports from the subject countries do not exist, and that the applicant as good as admits this to be the case in its public statements and in its published results.

Yours sincerely

Daniel Moulis
Principal Partner

Attachment – Adelaide Brighton *Annual Report 2015*