Australian Government
Anti-Dumping Commission

CUSTOMS ACT 1901 - PART XVB

STATEMENT OF ESSENTIAL FACTS

NO. 312

INQUIRY CONCERNING THE CONTINUATION OF ANTI-DUMPING MEASURES APPLYING TO

AMMONIUM NITRATE

EXPORTED FROM THE RUSSIAN FEDERATION EITHER DIRECTLY OR VIA ESTONIA

17 February 2016

PUBLIC RECORD

CONTENTS

ABBREVIATIONS

$	Australian dollars
ABF	Australian Border Force
ABS	Australian Bureau of Statistics
ACBPS	Australian Customs and Border Protection Service
the Act	*Customs Act 1901*
ADN	Anti-Dumping Notice
AEP	ascertained export price
ANM	Australian Nitrogen Management Pty Ltd
the applicants	CSBP Limited (CSBP) and Orica Australia Pty Ltd (Orica)
the Association	the All-Russia Association of Fertiliser Manufacturers
Azot	JSC Kemerovo Azot
CFR	cost and freight
COGS	cost of goods sold
the Commission	the Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
CTM	cost to make
CTMS	cost to make and sell
CTS	cost to sell
DBS	Downer EDI Mining - Blasting Services Pty Ltd
the Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
the Dumping Duty Regulation	*Customs Tariff (Anti-Dumping) Regulation 2013*
EBIT	earnings before income tax
EBITDA	earnings before income tax, depreciation and amortisation
FOB	free on board
FTS	Government of Russia Federal Tariff Service
Glencore	Glencore Pty Ltd
the goods	the goods the subject of the application
GOR	Government of the Russian Federation
Incitec	Incitec Pivot Pty Ltd
the Manual	the Anti-Dumping Commission's *Dumping and Subsidy Manual*
NIP	non-injurious price
Nitrochem	Nitrochem Pty Ltd
the Parliamentary Secretary	the Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science
the Regulation	*Customs (International Obligations) Regulation 2015*
SEF	Statement of Essential Facts

1. SUMMARY AND RECOMMENDATIONS

1.1 Introduction

This Statement of Essential Facts (SEF) sets out the findings and conclusions on which the Commissioner of the Anti-Dumping Commission (the Commissioner) proposes to base his recommendations to the Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary)[1] concerning the inquiry conducted by the Anti-Dumping Commission (the Commission) into the continuation of the anti-dumping measures applying to ammonium nitrate exported to Australia from the Russian Federation (Russia), either directly or via Estonia.

The inquiry was initiated on 9 October 2015 following the Commissioner's consideration of an application lodged by Orica Australia Pty Ltd (Orica) and CSBP Limited (CSBP; together 'the applicants') seeking the continuation of the anti-dumping measures. The inquiry period relating to the continuation of measures is from 1 July 2014 to 30 June 2015.

1.2 Legislative framework

Division 6A of Part XVB of the *Customs Act 1901* (the Act)[2] sets out, among other things, the procedures to be followed by the Commissioner in dealing with an application for the continuation of anti-dumping measures.

Subsection 269ZHE(1) requires that the Commissioner publish a statement of essential facts on which he proposes to base his recommendations to the Parliamentary Secretary concerning the continuation of the measures. Subsection 269ZHE(2) requires that in doing so the Commissioner must have regard to the application, any submissions received within 37 days of the initiation of the inquiry and any other matters that he considers relevant.

Pursuant to subsection 269ZHF(2), in order to recommend that the Parliamentary Secretary take steps to secure the continuation of the anti-dumping measures, the Commissioner must be satisfied that the expiration of the anti-dumping measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the material injury that the anti-dumping measure is intended to prevent.

1.3 Findings and conclusions

On the basis of the evidence currently available, the Commissioner is satisfied that:

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[1] On 23 December 2014, the Minister for Industry and Science delegated his powers and functions under Part XVB of the *Customs Act 1901* to the Parliamentary Secretary to the Minister for Industry and Science. On 20 September 2015, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Science.

[2] All legislative references in this report are to the *Customs Act 1901*, unless otherwise stated

- There is a particular market situation for ammonium nitrate in Russia, which makes the domestic price of ammonium nitrate in Russia not suitable for assessing normal value (Chapter 6);
- In constructing a normal value, the Commission considers that the extent of Government influence over the price of natural gas (the key raw material) indicates that the recorded costs are not market competitive costs. The Commission has therefore used a benchmark for natural gas costs (Chapter 7);
- The absence of cooperating ammonium nitrate producers that have also exported the goods to Australia during the inquiry period means that the Commission is unable to determine whether dumping has occurred. However, the Commission's comparison of known export prices with the constructed normal value for the single cooperating Russian ammonium nitrate producer indicates that dumping may occur, and therefore the removal of measures would be likely to result in the dumping of ammonium nitrate (Chapter 8); and
- It is likely that dumping will result in material injury to the Australian industry (Chapter 9)

1.4 Proposed recommendation

Based on the above findings, the Commissioner proposes to recommend to the Parliamentary Secretary that she take steps to secure the continuation of the anti-dumping measures applicable to ammonium nitrate exported from Russia. It is further proposed that the variable factors are modified, with a change of measures to a floor price set at the non-injurious price (NIP) (Chapters 11 and 12).

1.5 Responding to this SEF

This SEF sets out the essential facts on which the Commissioner proposes to base his final recommendations to the Parliamentary Secretary.

This SEF represents an important stage in the investigation. It informs interested parties of the facts established and allows them to make submissions in response to the SEF.

It is important to note that the SEF may not represent the final views of the Commissioner.

The Commissioner must have regard to submissions received in relation to this SEF within 20 days of the SEF being placed on the public record in making his final report to the Parliamentary Secretary. The report will recommend whether or not the anti-dumping measures should be secured, and if so, whether the relevant notice remains unaltered, cease to apply to particular exporters, or has effect as if different variable factors had been ascertained and therefore the extent of any interim duties that are, or should be, payable.

Responses to this SEF should be received by the Commissioner no later than **8 March 2016**. The Commissioner is not obliged to have regard to any submission made in response to the SEF received after this date if to do so would, in the opinion of the

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Commissioner, prevent the timely preparation of the report to the Parliamentary Secretary.[3]

The Commissioner must report to the Parliamentary Secretary by 4 April 2016.

Submissions should preferably be emailed to operations1@adcommission.gov.au.

Alternatively, they may be sent to fax number +61 3 8539 2499, or posted to:

Director Operations 1
Anti-Dumping Commission
Level 35, 55 Collins Street
MELBOURNE VIC 3000
AUSTRALIA

Confidential submissions must be clearly marked accordingly and a non-confidential version of any submission is required for inclusion on the Public Record.

A guide for making submissions is available at the Commission's web site www.adcommission.gov.au.

The Public Record contains non-confidential submissions by interested parties, the non-confidential versions of the Commission's visit reports and other publicly available documents. It is available by request in hard copy in Canberra (phone (03) 8539 2467 to make an appointment), or online at www.adcommission.gov.au

Documents on the Public Record should be read in conjunction with this SEF.

[3] Subsection 269ZHF(4).

2. BACKGROUND

2.1 Initiation and previous cases

Consideration Report 312 on the Electronic Public Record (EPR)[4] sets out the Commissioner's reasons for initiating the current continuation inquiry and the history of anti-dumping measures applying to ammonium nitrate exported to Australia from Russia. The measures were most recently secured following Trade Measures Branch Reports 168 (REP 168) and 169 (REP 169)[5], published in April 2011.

The anti-dumping measures applicable to exports of ammonium nitrate from Russia to Australia are due to expire on 24 May 2016.

2.2 Conduct of inquiry

Australian Industry

The Commission identified the two companies that, along with the applicants, comprise the Australian industry:

- Queensland Nitrates Pty Ltd (QNP), and
- Incitec Pivot Pty Ltd (Incitec)

These companies were contacted by the Commission and invited to participate in the inquiry, however neither has made any submissions at this point in time.

The Commission conducted a verification visit to CSBP's premises on 10-12 November 2015, and to Orica's premises on 16-18 November 2015. The reports of these visits are available on the EPR.[6]

Importers

A response to the importer questionnaire was received from two companies:

- Downer EDI Mining - Blasting Services Pty Ltd (DBS)
- Nitrochem Pty Ltd (Nitrochem)

The Commission conducted a verification visit to DBS' premises on 14 January 2016. The report of that visit will be available on the public record shortly after the publication of this SEF.[7]

Russian producers

A response to the exporter questionnaire was received from one company:

- JSC Kemerovo Azot (Azot)

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[4] The EPR is located at www.adcommission.gov.au.

[5] REP 168 covered continuation of measures and REP 169 covered review of measures

[6] www.adcommission.gov.au/cases/Pages/CurrentCases/EPR312.aspx.

[7] Ibid.

The Commission considers that this producer has cooperated with the investigation, noting that Azot did not export the goods to Australia during the inquiry period.

On 19-22 January 2016 the Commission conducted a remote verification of information provided by Azot. The report of that verification process will be available shortly after publication of this report on the EPR.[8]

2.3 Submissions received from interested parties

The Commission has received a number of submissions at this stage of the investigation. These are considered in Chapter 9 of this report. The Commissioner will consider all submissions received prior to 8 March 2016 in the course of either terminating the inquiry or providing a final report to the Parliamentary Secretary.

2.4 Due date for Statement of Essential Facts

The initiation notice advised that this SEF would be placed on the public record by 27 January 2016. The Commissioner sought additional time to complete the SEF owing to extensions of time allowed for various interested parties to supply information and the need to carefully verify that information for the purpose of calculating dumping margins.

An extension of 21 days was subsequently granted by the Parliamentary Secretary in accordance with section 269ZHI, which resulted in a new deadline of 17 February 2016 for publication of this SEF on the public record. ADN 2016/08 incorrectly stated that the deadline was 16 February 2016.[9]

[8] www.adcommission.gov.au/cases/Pages/CurrentCases/EPR312.aspx.

[9] www.adcommission.gov.au/cases/documents/017-ADN2015-24-ExtensionoftimetoCompleteSEF.pdf

3. THE GOODS AND LIKE GOODS

3.1 Preliminary finding

The Commissioner considers that the ammonium nitrate produced locally is 'like' to the goods under consideration.

3.2 Legislative framework

In order to be satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation or recurrence of dumping, the Commissioner must firstly determine that the goods produced by the Australian industry are "like" to the imported goods. Subsection 269T(1) defines like goods as:

> "G*oods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.*"

Where the locally produced goods and the imported goods are not alike in all respects, the Commissioner assesses whether they have characteristics closely resembling each other against the following considerations:

i. physical likeness;
ii. commercial likeness;
iii. functional likeness; and
iv. production likeness.

3.3 The goods

The goods, the subject of the current anti-dumping measures, are:

> *ammonium nitrate, prilled, granular or in other solid form, with or without additives or coatings, in packages exceeding 10 kg.*

3.4 Tariff classification of the goods

Ammonium nitrate, whether or not in aqueous solution, is classified within sub-heading 3102.30.00, statistical code 05.

Current anti-dumping measures on ammonium nitrate only apply to exports from Russia, either directly or via Estonia. These measures take the form of combination measures, with separate factors for high density ammonium nitrate (HDAN) and low density ammonium nitrate (LDAN).[10]

[10] Following the decision in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870, anti-dumping measures are no longer able to be differentiated on the basis of model or type – refer to discussion at section 10.3, below.

3.5 Like goods

The issue of like goods was considered during the original investigation, in the 2005 review and in the 2011 continuation and review inquiries.

In Trade Measures Branch Report 28 (REP 28) the Australian Customs and Border Protection Service (ACBPS) determined that:

> "*…low density, high density ammonium nitrate and ammonium nitrate solution are sub-sets of the product group of ammonium nitrate…all types of ammonium nitrate, irrespective of whether in solid or solution state, prilled or granular form, low density or high density, are like goods.*"

In reaching this conclusion, ACBPS found that although LDAN, HDAN and ammonium nitrate solution (ANsol) were not identical to the goods, they possessed physical characteristics closely resembling them. It was also found that:

- Australian produced LDAN was substitutable with imported LDAN;
- Australian produced HDAN and ANsol could be substitutable with imported high density HDAN;
- in certain circumstances, high and low density ammonium nitrates could be substituted for each other; and
- emulsion explosives made from both ANsol and HDAN compete with each other.

In the original investigation it was found that certain densities, states or forms of ammonium nitrate are technically more suited to the manufacture of different explosives but that the essential characteristics of different ammonium nitrate products are not changed by the variations in density, state or form.

In the continuation inquiry and review of measures in 2005, ACBPS revisited the issue of like goods.[11] In Trade Measures Report No. 104 and 105 (REP 104 and 105) it was found that ammonium nitrate produced by the Australian industry were like goods to ammonium nitrate exported to Australia from Russia, irrespective of whether it was in solid or solution state, prilled or granular form, low density or high density. The same conclusion was reached in REP 168 and 169.

The Commission has again examined this issue in this continuation inquiry. The Australian industry no longer sells HDAN on the domestic market. The industry now only sells low density, or explosive grade, ammonium nitrate and ANsol.

3.5.1 Commission's analysis

The following analysis is based on the verification visits to Australian industry members Orica and CSBP, DBS (an importer and end user) as well as the verification process conducted with Azot.

[11] See Trade Measures Report No. 104 and 105 (REP 104 and 105) and REP 168 and 169.

- Physical likeness: HDAN, LDAN and ANsol are physically similar, being ammonium nitrate with minor technical variations in density, form and concentration;
- Commercial likeness: there is a commercial likeness between the goods as they compete in the same market;
- Functional likeness: the goods are functionally similar as they are all used in the manufacture of explosives; and
- Production likeness: the Commission observed that the key steps in the production process (as outlined in Chapter 4, below) are very similar between Orica, CSBP and Azot.

The Commission has found that imported HDAN from Russia is used for the purpose of manufacturing emulsion explosives. This has been confirmed during the visit to DBS, an Australian blasting services provider who uses HDAN imported from Russia for this purpose.

Based on the above, and as per previous inquiries, the Commission remains satisfied that LDAN and ANsol manufactured by Australian are like goods to the HDAN exported from Russia.

3.5.2 Submissions

Interested parties have made submissions concerning whether the Australian industry produces a like good to the imported HDAN. A related point is that if the Australian industry does not produce HDAN, the importation of these goods would not cause injury to the Australian industry. This issue is addressed below in Chapter 8.

Australian Nitrogen Management (ANM), an importer of ammonium nitrate, stated that:

> *"Russian ammonium nitrate has been and remains a supplier of fertiliser grade ammonium nitrate not a producer of industrial grade ammonium nitrate and that the Russian suppliers have priced ammonium nitrate at the value of nitrogen in the markets in which they compete."*[12]

In response, the Australian industry submitted that imported HDAN displaces locally produced ammonium nitrate solution in the manufacture of emulsions, and that if prices were sufficiently attractive, emulsions explosives could be used as a substitute for LDAN based explosives.

Further, the Commission is advised that the ammonium nitrate primarily used in Australia for fertiliser is urea or urea ammonium nitrate (UAN)[13], non-oxidising products which are high in nitrogen while not requiring the same level of security for transportation. Urea and UAN are classified under statistical code 3102.10.00, and is not a like good as it is physically, functionally and commercially distinct from the goods under consideration.

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[12] www.adcommission.gov.au/cases/Pages/CurrentCases/EPR312.aspx.

[13] https://www.iama.org.au/sites/default/files/Australian%20Fertilizer%20Industry%20Value%20and%20Issues%20August%202010.pdf

3.5.3 Conclusion

For the purpose of considering whether there is an Australian industry producing like goods, the Commission makes this determination by considering the description of the goods as a whole. The Commission considers that the assessment cannot be made as to whether the Australian industry produces goods which are only ‘like’ to certain sub-categories of the goods as defined.

Noting the very similar physical, commercial, functional and production likenesses between the goods under consideration and the goods produced by the Australian industry, the Commission remains satisfied that LDAN is a sub-set of the product group ammonium nitrate, and that the ammonium nitrate produced by the Australian industry are like goods.

4. THE AUSTRALIAN INDUSTRY

4.1 Preliminary finding

There is an Australian industry producing the like goods, comprising Orica, CSBP, Incitec and QNP.

4.2 Legislative framework

The Commissioner must be satisfied that the "like" goods are in fact produced in Australia. Subsection 269T(2) of the Act specify that for goods to be regarded as being produced in Australia, they must be wholly manufactured in Australia. Under subsection 269T(3), in order for the goods to be considered as partly manufactured in Australia, at least one substantial process in the manufacture of the goods must be carried out in Australia.

4.3 Production process

Ammonium nitrate is produced by neutralising nitric acid with ammonia.

The main raw material for ammonia production is natural gas. Natural gas is reacted with steam and then air to produce hydrogen, nitrogen and carbon dioxide. The carbon dioxide is removed and the hydrogen is reacted with nitrogen to produce ammonia.

Nitric acid is produced by reacting ammonia with oxygen in the presence of a catalyst. The reaction produces nitric oxides, which are then dissolved in water to produce nitric acid.

The reaction of ammonia with nitric acid produces an ANsol. This can be sold in the solution state or solidified by either prilling or granulating.

To produce prills, the solution is sprayed into the top of a prilling tower. A rising air stream cools and solidifies the falling droplets into spherical balls or prills.

The density of the finished product is governed by the concentration of the solution. Low density prills are produced using a solution with a higher moisture content. The solidified prills also have a higher moisture content and go through a long drying process. High density prills are produced using a solution with a lower moisture content.

Additives are introduced prior to prilling which changes the structure of the prills during the prilling process to make it more of a hollow, honeycomb type structure that is the low density product. It is the additives that increase the internal crystalline strength of the low density product. Coating agents are applied to stop the product clumping together, and to improve handling and storage properties.

Granules are made by either a rotating drum granulation process or fluid bed granulation process. Regardless of the production process, all granules are high density.

Verification visits were undertaken to CSBP and Orica. The visit reports[14] detail verification of production costs, sales revenue and submissions made by these parties. The visit to CSBP also included a tour of the facility. CSBP was observed to convert

[14] Orica Australia Pty Ltd and CSBP Limited reports are available on the EPR at www.adcomission.gov.au.

natural gas into ammonia, and ammonia into nitric acid, before producing ammonium nitrate.

4.4 Preliminary conclusion

The Commission considers that the substantial processes in the manufacture of ammonium nitrate are carried out in Australia, and therefore there is an Australian industry producing like goods.

5. AUSTRALIAN MARKET

5.1 Preliminary finding

There is an Australian market for the goods, which is supplied predominantly by local supply with some imports.

5.2 Background

The Commission has calculated the size of the Australian market by using information from the Australian Border Force (ABF) import database as well as verified data obtained from the Australian industry, importers and exporters.

Ammonium nitrate has two primary uses, being the manufacture of explosives and fertilisers. The applicants advised that in Australia ammonium nitrate is predominantly used by the mining and quarrying industries as a raw material for explosives manufacture. The applicants advised that ammonium nitrate has limited usage in Australia as a fertiliser. This is mainly due to the additional security protocols required for its transport and storage relative to other nitrogenous products such as Urea and UAN.

The Australian ammonium nitrate market is supplied from local production by Orica, CSBP and QNP. The main sources of import supply are Indonesia, Ukraine and China. Russia currently accounts for 2.5% of imports by volume.

5.3 Market structure

The Commission has found that the Australian ammonium nitrate market has some large contracts; however there are many smaller sales which are normally done on a quotation basis.

5.3.1 Australian supply

The Australian industry holds the major contracts for supply in the market, and as such represents the majority of supply. These contracts (arranged following a tender process) last for several years and will normally specify a base price, the process for price adjustments and any other conditions of sale. These are used to underpin the business cases for maintaining or constructing ammonium nitrate manufacturing plants. This is beneficial to the mining industry as it guarantees supply for extended periods of time.

The Australian industry almost exclusively manufactures LDAN and ANsol. Any manufacture of HDAN is incidental.

5.3.2 Russian supply

All imports from Russia in the investigation period have been of HDAN. While Russia has the capability to manufacture some LDAN, it primarily manufactures HDAN for use in fertilisers. Independent third-party research provided by the applicants in the application indicates that the current Russian LDAN capacity is 500,000 tons per year, and this is almost exclusively in western Russia.

5.3.3 Other importers

The other major sources of ammonium nitrate in Australia are Indonesia, Ukraine and China who represent a little over 92% of the import market.

5.4 Market size and share

The market for ammonium nitrate has continued to expand over the last 15 years in line with mining operations coming online. This is evident through the expansion of existing ammonium nitrate plants, such as CSBP's expansion of their Kwinana plant, and the construction of new plants such as the Incitec plant at Moranbah. The market size has been estimated at 2.2 million ton per annum based on verified sales data, import figures and the nameplate capacity of any non-verified plants.

The recent downturn in mining exploration has not materially affected the market as it is primarily tied to extraction activities. Extraction activities do not materially vary for operating mines, so while the rate of growth is expected to slow with the reduction in new mines being opened, the demand for ammonium nitrate is not expected to significantly drop in the short- to mid-term.

The recent scaling down of production at the Orica plant at Kooragang Island in Newcastle at the same time as the creation of an Orica joint venture on the west coast reveals the dynamic that exists between the east and west coasts. Each market is primarily serviced by manufacturers on that side of the country due to the prohibitive cost of transport from Western Australia to Queensland or New South Wales, and vice versa.

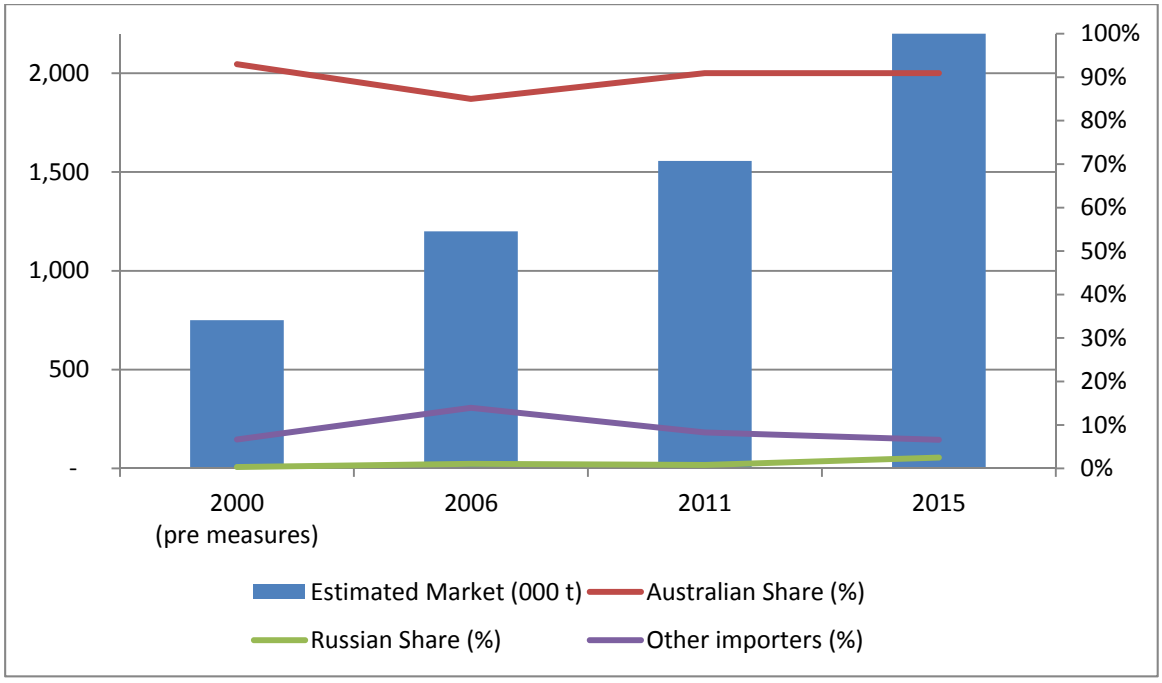

Figure 1: Australian market size and share

As can be seen above, the Australian industry share of the market has continued to be reasonably steady at approximately 90% since the measures were first imposed, even as the market more than doubled in size. The Russian imports' share of the market has

increased from 0.8% at the time of the prior inquiry in 2011 to 2.5% in 2015, however the volumes are still small.

6. PARTICULAR MARKET SITUATION

6.1 Background

6.1.1 Allegations of market situation

In their application, Orica and CSBP state that the price of natural gas, the raw material which is used in the manufacture of ammonia and nitric acid for the production of ammonium nitrate, is regulated by the Government of Russia (GOR) which effectively results in the market selling prices for ammonium nitrate being artificially low. The applicants therefore claim that a particular situation in the market exists within Russia which renders domestic sales unsuitable for determining the normal value of ammonium nitrate under subsection 269TAC(1) of the Act.

6.1.2 Legislative framework

In the original investigation and in the subsequent continuation inquiries, Russia was considered to have an economy in transition and therefore subsection 269TAC(5D) was used to determine the normal value. Following the last continuation inquiry in 2011, Russia has been admitted into the World Trade Organization (WTO) and was subsequently recognised by Australia as a market economy.[15] As such, the starting point for calculating the normal value of the goods is subsection 269TAC(1).

Subsection 269TAC(1) of the Act states:

> *Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.*

However subsection 269TAC(2) provides:

> *Subject to this section, where the Minister*
>
> *(a) is satisfied that:*
> *i. …*
> *ii. because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);*
>
> *the normal value of the goods for the purposes of this Part is:*
>
> *(c) except where paragraph (d) applies, the sum of:*
>
> - *such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and*

[15] Customs Amendment Regulation 2012 (No. 7) (SLI No 224 of 2012).

- *on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of 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; or*

(d) if the Minister directs that this paragraph applies – the price determined by the Minister to be the price paid or payable for like goods sold in the ordinary course of trade in arms length transactions for exportation from the country of export to a third country determined by the Minister to be an appropriate third country, other than any amount determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of any such transaction.

The Act does not provide any definition of particular circumstances or factors which would satisfy the Minister that a 'market situation' exists in a domestic market. The WTO *Anti-Dumping Agreement* is similarly silent regarding the definition of the concept of a 'particular market situation' referred to within Article 2.2.

6.1.3 Policy and Practice

In relation to market situation, the Commission's *Dumping and Subsidy Manual* (the Manual)[16] states:

> *In considering whether sales are not suitable for use in determining a normal value under s. 269TAC(1) because of the situation in the market of the country of export the Commission may have regard to factors such as:*
>
> - *whether the prices are artificially low; or*
> - *whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under s. 269TAC(1).*
>
> *Government influence on prices or costs could be one cause of "artificially low pricing". Government influence means influence from any level of government.*
>
> *In investigating whether a market situation exists due to government influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market.*

The Manual also goes on to state:

> *Prices may also be artificially low or lower than they would otherwise be in a competitive market due to government influence and distortion of the costs of inputs. Again the mere existence of any government influence on the costs of inputs would not be enough to make sales unsuitable. Rather, the Commission looks at the effect of this influence on market conditions and the extent to which domestic prices can no*

[16] Available at http://www.adcommission.gov.au/accessadsystem/Pages/Dumping-and-Subsidy-Manual.aspx.

> *longer be said to prevail in a normal competitive market. It should be noted government influence on costs can only disqualify the sales if those costs can be shown to be affecting the domestic prices.*

In this context, the Commission considers it is reasonable, for the purpose of assessing whether a market situation exists, to examine any factors that may have affected the competitive conditions in the market for the production of ammonium nitrate in Russia in the inquiry period.

6.1.4 Evidentiary threshold

The Commission notes that the Act does not provide any guidance, implicit or explicit, to the evidentiary standard required to warrant a finding being made that a situation exists in the market for the purposes of subsection 269TAC(2)(a)(ii). Ultimately, the Commissioner must be satisfied that because of the situation in the domestic market, domestic prices are not suitable for determining normal values under subsection 269TAC(1) in order to make a recommendation to the Parliamentary Secretary.

It is considered that the assessment as to whether a market situation exists in a particular country constitutes a positive test. That is, before actual selling prices are rejected, the Commission needs to identify a 'market situation', and be satisfied that the 'market situation' renders the sales in that market not suitable for normal value purposes. However, in doing so, the impact of the 'market situation' on the prices in that market do not necessarily have to be quantified.

6.2 Assessment of influence of GOR on natural gas prices

6.2.1 Russian natural gas industry

Gazprom is Russia's largest natural gas producer and exporter, accounting for 69% of all Russian gas production in the 2014 calendar year.[17] During the previous review of measures and continuation inquiry (REP 168) it was found that Gazprom accounted for 83% of all Russian gas production. Although the company is still the dominant supplier of gas within the country, the Commission notes that independent gas producers are successfully increasing their share of the total volume of gas being supplied to Russian consumers. Novatek, which is Russia's largest independent natural gas producer and also the second-largest natural gas producer in Russia, supplied 10% of the total Russian natural gas production in 2014.[18]

[17] OAO Gazprom Annual Report 2014, http://www.gazprom.com/f/posts/45/410871/gazprom-annual-report-2014-en.pdf, p10

[18] OAO Novatek Annual Report 2014, http://www.novatek.ru/common/tool/stat.php?doc=/common/upload/doc/NOVATEK_Annual_Report_2014_Eng.pdf, p2

Gazprom has the exclusive right to export natural gas. The company also has the authority to approve access to the natural gas pipeline system which it owns and operates. A 50.23% interest in the company is controlled by the Russian Government.[19]

6.2.2 Previous findings regarding influence of Russian Government

REP 168 found that the Russian Government controlled the price of natural gas sold domestically within Russia and that the prices did not substantially reflect free market conditions. This was based on information provided by the Russian Government, which indicated that the domestic price of natural gas was regulated by the Russian Federal Tariff Service (FTS). They also advised that Gazprom was the only company required to price all natural gas sold domestically in accordance with the regulated rates established by the FTS. That is, all other independent Russian gas suppliers were not required to sell at the regulated prices. However, during that inquiry it was determined that a major impact of the regulation of Russian domestic natural gas prices was that the rates being paid by consumers for natural gas from producers other than Gazprom were significantly higher than the prices for Gazprom natural gas.

The previous inquiry found that:

> *"...the government control of prices for natural gas had the effect of holding natural gas prices at significantly lower levels than would have been achieved if they were not so controlled. The Government control of natural gas prices would, in turn, have had a strong depressing output price effect, resulting in lower ammonium nitrate prices in Russia."*[20]

It was also identified that:

> *"…an indirect price control situation was evident in respect of the domestic selling price of ammonium nitrate in Russia. A price control situation applied in relation to the domestic selling price of ammonium nitrate in Russia because these prices are controlled, or substantially controlled, by the Russian Government."*[21]

6.2.3 Analysis of current Government influence on domestic gas prices

With respect to the current inquiry, the GOR advised the Commission that:

- the Federal Law No. 147-FZ of 17 August 1995 '*On Natural Monopolies'* (as last amended on 21 July 2014) was enacted to enable the GOR to regulate the price of goods and services produced by natural monopolies;
- the Federal Law No. 69-FZ of 31 March 1999 *"On Gas Supply in the Russian Federation"* (as last amended on 30 December 2012) provides the GOR with the authority to establish the principles used in formulating gas prices;

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[19] Logofet, D, Konnov, O, Mamay, A and Bakaeva I (2016) 'Energy: Oil & Gas – Russia – Law & Practice.' http://www.herbertsmithfreehills.com/-/media/Files/PDFs/2015/RUSSIA_LP.pdf, *Chambers Global Practice Guides*, p 4

[20] SEF 168: Continuation Ammonium Nitrate February 2011

[21] SEF 168: Continuation Ammonium Nitrate February 2011

- the Resolution of the Government of the Russian Federation No. 1021 of 29 December 2000 *"On State Regulation of Gas Prices and Gas Transportation Services Tariffs on the Territory of the Russian Federation"* provides guidance on the setting of gas prices and tariffs for the transportation of gas on a cost plus profit basis;
- the regulated prices in the gas sector are only applicable to:
    - the gas produced by Gazprom and its affiliates; and
    - services for the transportation of gas produced by privately owned companies through pipelines owned by Gazprom and its affiliates.
- the price for gas continues to be calculated and regulated by the Federal Tariff Service[22] taking into account:
    - recovery of economically justified costs covering gas production, overheads, financing charges, and gas transportation;
    - maintenance and upgrade of extraction and distribution infrastructure;
    - investment in exploration and development of new fields;
    - price regions, which generally match the territory and entities of the Russian Federation, to take into account the location of customers from the gas fields; and
    - recovery of reasonable profits.
- the price for transportation services of gas from non-Gazprom producers through the gas pipe network owned by Gazprom is dependent on the volumes of gas being transported as well as the distance travelled;
- the Resolution of the Government of the Russian Federation No. 333 of 28 May 2007 established regulated prices for Gazprom, with minimum and maximum price levels for different consumer categories and regions. The right to negotiate and determine gas prices within these minimum and maximum limits is granted to suppliers and buyers. The resolution also introduced measures whereby the domestic gas prices would be increased to align them with international gas prices by 2011.

It should be noted that the regulated prices are inclusive of transportation costs.

The Commission considers that the information above demonstrates that the Russian Government continues to exert control over the Russian natural gas industry through its price regulation.

The Oxford Institute for Energy Studies had this to say on gas prices:

> "*Due to unforeseen developments in European gas pricing which were largely linked to higher oil price levels, the implementation of Resolution No. 333 in 2007 by the Russian Government in 2007 has to date not resulted in domestic Russian gas prices matching prices of Russian gas being sold within the European market.*"[23]

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[22] Available at http://www.fstrf.ru/tariffs/info_tarif/gas

[23] Henderson, J (2011) *Domestic Gas Prices in Russia – Towards Export Netback?*, http://www.oxfordenergy.org/wpcms/wp-content/uploads/2011/11/NG_57.pdf, NG57, The Oxford Institute for Energy Studies, p2

For the 2014 calendar year, Gazprom[24] reported that:

- the average sale price of gas sold domestically within Russia was 3,531 roubles per 1,000 cubic metres; and
- the average delivered sale price of Russian gas sold to European and other countries was approximately 10,992 roubles per 1,000 cubic metres (net of customs duties and excise taxes).

For the six months to 30 June 2015, Gazprom[25] reported that:

- the average sale price of gas sold domestically within Russia was 3,543 roubles per 1,000 cubic metres; and
- the average delivered sale price of Russian gas sold to European and other countries was approximately 11,779 roubles per 1,000 cubic metres (net of customs duties and excise taxes).

Although some of the variance between the domestic and international prices is attributable to higher costs required to transport the gas to foreign countries, it is clear that there is a discrepancy between these prices. The Commission considers this is most likely a result of the GOR regulating natural gas prices at levels lower than likely would have been payable had market conditions prevailed. For example, despite Gazprom selling 51% of its total gas volume within Russia in 2014, the value of sales generated from this amount represented only 27% of its total annual gas sales revenue.[26]

The Commission acknowledges that although the Russian gas prices are heavily regulated, and therefore at rates which are significantly lower than compared to those being sold by Gazprom to foreign countries, an increasing number of private and independently owned gas producers are still able to profitably produce and sell gas within Russia. For example, the performance of Novatek (the largest independent gas producer operating within Russia) during the 2014 calendar period was reviewed by the Commission. It was found during that period that Novatek's total gas sales in Russia represented 64% of its total revenues, and that it had an EBITDA margin of 45.4%.[27] Clearly these are very strong results, which are similar to its performance in previous periods. Gazprom itself appeared to have generated a profit of approximately 99 billion roubles from Russian gas sales in 2014, representing 8.3% of EBIT.[28]

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[24] Extracted from Gazprom in Figures 2010-2014, http://www.gazprom.com/f/posts/91/415561/gazprom-in-figures-2010-2014-en.pdf, p80-82

[25] Extracted from OAO Gazprom, Management's Discussion and Analysis of Financial Condition and Results of Operations – Interim Results for the Half Year Ending 30 June 2015, http://www.gazprom.com/f/posts/12/001311/gazprom-ifrs-2q2015-management-report-en.pdf, p3

[26] OAO Gazprom Annual Report 2014, http://www.gazprom.com/f/posts/91/415561/gazprom-annual-report-2014-en.pdf, p79

[27] OAO Novatek, Fourth Quarter and Full Year 2014 Operational and Financial Results Conference Call, http://www.novatek.ru/common/tool/stat.php?doc=/common/upload/doc/NOVATEK_CC_FY_14[1].pdf

[28] OAO Gazprom Financial Report 2014, http://www.gazprom.com/f/posts/91/415561/gazprom-financial-report-2014-en.pdf, pp57-58

The successful performance of independent gas producers is due to a number of factors. These include freedom from the restrictions of the regulated price regime, which allows them to charge whatever prices the market will accept. Gazprom has stated[29] that a direct result of this is that independent gas producers offer their gas at lower than the minimum regulated prices, however there have been instances in the past where they have also sold at prices higher than the maximum regulated price.[30] However, despite the fact it is not bound to charge the regulated prices, Novatek has claimed that its "natural gas prices on the domestic market are strongly influenced by the prices regulated by the Federal Tariff Service (FTS)."[31] Novatek went on further to say that during the 2014 calendar period, its natural gas prices increased by an average of 4.8% "due to a cumulative increase in the average regulated FTS price by 7.4%."[32]

The Commission acknowledges that independent producers are able to make sizable profits while selling gas at prices below those of Gazprom. However, the price cap set by the existence of regulations on Gazprom (which is the dominant provider in the market), or anyone using Gazprom pipes, restricts the profit maximising behaviour that characterises a market economy. As such, the Commission is unable to view these prices as being representative of a true market price, and instead reflect a supressed price.

Since October 2014 monthly natural gas auctions have been held at the Saint-Petersburg International Mercantile Exchange (SPIMEX), thereby allowing exchange-based gas trading within the Russian domestic market. Gazprom stated in its 2014 Annual Report that "on-exchange gas trading is a vital tool to establish market criteria and improve transparency for market gas pricing practices, enabling [Gazprom] to obtain market input for the pricing system."[33]

Although gas sales on SPIMEX are based on unregulated prices, the Commission has noted that the natural gas prices listed on the SPIMEX are exclusive of transportation costs. Once transportation costs are added to the monthly SPIMEX price, none of the sales made between October 2014 and June 2015 exceeded the maximum unit price thresholds for each respective region within Russia which were established by the FTS. In addition the vast majority of gas sales were actually made at prices which were lower than the minimum prices, sometimes by more than 10%.[34] This demonstrates that the lower bound of the FTS price acts as a cap, above which private sales do not make fiscal sense as it would be cheaper to buy directly from Gazprom.

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[29] OAO Gazprom Annual Report 2014, http://www.gazprom.com/f/posts/91/415561/gazprom-annual-report-2014-en.pdf, p52

[30] Henderson, J (2011) *Domestic Gas Prices in Russia – Towards Export Netback?*, http://www.oxfordenergy.org/wpcms/wp-content/uploads/2011/11/NG_57.pdf, NG57, The Oxford Institute for Energy Studies, p28

[31] OAO Novatek (2014), Management's Discussion and Analysis of Financial Condition and Results of Operations, http://www.novatek.ru/common/tool/stat.php?doc=/common/upload/doc/MDA_2014[3].pdf, p11

[32] ibid., p12

[33] OAO Gazprom Annual Report 2014, http://www.gazprom.com/f/posts/91/415561/gazprom-annual-report-2014-en.pdf, p160

[34] Information extracted from the SPIMEX website: www.spimex.com.

In consideration of this, the Commission is of the view that, while the gas sales made on the SPIMEX are not at regulated gas prices, they are unable to be considered as representative of a truly competitive price.

6.3 Market situation affecting Russian sale prices

During the verification process with Azot, the price setting mechanisms for fertiliser grade HDAN was discussed. Agricultural fertiliser sales, which account for 93% of Azot's domestic sales, are made with reference to the price established by the All-Russian Association of Fertiliser Manufacturers (the Association).

Each month the ammonium nitrate producers from across Russia meet to discuss a ceiling price to propose to the Association. This is set with reference to the price of Russian ammonium nitrate at the Black Sea and Baltic Sea ports, as published in *Fertecon Weekly*. The Association either accepts or rejects the proposed ceiling price.

This arrangement was put in place in January 2013. Prior to this the ceiling price was set centrally by the Government. To date the price has never been rejected by the Association, nor has any manufacturer sold above the ceiling.

Prices at the Black Sea and Baltic Sea are almost exclusively for ammonium nitrate from Russia, with minimal sales from other countries such as Ukraine. As such, the prices are reflective of the domestic price for the majority of the product sold, being fertiliser grade HDAN. This, combined with the arrangement with the Association detailed above, results in a feedback loop where the domestic price influences the export price, and vice versa.

In addition, the Commission considers these prices to be artificially low due to the competitive advantage afforded by the non-competitive gas prices.

6.4 Conclusion

The Commission believes that domestic prices are unreliable to use on this basis. As such, the most appropriate determination of normal value will be the construction of a normal value using a replacement gas cost. This should be based on a comparable benchmark price which appropriately reflects a competitive cost of gas in Russia delivered to the plant.

7. REPLACEMENT COST OF GAS

7.1 Basis of replacement of gas prices

The market situation outlined in Chapter 6 means that it is unsuitable to establish a normal value under section 269TAC(1). Instead, normal value will be constructed under subsection 269TAC(2)(c). Due to the particular situation in the market, described in Chapter 6, it will be necessary to determine a replacement cost for certain non-competitive costs in order to construct the normal value.

7.2 Comparative benchmark gas prices

Using the appropriate benchmark price for the replacement price is important. Three benchmark prices are proposed as alternatives: the price of Russian gas at the German border excluding transport costs, the Henry Hub in USA, and the Victorian wellhead price.

7.2.1 Gas prices paid in Kemerovo, Russia

In their application, the applicants referred to natural gas cost data which was provided by an independent third party research company for their pricing calculations. The data was specific to ammonium nitrate which was transported to Europe through Western Russia via the Baltic Sea.

7.2.2 Applicant's proposed value – Russian natural gas at German border

In their application, the applicants proposed substituting the price of Russian gas at the German border. Gazprom has exclusive rights to export Russian gas to international markets, and is able to do so without being burdened by regulated prices from the Russian Government, as these only apply to domestic sales. Consequently it is able to sell at prices that the market is willing to pay.

The graph below provides a summary of the price for Russian natural gas at the German border, as per the IMF database:

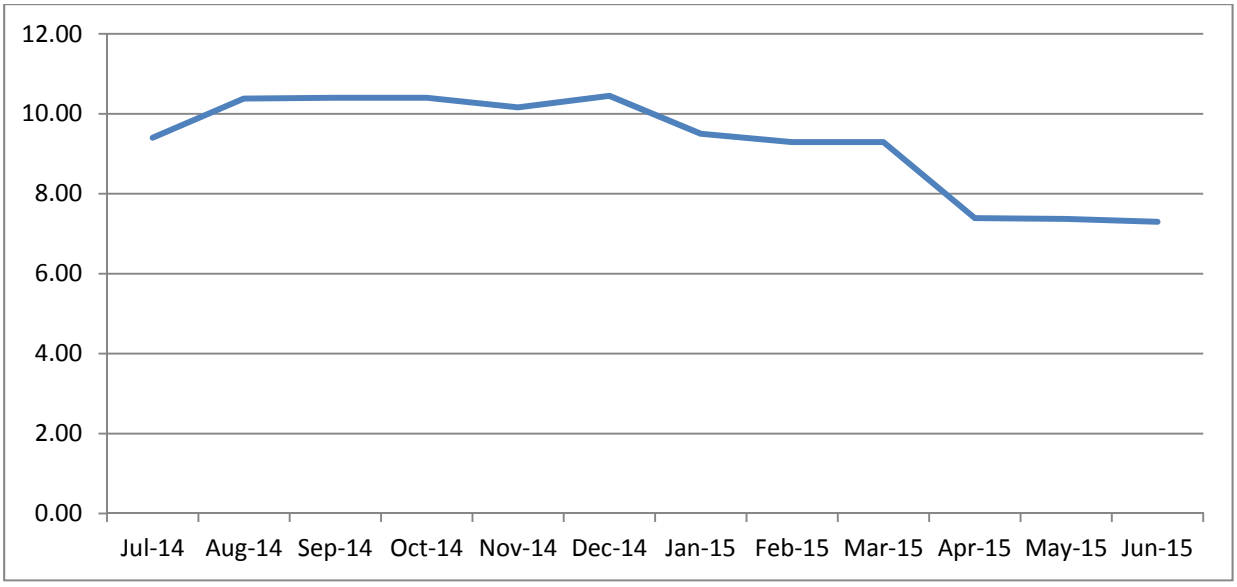

Figure 2: Russian natural gas price at the German border

A number of points must be considered in relation to this benchmark[35]:

- Gas exported from Russia to Germany is normally done so under long term contracts, which can last up to 25 years. Consequently they are not governed by spot gas prices (which other potential benchmarks such as the Victorian gas price and the Henry Hub terminal in Louisiana are based on);
- This benchmark is based on the border price of gas imported from Russia.[36] Consequently it will be inclusive of taxes and all transportation costs up to the German border.

Within their application at Confidential Attachment 5, the applicants have provided evidence of the average transmission cost of gas from gas fields to the German border. This has been used to determine the cost of gas at the gas production plant over the review period, and has been modelled in the graph below:

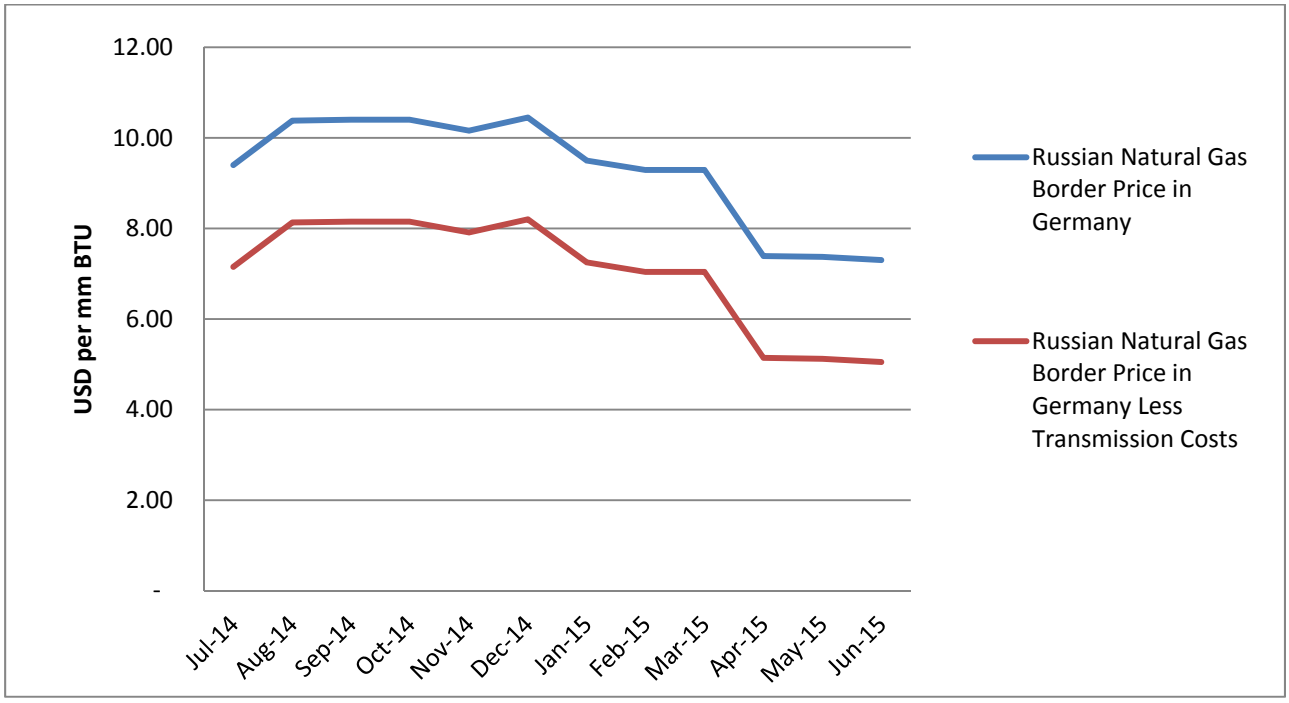

Figure 3: Effect of removing transport costs from gas price

Gas sales are determined using a price formula which takes into account oil prices for the previous 6 to 9 months. Consequently although the impact in the significant downturn in

[35] http://www.gazprom.com/about/marketing/europe/

[36] Market Observatory for Energy (2014), *Quarterly Report on European Gas Markets*, https://ec.europa.eu/energy/sites/ener/files/documents/quarterly_report_on_european_gas_markets_2014_q4.pdf, DG Energy, Volume 7, European Commission, p24

global oil prices will have a flow-on effect on the price of natural gas, the flow-on effect to this benchmark did not start to occur until the second quarter of 2015.[37]

There is a significant correlation between the price of oil and natural gas, as shown in the graph below, and consequently further declines in the price of gas are therefore expected beyond the inquiry period.

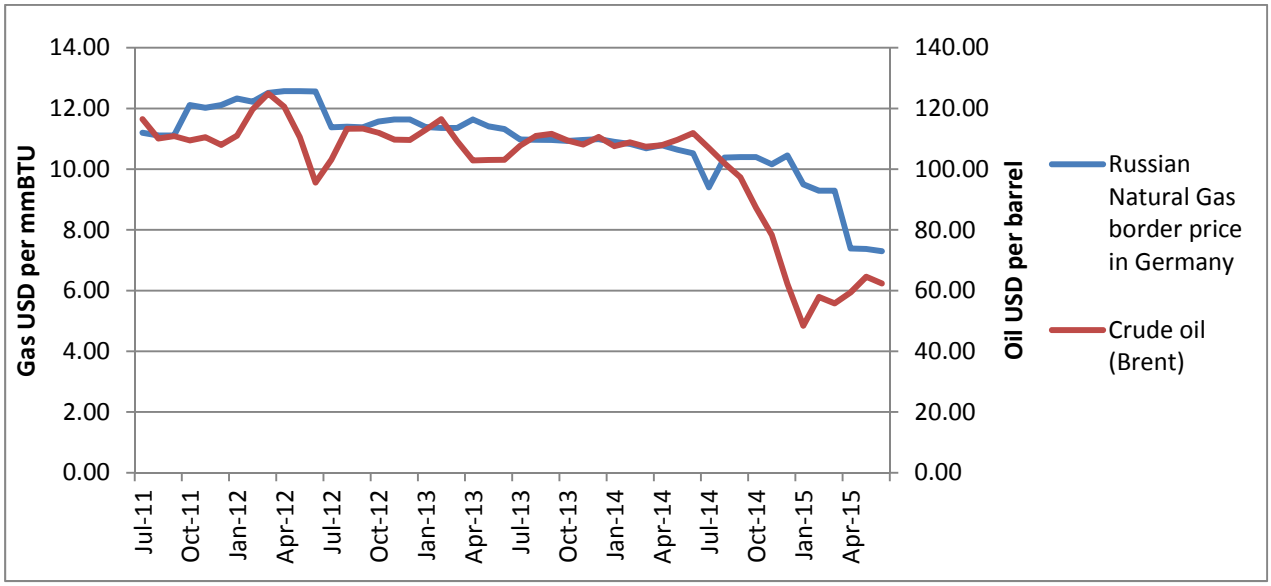

Figure 4: Russian natural gas price vs Brent crude oil price

7.2.3 Alternate 1 – Victorian gas price

Victoria's wholesale gas market allows participants to buy and sell gas at a spot price.[38] Trading occurs five times a day. Prices are for gas only; transportation is an additional cost which is charged separately by the pipeline owner in addition to the gas spot price.[39] Consequently this must be taken into consideration when comparing this to other benchmark prices.

7.2.4 Alternate 2 – Henry Hub Louisiana

The Henry Hub is the largest centralised point for natural gas spot and futures trading in the United States. It is a distribution hub on the natural gas pipeline system located in Louisiana. Consequently the prices are for the gas commodity only, with transportation an

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[37] Market Observatory for Energy (2014), *Quarterly Report on European Gas Markets*, https://ec.europa.eu/energy/sites/ener/files/documents/quarterly_report_on_european_gas_markets_2014_q4.pdf, DG Energy, Volume 7, European Commission, p16

[38] Australian Energy Regulator (2011) https://www.aer.gov.au/system/files/Chapter%203%20Gas.pdf, p85

[39] Australian Energy Regulator (2014), *User Guide to the AER Weekly Gas Market Report*, https://www.aer.gov.au/system/files/User%20guide%20to%20the%20AER%20gas%20weekly%20report.pdf, p15

additional cost. Spot prices set at Henry Hub generally correlate to the US wellhead natural gas price.[40]

7.2.5 Comparison of all prices

The graph below provides a comparison of the relative natural gas price benchmarks over the 12 month review period:

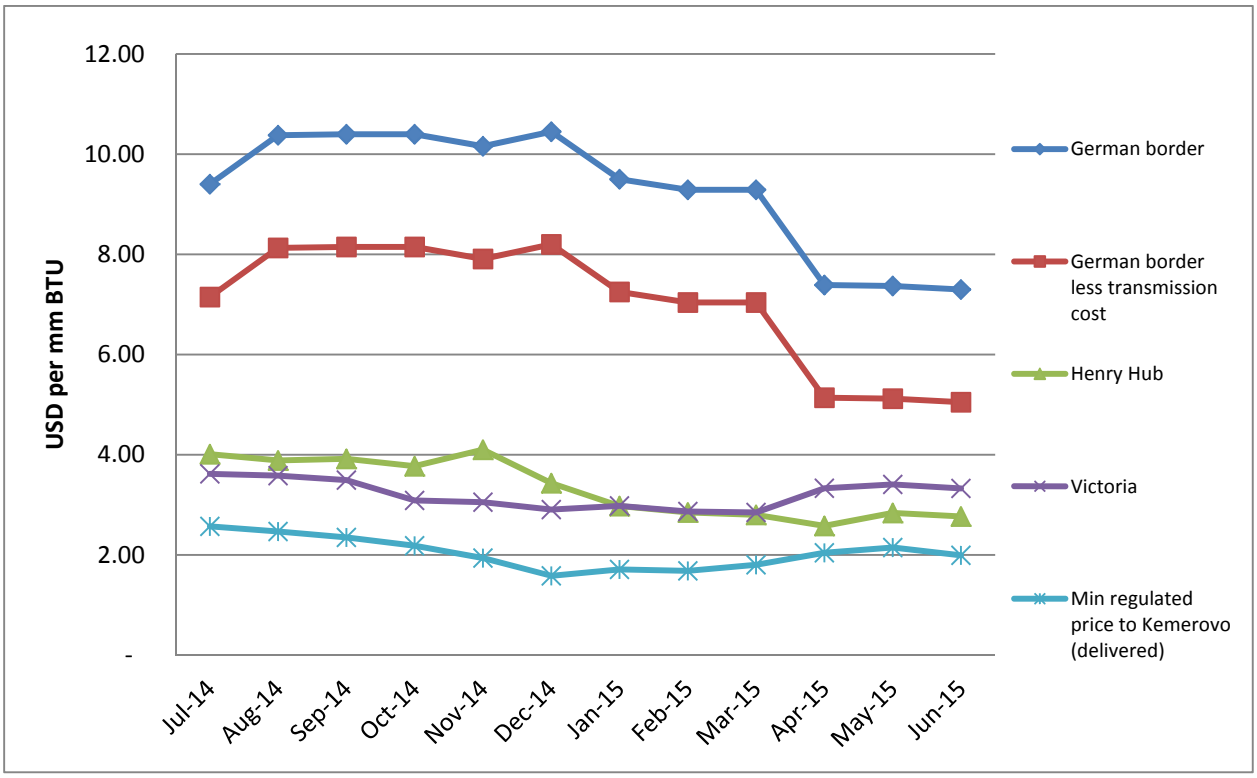

Figure 5: Comparison of natural gas benchmark prices

Gas prices from the SPIMEX have not been considered in the above graph, mainly because no transactions were made to customers specifically from the Kemerovo region in Russia. However, analysis performed by the Commission suggests that, were any sales to be made to this region, the price for natural gas paid would not exceed the maximum price regulated by the FTS as per Chapter 6.

The Commission is of the view that all of the alternative natural gas benchmarks are dependent on market conditions, whereas the Russian domestic price does not share this same dependency. The movements in the Russian domestic price in the graph above as the supplied price are entirely a result of the foreign exchange fluctuation of the Russian Rouble against the US Dollar, as the prices are fixed in roubles by the GOR and the above chart is in USD.

In the verification with Azot, the appropriate substitution price was discussed. Azot stated that the Russian government intends to move domestic gas prices towards parity with the price at the German border (excluding the cost of transport).

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[40] http://www.eia.gov/oiaf/analysispaper/henryhub/

Using the price at the border excluding transport costs also provides the most appropriate price that reflects market prices in Russia. The American market is relatively self-contained with relatively small imports or exports. The Australian market, in particular Victoria, does not have the same infrastructure to facilitate the transport of gas to other countries seen in Russia, with the Nord Stream and South Stream pipelines which supply Europe with Russian gas.

The Commission intends to use the price of Russian gas at the German border less transport charges as the basis of the replacement cost of gas for calculation of the normal value.

8. LIKELIHOOD OF DUMPING RECURRING

8.1 Determination of normal value

The starting point for determining normal value is the price paid or payable for like goods in the domestic market of the country of export. However, the Commissioner's finding that a particular market situation for ammonium nitrate has resulted in those prices being considered to be unsuitable. Consequently, for cooperating exporters, normal values have been constructed under subsection 269TAC(2)(c) and, as required by subsections 269TAC(5A) and (5B) in accordance with the conditions of sections 43,44 and 45 of the *Customs (International Obligations) Regulation 2015* (the Regulation). In accordance with section 269TACAB, the normal value of goods for uncooperative exporters has been worked out under subsection 269TAC(6).

Subsection 269TAC(2)(c) of the Act provides, in part, that the normal value of the goods is 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*
>
> *(ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of 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.*

In determining the cost of production, as outlined in Chapter 6 the Commission has found that the natural gas costs recorded in the cooperating producer's accounts are not reasonably competitive market costs.[41] Accordingly, the Commission has replaced those costs with what it considers to be a suitable benchmark, being the cost of Russian natural gas at the German border excluding transport costs, for the reasons discussed in Chapter 7.

Gas conversion rates have been calculated based on gas usage per tonne of ammonium nitrate provided by Azot. Gas prices have been calculated from the International Monetary Fund database, and can be found at **Confidential Appendix 1 – market analysis**.

All other costs used are the verified costs established for the cooperating manufacturer, as no allegation has been substantiated regarding non-competitive costs for other inputs. This includes costs for manufacturing (except for gas inputs), sales and administration costs, overheads, transport costs and profit margin.[42] It is worth noting that this profit figure is high, and the Commission believes this may not be representative of the broader Russian ammonium nitrate industry. However, in the absence of better information, the Commission considers that the constructed normal value for Azot is suitable for the purpose of assessing whether dumping may recur.

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[41] Section 43(2)(b)(ii) of the Regulation refers.

[42] Sections 43(2) and 44(2) of the Regulation refer.

The calculations for the cooperating producer and all uncooperative exporters result in the same normal value, and as such only calculation will be undertaken for the dumping margin.

The complete calculations are in **Confidential Appendix 2 – Normal Value**.

8.2 Export price

As there were no cooperating exporters having export sales to Australia, subsection 269TACAB directs that the export price is to be worked out under subsection 269TAB(3). Subsection 269TAB(3) provides that:

> *(3) Where the Minister is satisfied that sufficient information has not been furnished, or is not available, to enable the export price of goods to be ascertained … the export price of those goods shall be such amount as is determined by the Minister having regard to all relevant information*

For the purposes of this calculation, the AEP will be calculated under subsection 269TAB(3) as the average FOB price for all exports of ammonium nitrate from Russia to Australia during the injury analysis period, being 1 July 2014 to 30 June 2015. The complete calculations are in **Confidential Appendix 3 – Export Price**.

8.3 Calculation of dumping margin and discussion

Based on the constructed normal value for Azot, and the AEP outlined above, the calculated dumping margin is approximately 23.5%.

The market situation has depressed markets below normal competitive prices in Europe. This has resulted in the current market price for Russian ammonium nitrate at the Baltic Sea being below the constructed normal value. The ongoing sale of ammonium nitrate below the constructed normal value indicates a propensity of manufacturers to undertake sales at prices which would be dumped in the Australian market.

8.4 Continuation of exports

It is clear from the ongoing sale of ammonium nitrate into Australia from Russia that there continue to be export pathways from Russia to Australia, despite the imposition of measures for 15 years. The removal of measures would be highly likely to increase the volume of ammonium nitrate sold to Australia from Russia, with the primary limiting factors being port capacity at both the export and import terminals due to the restrictions around the volume of oxidising agents allowable at ports.

8.5 Capacity to dump goods

In the Merchant Research and Consulting report on the Russian ammonium nitrate market[43], it reported that Russian production in 2014 was 8.25 million ton of ammonium

[43] Merchant Research & Consulting *Russian Ammonium Nitrate Market Outlook 2015*

nitrate, while capacity was 10.45 million ton. The spare capacity of 2.2 million represents approximately 5% of total global production capacity.

8.6 Preliminary conclusion

The Commission's view is that the Russian ammonium nitrate manufacturers have a demonstrated propensity to export ammonium nitrate below the constructed normal value. The Commission is also satisfied that there is excess capacity for production in Russia, and that there are still export channels from Russia to Australia for ammonium nitrate. On this basis, the Commission believes it is likely that the removal of measures would result in the recurrence of dumping.

9. LIKELIHOOD OF RECURRENCE OF MATERIAL INJURY

9.1 Preliminary finding

There appear to be reasonable grounds for being satisfied that the expiration of the anti-dumping measures to which the application relates would lead, or would be likely to lead, to a continuation of, or a recurrence of, the material injury that the measures are intended to prevent.

9.2 Approach to injury analysis

Subsection 269ZHD(2)(b) requires an inquiry into whether the expiration of the measures would lead, or be likely to lead, to a, in this case, recurrence of the material injury the measures are intended to prevent.

As the measures have been in place for fifteen years, it is relevant to consider both the material injury that was found to occur when the measures were first in place, the market conditions since the measures were imposed, and to analyse likely market behaviour should those measures now expire.

As stated in Chapter 8, it is likely that if the measures were not in place dumping would recur due to Russian ammonium nitrate manufacturers demonstrated propensity to export ammonium nitrate below the constructed normal value and that exporter pathways still exist and are likely to resume should measures expire. Given this finding, the next question is whether this dumping would lead to material injury recurring.

In the original investigation REP 28 in 2001 the then investigating authority found that ammonium nitrate had been dumped from Russia and that dumping had caused material injury to Australian industry.

Ammonium nitrate is a chemical and for high density and low density ammonium nitrate respectively there are minor differences (if any) in chemical composition. Due to this fundamental characteristic of this product, there is limited scope for product differentiation on factors other than price and ammonium products are therefore considered to be commodity products.[44] As such, price is the primary driver of purchasing decisions – particularly for spot quotes outside of long term contracts that may place a value on guarantee of supply.

In considering whether the dumping that is likely to occur should the measures expire would lead to material injury, the Commission has had regard to the price-based nature of competition in ammonium nitrate markets and the likelihood that, absent measures in place, price suppression caused by dumping would make the Australian industry susceptible to material injury.

[44] IBISWorld, IBISWorld Industry Report *C1892: Explosive Manufacturing in Australia (July 2015)*

9.3 Price suppression and depression

Average sales prices from ammonium nitrate have been fairly steady relative to costs to manufacture for the Australian industry since the implementation of measures. The past five years of information is displayed for the aggregated information verified with the applicants.

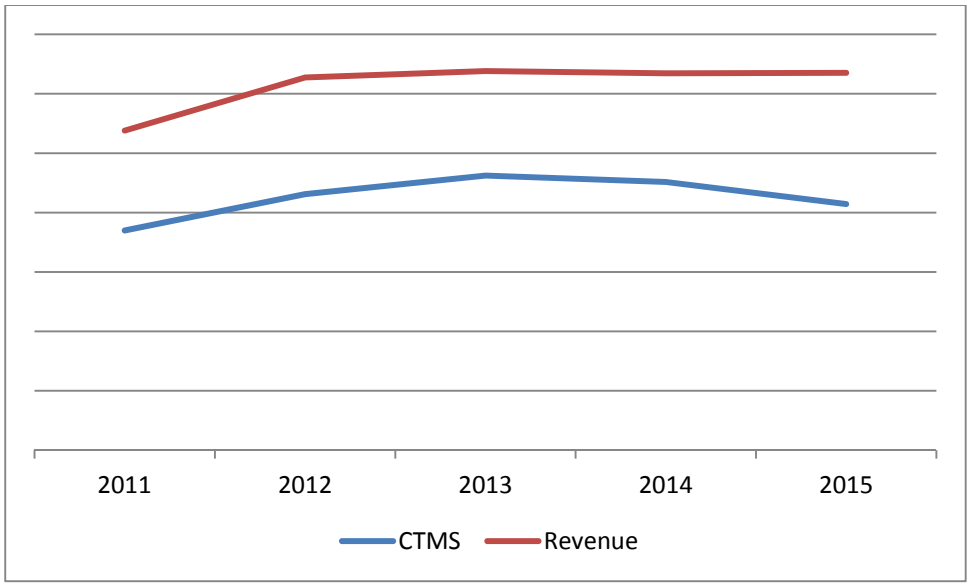

Figure 6: Revenue and cost to manufacture per ton for Australian industry

The applicants have presented evidence showing that quotes are sought by Australian customers for prices of ammonium nitrate in Russia at the Baltic Sea, which are then used to force local prices down. This is included in **Confidential Attachment 4 – Import Parity Pricing**.

The Baltic Sea FOB prices are below both the constructed normal value at FOB and the Australian average ex-works price.

On this basis, it is expected that price depression would occur if the measures are removed, as the Russian export price will likely approach the Baltic Sea price which would undercut the Australian market, driving the Australian price down. The presence of cheaper Russian exports in the market would be likely to have a suppressive effect on Australian prices if the CTMS were to increase (for example, through anticipated increases in natural gas prices in Australia).

9.4 Volume effects

The Commission's understanding of the relevant markets is informed by information collected over the fifteen years the measures have been in place.

At the time of the original investigation, the then investigating authority found that there was evidence that Australian industry had lost particular accounts to Russian exports and was able to estimate an amount of ammonium nitrate revenue forgone in lost sales.

In the last continuation inquiry, evidence was provided which showed that the Australian industry had referenced import prices of high density ammonium nitrate in seeking parity pricing for ammonium nitrate for the Australian industry.[45]

Since the measures have been imposed, the Australian industry has significantly scaled up production capacity and production volume has also increased to meet increased demand over the same period. This suggests that the measures have been effective in addressing material injury caused by dumping.

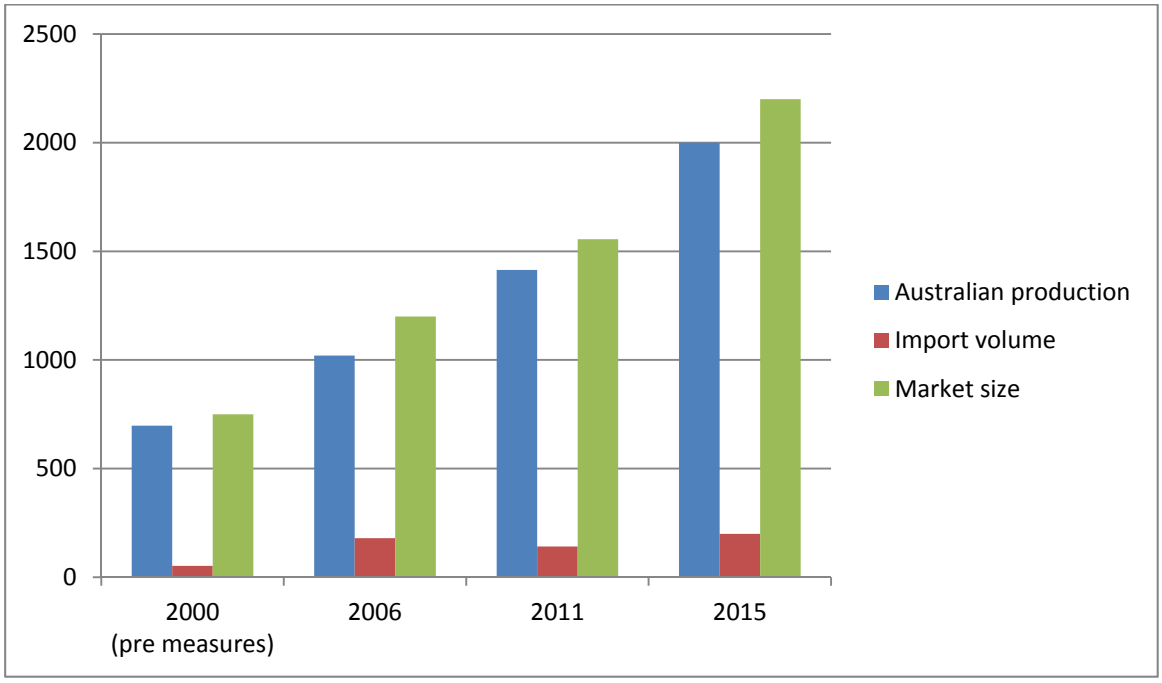

Figure 7: Relative market shares and total market size

Import volumes from all sources in 2000, prior to implementation of measures, represented 7% of market share which increased to 15% in 2006. The import volume then declined in 2011 but has stabilised at approximately 10% of the market since then, showing that market share has increased despite the imposition of measures in a growing market.

In the current continuation inquiry, there is evidence that importers use Russian quotes to attempt to influence prices in Australia in their negotiations with CSBP and Orica (as discussed above). It can also be seen in the above that the current evidence shows scaled up capacity and production volume.

Analysing the above information, the picture that emerges is an Australian industry that is not suffering material injury since the measures were in place but one that is highly susceptible to price-based competition in circumstances where, absent the measures, dumping is likely to resume (see Chapter 8) and price suppression occur (see above).

[45] REP 169, p.30

This, combined with the Commission's understanding of the chemical similarity of ammonium nitrate between suppliers and past and current market behaviour, supports the view that price is a key consideration in the customer's purchasing decisions.

As set out above, price depression is expected to occur if the measures are removed. Because of this, the removal of measures would allow Russian ammonium nitrate to be sold at lower prices. This is because currently the measures require exporters to pay a duty or, to avoid a duty, export at or above the established floor price. The removal of measures will remove the incentive for pricing at the floor price. This would likely result in lower prices to regain market share, noting the findings above that dumping is likely to recur should the measures be removed.

This, combined with the Commission's understanding of the price-driven nature of the market, suggests that injury in the form of lost volumes would occur if the measures are removed. The Commission believes this would likely lead to the displacement of goods which would otherwise be sold by the Australian industry. Although the market is growing, these Russian imports are likely to meet demand that would otherwise be met by Australian industry.

9.5 Profits and profitability

A reduction in market share or suppression of prices will have an impact on Australian profits and profitability. The removal of measures is likely to lead to both loss of market share and price suppression, as discussed above.

Reduced profits will result in lower a return on capital and return on net assets, the primary measures by which performance is measured for the applicants. This is due to the large up-front investment required for each plant, which is based on an expected return over the life of the plant.

In addition to this, further injury would occur based on excess capacity developing within the Australian industry. The actual volume of production possible in an ammonium nitrate plant occurs within a narrow bandwidth, with limited ability to vary production volumes to match a decline in demand. At a certain point, production volumes cannot be reduced any further; the plant must be shut down. This is a highly expensive process, but it is expected that the displacement of sufficient local product by dumped imports would make this a significantly more likely occurrence, increasing the unit cost while reducing the output which would compound the problem.

9.6 Factors other than dumping

9.6.1 Australian natural gas pricing

The price of natural gas has significantly increased recently, in particular after 30 June 2015, in Australia due to export markets opening up in Asia due to the commissioning of liquid natural gas plants in Queensland. This has increased the cost of the raw materials and, while this is either partially or completely compensated for in existing contracts, it makes tendering for new contracts more challenging.

9.6.2 Downturn in mining exploration

A contraction of the mining industry would likely result in decreased demand for ammonium nitrate. While the industry has not demonstrated contraction yet, based on the current market size and the ongoing expansion of Australian capacity, this may still occur with the tailing off of exploration.

The Commission's view is that this in itself does not inherently harm the industry while market share is not unduly affected by dumped goods. The displacement of market share by dumped goods which leads to lower volumes of sales, and the price depression from the presence of dumped goods which leads to lower sale price, would be the primary injury factors.

9.6.3 Conclusion

The Commission's view is that, while there may be other factors which are causing injury to Australian industry, the injury caused by the presence of dumped goods in the market is likely to be, in and of itself, material.

10. RESPONSES TO SUBMISSIONS

All submissions referred to can be found on the EPR at www.adcommission.gov.au, They have been summarised below, and the Commission's response provided

10.1 Nitrochem Pty Ltd submissions

ABS data

Nitrochem Pty Ltd (Nitrochem) submitted that the Australian Bureau of Statistics (ABS) data used in the application by the applicants was incorrectly calculated, and that this raised concerns about other calculations in the application.

The Commission has not relied on the aggregated ABS data provided by the applicants, and instead has used Australian Border Force (ABF) data for its analysis.

Baltic Sea price

Nitrochem submitted that the Baltic Sea price from an independent third party indicated that the price for ammonium nitrate has declined over the inquiry period, and that this is reflective of a trend occurring around the world. This has been factored into calculation made for Baltic Sea prices during the inquiry.

Cost to manufacture and sell

Nitrochem submitted that the cost base used for the constructed cost in the application overstated the cost to manufacture. Nitrochem provided alternate figures for the CTMS, based on information from a third party source. This information cannot be directly verified in the manner that the information from the cooperating manufacturer has been, and as such has not been relied upon.

Australian overcapacity

Nitrochem alleged that Australian producers have overcommitted to capacity, which has resulted in excess production which cannot be used due to the mining boom slowing down. Orica has reduced capacity at its Yarwun plant in response to a 'short term oversupply'.[46]

This claim is disputed by CSBP, who have stated that ammonium nitrate is primarily used in the extraction phase and that the slowdown has been in exploration. CSBP's view is that there may be an oversupply on the east coast where the Yarwun plant is located, but Orica's participation in the Burrup plant indicates that there is additional demand in the Australian industry that can be met without importing further product.

[46] As per non-confidential attachment 8 of the application for continuation of measures, available on the EPR

The Commission considers that any overcapacity of the Australian industry does not affect the likelihood of dumping, nor does it prevent dumped goods from causing injury, and as such does not agree with the submission.

Foreign Exchange

Nitrochem has disputed the conversion rate between the US dollar and the Australian dollar used in the application.

The Commission has used the rates referenced by the Reserve Bank of Australia to convert between USD and AUD in its own calculations.

Natural gas price

Nitrochem objects to the use of the price of Russian natural gas at the German border as a substitute value for raw materials used in the cost of production for ammonium nitrate. As discussed in Chapter 7, this has been deemed by the Commission as the most appropriate value due to the market situation.

10.2 Glencore submission

Material injury

Glencore argues that natural gas prices in Russia cannot account for any material injury, as it is transformed into ammonia prior to becoming ammonium nitrate. Glencore states that Australian manufacturers disadvantaged by the lower natural gas prices could avoid injury by purchasing Russian ammonia as the feedstock for ammonium nitrate, instead of manufacturing their own.

This argument does not factor in the high cost of transport from Russia which makes this approach uncompetitive, nor does it take into account the vertical integration of ammonia production which is prevalent in the industry. As such, the Commission does not accept that this would be a viable option for the Australian industry.

Natural gas price

Glencore argued that the European market is a poor substitute for the Russian market due to high barriers to entry and an absence of other alternative sources of gas. It also argued that, as GDP is lower in Russia than in Western Europe, it would be normal for gas prices to be lower. Glencore gave the example of the Henry Hub in the USA, which has a lower cost than the Russian domestic price.

As discussed in Chapter 7 the Commission views the price of Russian gas at the German border as the most appropriate substitute.

Normal value calculation

Glencore referred to REP 169 and stated that the normal value calculation in the prior investigation was determined through subsection 269TAC(4), and that due to there being “no evidence produced” that warrants any alterations to the domestic price, that subsection 269TAC(1) should be used.

The Commission agrees that subsection 269TAC(4) does not apply to the Russian economy, and notes that Russia was an economy-in-transition at the time of REP 169 but has subsequently been recognised as a market economy. Discussion of calculation of normal value is in Section 8.1.

10.3 Ammonium Nitrate Management submission

Substitutability and like goods

As addressed in Section 3.5, the ANM submission on different end users is not accepted by the Commission. UAN and other fertilisers, as opposed to HDAN, are not subject to the measures and never have been.

Availability of ANsol

ANM argues that “the manufacture of most form of bulk explosives requires ammonium nitrate (in whatsoever form) between 70 and 94% as the raw materials … explosive producers who are not vertically integrated back into ammonium nitrate manufacture cannot purchase ammonium nitrate solution at prices that allow them to compete in the supply of explosive to end users”.

The Commission has not been provided with any evidence to support this allegation. Additionally, there are a number of explosives manufacturers in the Australian industry who do not have ammonium nitrate manufacturing facilities but are able to compete against vertically integrated explosives providers, including DBS. As such, the argument is not accepted.

End Use

ANM argues that fertiliser grade ammonium nitrate below 45% ammonium nitrate by mass is not ‘security sensitive’ and is not useful for the production of explosives.

The Commission notes that in the inquiry period all imports of the goods, as defined in Section 3, were by companies whose primary business is the manufacture of explosives. As such, it is highly likely the goods are being imported for explosive use, and that goods which have a low percentage of ammonium nitrate are being brought in under other tariff codes such as those for UAN.

Linkage between cost to manufacture ammonium nitrate and market value

ANM states that they “believe that gas pricing in Russia whilst important is not a significant factor in the total cost of ammonium nitrate”. ANM stated that the other cash and non-cash costs, along with an 18% return on net assets, are the largest costs in the price of ammonium nitrate.

As the Commission has constructed a normal value based on a substitute price of gas and has not replaced other factors outlined in Chapter 8, this has been taken into account.

10.4 Government of Russia submission

Market situation

The GOR submits that, under Article 2 of the WTO *Anti-Dumping Agreement*, adjustments to normal value "may be made only if … accounting records do not reasonable reflect costs associated with production (not inputs) and sale of product (not inputs)" or "in case of a particular market situation". As such, it contends that replacement of inputs cannot be undertaken.

In addition to this, the GOR alleges that there is a free market for natural gas in Russia due to the existence of SPIMEX and other non-Gazprom sellers of gas who are not subject to government regulation of prices.

The Commission notes that the cost of production or manufacture of like goods sold by an exporter is worked out in such manner, and taking into account of such factors, as the Regulation provides.

Subsection 43(2) of the Regulation requires that if an exporter of like goods keeps records relating to the like goods, and those records:

1. are in accordance with generally accepted accounting principles (GAAP) in the country of export; and
2. reasonably reflect competitive market costs associated with the production or manufacture of like goods;

then the amount to be the cost of production or manufacture must be worked out using information set out in the exporter's records.

During this investigation, the Commission has verified that the accounting records of Azot have been kept in accordance with the Russian GAAP, relying on the auditor's opinion in the company's audited financial statements.

The Commission considers that the question to be answered for the purpose of the Regulation is whether Azot's records reasonably reflect competitive market costs associated with the manufacture or production of the relevant goods.[47]

If the Commission believes that where Azot's records do not reasonably reflect competitive market costs, which include the costs of the upstream inputs, it is open to the Parliamentary Secretary to calculate a cost of production from all relevant information that is available. This may then necessitate an adjustment to the costs contained in Azot's records in order to reflect competitive market costs associated with the manufacture or production of the goods under consideration.[48]

As outlined in Chapters 6 and 7, the Commission is satisfied that there is a particular market situation for ammonium nitrate in Russia that makes domestic sales unsuitable for

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[47] *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 (30 August 2013) Nicholas J [91].
[48] Ibid [41] – [42].

calculation of the normal value, and that the cost of natural gas recorded in Azot's accounts is not a competitive market cost and therefore has been replaced by an appropriate benchmark.

Russian electricity market

The GOR states that distributors and sales companies selling electricity and capacity to industrial consumers do so at free market prices. This is validated by Federal Law 35-FZ of 26 March 2003.

The Commission has made no replacement of electricity costs in the constructed normal value for Azot.

Country in transition

The GOR specified that, subsequent to REP 169 it is no longer an economy-in-transition, and as such measures cannot be applied on that specific basis. This is agreed, and the Commission will not be using any economy-in-transition based measures.

10.5 CSBP and Orica submission

Natural gas

The applicants state that "the Russian government continues to legislate domestic prices that are substantially lower than export prices".

The Commission accepts that this is the case, as set out in Chapter 6.

Competitiveness of electricity costs

The applicants assert that "it has been demonstrated that the government of the Russian Federation regulates and therefore significantly influences domestic electricity prices".

To date this allegation has not been substantiated, and as 80% of electricity is sold at non-regulated prices[49] the Commission considers that the cost of electricity recorded by Azot in its accounts is reasonably reflective of competitive market costs.

Impact on Australian Market

The applicants allege that in 2014 "imports declared from Malaysia (where no ammonium nitrate manufacture exists) of 21,600 tonnes and supplied into Port Hedland W.A. originated in the Russian Federation" and that "in 2015, imports from the Russian Federation accounted for almost one-third of total import volumes into Australia" once Malaysian imports are included.

The Commission cannot take into account imports which are not from the Russian Federation, either directly or via Estonia. If the applicants wish to have this investigated, an anti-circumvention inquiry will be required. As such, the Commission will continue to treat Russian exports as 2.5% of imports as per Section 3.

[49] http://us.practicallaw.com/6-527-2969.

11. PROPOSED MEASURES

11.1 Preliminary finding

The Commissioner proposes to recommend that the Parliamentary Secretary secure the continuation of anti-dumping measures applying to certain ammonium nitrate exported to Australia from the Russian Federation, either directly or via Estonia.

Based on the information available at this stage of the inquiry, the Commissioner proposes to recommend that, in continuing the anti-dumping measures, interim dumping duty be calculated based on the floor price duty method.

Furthermore, consistent with the Federal Court decision discussed in section 12.5 below, the Commissioner also proposes to recommend that the dumping duty notice be altered to specify single variable factors for all grades of ammonium nitrate.

11.2 Existing measures

The method of interim dumping duty currently applied to ammonium nitrate is the combination method pursuant to subregulation 5(2) of the *Customs Tariff (Anti-Dumping) Regulation 2013* (the Dumping Duty Regulation).

Further, the dumping duty notice published in respect of certain ammonium nitrate exported from Russia specifies different variable factors for different sub-sets of the goods: high density ammonium nitrate and low density ammonium nitrate.

The Commission notes that the continuation inquiry was initiated on the expectation that it may also incorporate a review of the measures applying to ammonium nitrate exported to Australia from Russia. The Commission has therefore considered whether the variable factors relevant to the taking of the measures (being the normal value, the export price and the non-injurious price) have changed.

11.3 Forms of duty available

The forms of duty available to the Parliamentary Secretary when imposing anti-dumping measures are prescribed in the Dumping Duty Regulation and include:

- combination of fixed and variable duty method (combination method);
- floor price duty method;
- fixed duty method ($X per tonne); or
- *ad valorem* duty method (i.e. a percentage of the export price).[50]

The various forms of dumping duty all have the purpose of removing the injurious effects of dumping. However, in achieving this purpose, certain forms of duty will better suit particular circumstances more so than others.

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[50] Section 5 of the *Customs Tariff (Anti- Dumping) Regulation 2013*

11.4 Commissioner's assessment on the form of duty

11.4.1 Background

In considering which form of duty to recommend to the Parliamentary Secretary, the Commission has had regard to its published *Guidelines on the Application of Forms of Dumping Duty November 2013*[51] (the Guidelines) and relevant factors in the ammonium nitrate market.

11.4.2 Combination duty method

The combination duty comprises two elements: the "fixed" duty element and the "variable" duty element.

The fixed element is determined when the Parliamentary Secretary exercises powers to "ascertain" an amount (i.e. set a value) for the export price and the normal value.

The variable component stems from a feature of this form of duty whereby, having ascertained the export price for the purposes of imposing the dumping duty, if the actual export price of the shipment is lower than the ascertained export price, the variable component works to collect an additional duty amount (i.e. the difference between the ascertained export price and the actual export price). It is called a 'variable' element because the amount of duty collected varies according to the extent the actual export price is beneath the ascertained export price.

11.4.3 Fixed duty method

A fixed duty method operates to collect a fixed amount of duty – regardless of the actual export price of the goods. As explained in section 12.5.2, the fixed duty is determined when the Parliamentary Secretary exercises powers to ascertain an amount for the export price and the normal value.

11.4.4 *Ad valorem* duty method

The *ad valorem* duty method is one of the simplest and easiest forms to administer when delivering the intended protective effect. It is duty applied as a proportion of the actual export price of the goods.

An *ad valorem* dumping duty is determined for the product as a whole, meaning that a single ascertained export price is required when determining the dumping margin.

11.4.5 Floor price duty method

The floor price duty method sets a 'floor' – for example a normal value of $100 per tonne – and duty is collected when the actual export price is less than that normal value of $100

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[51] Available at http://adcommission.gov.au/accessadsystem/Documents/Forms%20and%20Guidelines/Guidelineformsofdumpingduty-November2013.pdf

per tonne. The floor price is either the normal value or the non-injurious price, whichever becomes applicable under the duty collection system.

This duty method does not use an ascertained export price as a form of 'floor price' as occurs with the combination and fixed duty methods.

11.4.6 Factors taken into consideration by the Commission

The Commission has weighed up the following factors in determining which duty method is the most appropriate in the circumstances.

Calculation of an ascertained export price

As set out in Chapter 8, Azot did not export the goods to Australia during the inquiry period and therefore the Commission considers that insufficient information is available to determine export price under section 269TAB(1) of the Act. After having regard to all relevant information, export price was established in accordance with section 269TAB(3) of the Act.

The combination, fixed and *ad valorem* duty methods all require determination of an ascertained export price and ascertained normal value which result in a positive dumping margin calculation. As the Commission considers the constructed normal value to be not necessarily representative of other Russian exporters (see Chapter 8), and the lack of exports to Australia by the cooperating manufacturer, the Commission views these forms of measures to be inappropriate in the present circumstances.

Setting a floor price

The floor price duty method does not use an ascertained export price as a form of 'floor price'. The floor price is either the normal value or the non-injurious price, whichever is applicable.

Discussion on the appropriate price for the floor is in Chapter 12.

CSBP's preference for a combination form of duty

The Commission notes the applicants have a preference that, should the Parliamentary Secretary secure the continuation of the anti-dumping measures, interim dumping duty be calculated by applying the combination method.[52]

As outlined above, the existing anti-dumping measures applying to ammonium nitrate are in the form of a combination duty. The amount of interim dumping duty payable on certain imports of ammonium nitrate from Russia shall be the sum of:

- an amount equal to the rate of interim dumping duty per kilogram ($AUD) ("fixed" component of duty); plus

[52] www.adcommission.gov.au/cases/Pages/CurrentCases/EPR312.aspx.

- an additional amount if the actual export price of the goods is less than the confidential export price as last ascertained by the former Minister for Home Affairs ("variable" component of duty).

For both high and low density grades of ammonium nitrate, the rate of interim dumping duty is AUD $0 per kilogram. The effect is that the fixed element of the duty will be zero for all imports of ammonium nitrate. Interim dumping duty is only payable when the actual export price of the goods is less than the ascertained export price. In effect, the existing anti-dumping measures act in the same manner as a floor price duty method.

11.5 Federal Court finding

Where the Parliamentary Secretary publishes a dumping duty notice, that notice must include a statement of the ascertained normal value, ascertained export price and non-injurious price of the goods. The notice cannot specify different variable factors for different sub-sets of the goods. This reflects the Federal Court of Australia decision in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth [2013] FCA 870* (FCA 870), which was handed down on 4 September 2013.[53]

As outlined above, different variable factors currently apply to high density ammonium nitrate and low density ammonium nitrate. Consistent with the Federal Court finding, the Commissioner is proposing to recommend the dumping duty notice be altered to specify single variable factors for all grades of ammonium nitrate.

11.6 Conclusion

The Commission considers that:

- the normal value applicable to the single cooperating producer, Azot, has been established; however
- in the absence of cooperation from other exporters, their normal values have been established using TAC(6);
- the export price relevant to Azot and all other exporters has been determined using TAB(3); and
- the comparison of Azot's normal value to the export prices obtained by other exporters is not a reasonably reliable basis for changing the variable factors applying to all exporters generally.

The Commission recognises CSBP's preference for a combination form of duty. However, based on the evidence available and preliminary analysis conducted by the Commission, the Commissioner is satisfied that there should be a shift from use of a combination duty to the floor price duty method.

The Commissioner also proposes to recommend the dumping duty notice be altered to specify single variable factors for all grades of ammonium nitrate (in line with the Federal Court decision handed down on 4 September 2013).

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[53] Federal Court of Australia, Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth [2013] FCA 870, http://www.adcommission.gov.au/cases/Pages/Federal-Court-Cases.aspx

Interested parties are invited to make further submissions (with evidence as applicable to demonstrate claims) on the most appropriate form of measures, within 20 days of the SEF. The Commissioner will have regard to those submissions in making a final recommendation to the Parliamentary Secretary.

12. NON-INJURIOUS PRICE

12.1 Preliminary assessment of Non-Injurious Price (NIP)

The NIP is defined in Section 269TACA of the act as "the minimum price necessary … to prevent the injury, or a recurrence of the injury, or to remove the hindrance [to the industry]" caused by the dumped goods the subject of a notice under section 269TG. It is ordinarily the Australian sales price from a period where the industry is not affected by dumping.

The NIP has been calculated based on the verified average sales price for the applicants in the inquiry period, as the effects of dumping have been counteracted based on the imposition of measures, with adjustments to bring the price to FOB. These have been calculated using the verified information from the DBS verification.

The calculations are available in **Confidential Attachment 5 – NIP**.

12.2 Lesser Duty Rule

The calculation of the NIP is relevant for the purposes of the lesser duty rule under the Dumping Duty Act.[54] The level of dumping duty imposed by the Parliamentary Secretary cannot exceed the margin of dumping, but, where the NIP of the goods is less than the normal value of the goods, the Parliamentary Secretary must also have regard to the desirability of fixing a lesser amount of duty.

However, subsection 8(5BAA)(a) of the Dumping Duty Act provides that the Parliamentary Secretary is not required to have regard to the desirability of fixing a lesser amount of duty in certain circumstances. One such circumstance is where the normal value of the goods was not ascertained under subsection 269TAC(1) because of the operation of subsection 269TAC(2)(a)(ii) of that Act.

The Commission notes that even where one of these circumstances exists, the Parliamentary Secretary is not obliged to, but still may, consider applying a lesser amount of duty.

12.3 Discussion

The normal value which has been constructed is based on one manufacturer of ammonium nitrate who does not export to Australia. Due to the method of construction the normal value is significantly above the NIP.

Due to the degree to which the normal value exceeds the price which prevents injury to Australian industry, the Commissioner recommends that the Parliamentary Secretary exercise her discretion and consider applying the lesser amount of duty.

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[54] Subsection 8(5B) of the Dumping Duty Act.

13. APPENDICES AND ATTACHMENTS

Confidential Appendix 1	Market Analysis
Confidential Attachment 2	Normal Value
Confidential Attachment 3	Export Price
Confidential Attachment 4	Import Parity Pricing
Confidential Attachment 5	NIP