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26 October 2018

The Director  
Operations 2  
Anti-Dumping Commission  
Industry House  
10 Binara Street  
Canberra  
Australian Capital Territory 2600

By email

Dear Director

## **Downer EDI Mining-Blasting Services Pty Ltd Exemption inquiry 0066 - ammonium nitrate exported from Russia**

We are the lawyers for Downer EDI Mining Blasting Services Pty Ltd (“Downer”) for the purposes of this matter. We also represent Downer in the allied investigation presently underway with respect to the alleged dumping of ammonium nitrate from China, Sweden and Thailand.

Our client supports the request made by Nitro Sibir Australia Pty Ltd (“Nitro Sibir”) dated 8 June 2018 for high density ammonium nitrate (“HDAN”) to be exempted from the dumping measures presently in place with respect to the importation of ammonium nitrate exported from Russia.<sup>1</sup>

Section 8(7)(a) of the *Customs Tariff (Anti-Dumping) Act 1975* (“CTAD Act”) provides that:

*The Minister may, by notice in writing, exempt goods from interim dumping duty and dumping duty if he or she is satisfied:*

*(a) that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade;*

In its application Nitro Sibir makes the following submissions, amongst others:

- ammonium nitrate is a product group consisting of the subsets of low density ammonium nitrate (“LDAN”), HDAN and ammonium nitrate solution (“ANSOL”);
- these are different goods which are not substitutable for all purposes.
- LDAN and ANSOL are not suitable for use by Nitro Sibir in the manufacture of the downstream product known as emulsion explosives; and
- there is no product that is directly substitutable for HDAN available on the Australian market, and no Australian producers of HDAN.

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<sup>1</sup> Electronic public record, EX0066 Nos 001 and 003.

Nitro Sibir’s reference to its own inability to take-up ANSOL or LDAN in its production of bulk explosives is important *factual* support for the proposition that a like or directly competitive product to HDAN is not offered for sale in Australia to purchasers, and that it must therefore be sourced from outside Australia. However the question of whether or not HDAN and ANSOL/LDAN are “like” or “directly competitive” in the sense of the legislation is not answered only by a consideration of what Nitro Sibir can or cannot use for the purposes of making bulk explosives. Instead, the question is a universal one, having to do with a comparison of the products as well as their competitiveness with each other, and whether that is direct. Each stands alone as an entitlement to an exemption, and each impacts upon and is relevant to a consideration of the other.

Put simply, Downer submits that HDAN is neither like nor directly competitive with ANSOL produced by the Australian industry.

In this regard we note that AECI Australia Pty Ltd (“AEL”) has also indicated its support for the exemption.<sup>2</sup> **[CONFIDENTIAL TEXT DELETED – business model]** The dynamics of Downer’s business model gives the Commission a case study as to whether HDAN is properly “*like or directly competitive*” to what the Australian industry would contend is a comparable product, namely ANSOL.

- 1 The first point we would make is that the two products – ANSOL and HDAN – are very considerably different to each other in their physical properties. This of course is the main plank in the argument that Nitro Sibir, AEL and our client have advanced to the Commission. We believe that the point has been well made in other submissions, and that the difference means that the products are not like or directly competitive. ANSOL is a precursor to HDAN production. It is a hot liquid and is highly volatile. Its movement within Australia is highly regulated. ANSOL must be maintained at a temperature of at least 120 degrees C lest it crystallises and becomes unusable for purpose. It is directly added to and mixed with other materials, in Downer’s fixed emulsion plant, so as to produce the emulsion that is then used with LDAN to create the bulk explosives used to blast at Downer’s customers’ mine sites.
- 2 HDAN is made from ANSOL, by way of the cooling of droplets of ANSOL as they descend through what is known as a “prill tower”. No member of the Australian industry performs this production process. If the Australian industry did intend to do so, they would need to make the following changes to their plant set-up:
  - change the solution concentration, depending on the present concentrations achieved by the plant;
  - change the coating agent from that used to produce LDAN;
  - change the timing and cooling requirements within the prilling, or build a secondary tower.
- 3 Resistance to these changes by the Australian industry is driven by one or other of the following factors:
  - adverse effects on efficiencies and plant product rates by repeatedly changing tower usage from LDAN to HDAN;
  - costs of changeover referred to above, or of building new towers, including capital costs; and
  - HDAN is not needed by the Australian industry to maintain its market dominant position.

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<sup>2</sup> Electronic public record, EX0066 No. 12.

4 Downer does not and cannot undertake any of the processes required to manufacture HDAN from the ANSOL that it purchases from the Australian industry. Instead, ANSOL is a direct input to the production of emulsion by Downer, in those cases where the Downer facilities are close enough to the ANSOL facility concerned for the short transport times to be achieved.

5 HDAN is a granular ammonium nitrate with a smooth surface. Unlike ANSOL, it can be stored for long periods, until required to be taken up in the process of producing emulsion. It is distinguished from low density ammonium nitrate (“LDAN”) because it is more highly concentrated and is not used in its granular form in the final mixing process of bulk explosives on the mine site. LDAN prills are able to mix with ammonium nitrate emulsion and absorb diesel fuel. By contrast, HDAN prills are “melted” by Downer at its own emulsion plants, by the addition of water and heat in a separate process that results in the production of the ammonium nitrate emulsion itself. This is NOT a process that causes HDAN to be “turned back into” ANSOL. Rather, the bulk explosive production process employing HDAN involves the following processes:

- Step 1 – **[CONFIDENTIAL TEXT DELETED – materials used]** and HDAN are blended in batch tank #1. Blended granules are added and the mixture is heated to dissolve. The resultant **[CONFIDENTIAL TEXT DELETED – materials used]** is QA tested, and acid is added for PH adjustment as necessary.
- Step 2 – the solution from batch tank #1 is fed into batch tank #2 and gradually blended. **[CONFIDENTIAL TEXT DELETED – aspects of process used]** It is then tested for density and viscosity.
- Step 3 – the finished emulsion product is then transferred to storage tanks ready for transport to mine sites.

6 We refer to **[CONFIDENTIAL TEXT DELETED – evidence of ANSOL differences]** the special factors that attend the transportation and usage of ANSOL, none of which apply to HDAN:

**[CONFIDENTIAL TEXT DELETED – ANSOL characteristics and logistical matters]**

7 As a practical matter the tanks that move ANSOL the short distances over which it can be transported are limited in size. Importation of ANSOL, although not absolutely prohibited, is effectively prohibited by regulation, due to separation requirements and its physical properties and storage limitations as previously outlined. There would be significant impracticalities and high costs involved with such an exercise. An example is provided in the context of shipments from the Australian mainland to Tasmania. **[CONFIDENTIAL TEXT DELETED – ANSOL logistical matters]**. On this basis, it is not possible for Downer to transport ANSOL to its Savage River mine site in Tasmania. The journey, at its most optimal, would involve at least the following:

- transit **[CONFIDENTIAL TEXT DELETED – ANSOL logistical matters]**;
- waiting time at Melbourne port for a vessel to transport the I.S.O. containers across Bass Strait to Burnie; and
- collection of containers from Burnie and transport to Savage River mine site.

The absolute minimum timeframe in which this journey could be achieved, if all trains, ships and trucks were to line up optimally, would be seven to eight days.

8 An uninformed person might be excused for thinking that ANSOL and HDAN are loosely able to be thought of as “substitutes” for each other, because at the end of the day the same

product – ammonium nitrate emulsion – is produced. That is incorrect. They are not substitutes for each other in the “like or directly competitive” sense of Section 8(7)(a) of the CTAD Act.

9 We submit that legal precedent concerning the comparison of fresh milk and powdered milk is highly instructive for the purposes of a comparison of ANSOL and HDAN. In the WTO Panel Report concerning *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*,<sup>3</sup> New Zealand and the United States argued that the Canadian Special Milk Classes Scheme provided an export subsidy to Canadian processors of dairy products by making domestic fluid milk cheaper to buy. This engaged the parties in arguments about the meaning of the words “like or directly competitive products” in Paragraph (d) of the Illustrative List of Export Subsidies in Annex I to the WTO *Subsidies and Countervailing Measures Agreement*.

10 The manner in which the United States expressed its views about the meaning of the words “like or directly competitive goods” in the context of Paragraph (d) was summarised in the Panel Report as follows:

*The United States argued that the express reference to “like or directly competitive” products in Paragraph (d) of the Illustrative List was made in connection with the discussion of products provided “for use in the production of goods for domestic consumption”. However, because Paragraph (d) contemplated a comparison between the “terms or conditions” applicable to products used in the production of exported goods and those “commercially available” on world markets to exporters, that comparison could only be meaningful if the products themselves were comparable. Thus, any products available on the world market used in such comparison had to also be “like or directly competitive” with the products used in the production of exported goods. The United States emphasized that it did not consider milk powders to be “like or directly competitive” with fluid industrial milk within the meaning of that phrase as used in Paragraph (d) of the Illustrative List of Export Subsidies.<sup>4</sup> [footnotes omitted, our underlining]*

11 The United States pointed out:

- that in *Indonesia - Certain Measures Affecting the Automobile Industry*, the Panel had emphasised “that the definition [like or directly competitive goods] required not only that the characteristics of the products being compared resemble one another, but that the characteristics “closely” resembled one another”,<sup>5</sup>
- that the same Panel found that an important element to be considered were the physical characteristics of the products involved;<sup>6</sup>

<sup>3</sup> Panel Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (WT/DS103/R WT/DS113/R, 17 May 1999).

<sup>4</sup> *Ibid*, para 4.422.

<sup>5</sup> *Ibid*, para 4.423.

<sup>6</sup> *Ibid*. The relevance of product differentiation in negating “likeness” or “competitiveness” has also been expressly acknowledged by the WTO Appellate Body in *EC – Asbestos*:

*In addition, we do not share the Panel’s conviction that when two products can be used for the same end-use, their “properties are then equivalent, if not identical.” Products with quite different physical properties may, in some situations, be capable of performing similar or identical end-uses. Although the end-uses are then “equivalent”, the physical properties of the products are not thereby altered; they remain different.*

- that:

...there were obvious differences in the physical characteristics of fluid and powdered milk, the foremost being that one was in liquid form while the other has been dried to powdered form. In addition, fluid industrial milk contained butterfat, whereas skim milk powder contained no butterfat at all. These physical differences resulted in constraints on the use of milk powders in particular end-uses, and/or require additional processing steps for their use. Skim milk powder, because it lacked butterfat, could not alone be used for any of the multitude of dairy end-uses where butterfat was required. That butterfat had been added in any formulation using skim milk powder where butterfat was required underscored the lack of competitiveness of skim milk powder in such end-uses. Fluid industrial milk because it contained butterfat was not subject to a similar constraint. This fact, in itself, suggested that skim milk powder and fluid industrial milk did not "closely resemble" each other in terms of physical characteristics and, therefore, were not like products.<sup>7</sup> [footnotes omitted, our underlining]

- that:

...the same conclusion, i.e., that it was not a like product, was warranted with respect to whole milk powder. Again, whole milk powder and fluid milk were not classified in the same tariff category, and differed in terms of their physical form, one being in a liquid form, the other being a powder. Although both fluid industrial milk and whole milk powder contained butterfat, the fact that all liquid had been removed from whole milk powder meant that in almost all instances before it can be used it had to be rehydrated. This process was both time consuming and required additional costs, as well as additional equipment.<sup>8</sup> [footnotes omitted, our underlining]; and

- that:

...two separate GATT Panel reports had concluded that the differences between fluid milk and various products derived from milk were sufficient that they generally did not constitute like products or compete directly within the meaning of Article XI:2 of the GATT 1947. In Japan - Restrictions on Imports of Certain Agricultural Products, a Panel examined a broad variety of dairy products, including processed cheese, prepared whey, skim milk powder, and whole milk powder and determined that "a product in its original form and a product processed from it could not be considered to be 'like products'" for purposes of Article XI:2. In Canada - Import Restrictions on Ice Cream and Yoghurt, another Panel reached a similar conclusion, finding that neither ice cream nor yoghurt competed directly with raw milk.

*"The Panel considered that the term compete directly with ... 'imposed a more limiting requirement than merely 'compete with'.... The essence of direct competition was that a buyer was basically indifferent if faced with a choice between one product or the other and viewed them as substitutable in terms of their use. Only limited competition existed between raw milk and ice cream*

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Report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*- WT/DS135/AB/R, at para 112.

<sup>7</sup> Panel Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, para 4.424.

<sup>8</sup> *Ibid.*

*and yoghurt.*"<sup>9</sup> [footnotes omitted, our underlining]

- 12 The resonance of the facts of this case with the rulings of the Panels and Appellate Body referred to by the United States in the extracts above are striking. These include:
- that an important element to consider is the physical characteristics of the goods involved – we remind that ANSOL and HDAN have wide and critical physical differences;
  - that a product in its original form and a product processed from it could not be considered to be *'like products'* – we remind that HDAN is a product processed from ANSOL;
  - that a requirement to undertake further processing before a product could be used for a similar purpose to the product with which it was being compared, involving time, cost and additional equipment, differentiates products from each other such that they are not *"like or directly competitive"* – we remind that the different characteristics involve both different processing and different logistical considerations, all of which require different equipment, and all of which go to time and cost;
  - that direct competition would be established only in cases where a buyer was basically indifferent if faced with a choice between one product or the other and viewed them as substitutable in terms of their use – we remind that it is impossible for a buyer to be indifferent to a choice between ANSOL and HDAN.
- 13 On all these counts ANSOL and HDAN are highly differentiated. Thus, we submit that the available WTO jurisprudence is supportive of and indeed compels the conclusion that ANSOL and HDAN are not *"like or directly competitive goods"* in the sense required by those words as used in Section 8(7)(a) of the CTAD Act.
- 14 We would also think that cost and price are relevant to a consideration of the *"like or directly competitive"* wording of Section 8(7)(a). In pure market conditions the prices of directly substitutable products will be the same. If they are not, the higher priced substitute will not be offered to the market, because it will not be able to be bought and sold. In the case of the Australian ammonium nitrate industry and market, market conditions are not pure. The Australian industry does not produce the higher cost HDAN product, and is absolutely shielded from competition from imported ANSOL, because it is not imported (and cannot realistically be imported). **[CONFIDENTIAL TEXT DELETED –HDAN and ANSOL into-store and production cost comparison]** This degree of cost handicapping is further evidence that the element of direct competitiveness between HDAN and ANSOL is lacking.

For these reasons Downer submits that the ANSOL available from the Australian industry is not *"like or directly competitive"* to HDAN. Accordingly, *"like or directly competitive goods"* to HDAN are not offered for sale in Australia. The remaining words of Section 8(7)(a), that the offering of a like or directly competitive good to HDAN does not take place *"on equal terms under like conditions having regard to the custom and usage of trade"*, are not reached, and therefore do not need to be considered. The exemption is justified on the basis of the non-likeness of the goods and the fact that they are not directly competitive with each other.

However, even if the Commission were to engage in that added but we think unnecessary consideration, it will find that ANSOL is not *"offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade"*. This is due to the fact that the Australian industry that produces ANSOL participates as a seller in both the market for

<sup>9</sup> *Ibid*, para 4.427, quoting the Panel Report in *Canada – Import Restrictions on Ice Cream and Yoghurt*, L/6568, BISD 36S/68, adopted 5 December 1989, para 73.

ANSOL and in the market for blasting services. This distorts the price-setting conditions for the supply of ANSOL to companies such as Downer, **[CONFIDENTIAL TEXT DELETED – business practices]** The Australian industry's participation in both the ammonium nitrate and blasting services markets **[CONFIDENTIAL TEXT DELETED – business practices]**.

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For these above-stated reasons we respectfully submit that the present circumstances justify the grant of the Ministerial exemption that has been sought by Nitro Sibir. Indeed, we believe that the circumstances are precisely suited to that exemption.

HDAN is not like or directly competitive to ANSOL. They are very different products, produced through different processes, and are taken up into emulsion production differently. Production of emulsion using HDAN is much more expensive, because of the higher cost of HDAN and the higher cost of the different production and logistics associated with the acquisition and use of HDAN.

Further, and although unnecessary to resolve, ANSOL is not offered for sale in Australia on equal terms and like conditions, because the Australian ANSOL producing industry is both the supplier and the competitor of independent blasting service companies like Downer.

Yours sincerely



**Daniel Moulis**  
Partner Director

Encs

Copy to: Mr R Sims  
Commissioner  
Australian Competition and Consumer Commission