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7 August 2023

The Director
Investigations 4
Anti-Dumping Commission
GPO Box 2013
Canberra
ACT 2601

By email: investigations4@adcommission.gov.au

Dear Director,

Continuation Inquiry 629
Yara AB's interested party submission

This submission is made on behalf of Yara AB ("Yara") in accordance with section 269T(1) of the *Customs Act 1901* ("the Act").

A Introduction

As the Commission is aware, Yara AB ("Yara") is a Swedish manufacturer and exporter of ammonium nitrate. Yara is subject to the anti-dumping measures ("the measures") currently under consideration by Continuation Inquiry 629. Yara has expressed, and continues to express, strong disapproval regarding the findings reached in Investigation No 473 ("the Original Investigation"), to which this continuation inquiry relates. Yara welcomes the prospect that the need for these measures be revisited and strongly urges that the Commission do so in an open, transparent, and objective manner.

Yara has reviewed the application from CSBP Limited, Orica Australia Pty Ltd, Queensland Nitrates Pty Ltd and Dyno Nobel Asia Pacific Pty Ltd (collectively "the Applicants"), seeking the continuation of anti-dumping measures with respect to ammonium nitrate exported from China, Sweden, and Thailand.

Yara considers the Applicants' attempts to prolong the undue imposition of measures are without merit. The Applicants' arguments are based on pure speculation and histrionics, rather than positive evidence indicating any likely recurrence of dumping and material injury by Yara.[1] There is simply no factual or legal basis to continue the measures insofar as they relate to Yara. The legal standard for the continuation of measures has not been met.

In this submission, we demonstrate that when the legal standard for continuation is considered, the proposal that the measures be continued with respect to Yara is without merit.

B Continuation of Anti-dumping measures is meant to be exceptional

The legal standard for the continuation of measures is stated at section 269ZHF(2) of the *Customs Act* ("the Act"). The Commission is obviously aware of the terms of that section, given it forms the boundaries of this inquiry. Nonetheless, for the sake of convenience we extract and discuss them here:

> *The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.*[2]

Tellingly, this section precludes the Commissioner from recommending the continuation of the measures unless this requisite "satisfaction" is met. This is an interesting drafting technique. Elsewhere in the anti-dumping sections of the Act, the satisfaction is cast in the positive: if the decision-maker is satisfied of something the Minister may do something, or in the case of termination of an investigation, if the Commissioner is satisfied of something, they must do something. Here the decision-maker is explicitly prevented from doing something unless the requisite satisfaction is met. The strong implication is that continuation of measures is an exceptional thing.

Section 269ZHF(2) requires the Commissioner to be satisfied that there is a causative nexus between the expiry of measures and the recurrence of dumping *and* material injury because of that dumping. It must be, at least, likely (i.e., "more probable than not" and not simply possible or plausible) that dumping and material injury will recur if the measures were to be removed.[3] This determination must be

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1 Article 3.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("ADA"); *Minister of State for Home Affairs v Siam Polyethylene Co Ltd.*

2 Section 269ZHF(2) of the Act.

3 *Siam Polyethylene Co. Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838 at [49]; see also the *Dumping and Subsidy Manual* at page 130.

based on "positive evidence" that the termination of the duty is likely to lead to continuation or recurrence of dumping and injury".[4] This means that there must be a sufficient factual basis upon which the likelihood of such continuation or recurrence is drawn. If there is no evidence before the Commission supporting a recurrence of dumping, the measures cannot be continued.

The facts and circumstances we *discuss* in this submission clearly prevent the Commission from reaching the view that the expiry of measures would lead to even a remote possibility of Yara causing material injury to the Australian industry due to dumping. There is no information on the public record to support the continuation of measures with respect to Yara. Respectfully, the measures should be discontinued.

C Dumping will not recur

For there to be dumping, there needs to be exports. Yara has not made any exports of Swedish ammonium nitrate to Australia since 2018, so there is no basis to find that dumping occurred during the inquiry period, and so no basis to consider that dumping would "continue" if the measures were revoked. Accordingly, the only basis on which the continuation of measures can be recommended is on a finding that dumping is likely to recur absent of the measures.

The application considers this only briefly. The Applicants' argument is based on their assertions that Yara has maintained distribution links with Australia, that Yara considers Australia to be an attractive market and that Yara's capacity utilisation is somehow linked to Australian exports. In some instances, these points are inaccurate, in other instances they are plainly wrong. We address them below. Ultimately, when the Commission considers the unusual circumstances that related to the exports considered in the Original Investigation, the inevitable conclusion that should be drawn is that a recurrence of dumping is highly unlikely.

1 The circumstances in the Original Investigation will not recur

The Original Investigation considered exports made during the period 1 April 2017 to 31 March 2018. The majority of these exports – [CONFIDENTIAL TEXT DELETED – number] by volume – were sold pursuant to a supply contract between [CONFIDENTIAL TEXT DELETED – parties to contract]. A copy of that contract was provided to the Commission as Confidential Attachment 10 to Yara's exporter questionnaire response. There are several things to note in that regard:

- The purpose of the contract was to support a member of the Australian industry, [CONFIDENTIAL TEXT DELETED – commercially sensitive details of supply contract]. Per [CONFIDENTIAL TEXT DELETED – provision], the intent of the agreement was that supply under the contract would be made primarily from [CONFIDENTIAL TEXT DELETED – party], with supply from Sweden only being countenanced if supply could not be made from [CONFIDENTIAL TEXT DELETED – same party].[5]

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4 Para 28 of the Commission's submission to the Anti-Dumping Review Panel ("ADRP"), Panel Report, Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars, para 7.54. See also Report of the Appellate Body, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R 15 December 2003, page 42.

5 Please refer to Confidential Attachment 10, which is referred to at page 50 of *Report No. 473 Alleged Dumping of Ammonium Nitrate Exported from the People's Republic of China, Sweden, and the Kingdom of Thailand* ("Report 473"). A confidential copy of Yara's amended version which was considered, albeit not attached, to Report 473, is attached for your convenience.

- The price of exports from Sweden were calculated via an agreed pricing mechanism [CONFIDENTIAL TEXT DELETED – details of price mechanism].[6]
- According to [CONFIDENTIAL TEXT DELETED – provision], the supply agreement was scheduled to terminate in [CONFIDENTIAL TEXT DELETED – date]. No new agreement was entered into or exists. Yara ceased exporting Swedish ammonium nitrate to Australia under this agreement in September 2018.
- The counterparty to the supply agreement was wholly subsumed by [CONFIDENTIAL TEXT DELETED – company and details of their operation]. Per information on the public record exports from Chile increased in 2018. The Commission has recently found that exports from Chile have not been dumped.[7]

As will no doubt be clear from the public record in the Original Investigation, Yara was shocked by the conclusion that exports that were made on this basis, for this purpose, would be considered materially injurious to the Australian industry. The purpose of the supply agreement was to support fledgling member of the Australian industry. Dumped or not, the imposition of the measures baffles Yara to this day.

That stated, the matter of note is that the original dumping finding was very much a function of circumstances that have long since fallen away. The dumping finding was based on a pricing mechanism in a contract that terminated almost four years ago, in sales to a customer who has since been acquired by a company with a completely different modus operandi and commercial profile. Importantly, this successor appears to be related to a different ammonium nitrate exporter that falls outside the scope of this investigation. Yara has no supply agreements relating to the Australian market.

We note the Applicant's insistence that Yara has maintained distribution links with Australia. This assertion is baseless. The Yara Group has investments in Australia, including a significant stake in YPN. However, Yara, the Swedish manufacturer and exporter to whom the measures relate, does not. Yara's distribution link in the Original Investigation, relating to [CONFIDENTIAL TEXT DELETED – party], has expired.

There is a common saying in finance that past performance is not a predictor of future performance. That is equally relevant in the case of a continuation inquiry such as this: a prior finding of dumping is not indicative that dumping will recur when the measures are revoked. The Anti-Dumping Review Panel ("ADRP") has endorsed the understanding that measures cannot be continued on the basis of an assumption that dumping will simply continue because the measures are no longer in place.[8] In the case of Yara, however, there is ample pre-existing evidence before the Commission to establish that the Commission's earlier dumping finding that supposedly necessitated the imposition of measures, was bred from circumstances that no longer exist, and that will not recur.

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6 As noted at page 50 of Report 473, the prices of exports were intended to match prices "in accordance with the supply arrangement".

7 In the file note to *Investigation No 605 Ammonium nitrate Exported to Australia from Chile, Lithuania and the Socialist Republic of Vietnam* at page 2, the reason cited for termination of the investigation insofar as it related to Chile was that "…there has been no dumping by any exporter of the goods from Chile during the investigation period".

8 The letter from the ADRP to the Commissioner seeking a reinvestigation in ADRP Review No. 166, at paragraph 5.

2 Australia is not a key market for Yara

During the Original Investigation, Yara's exports to Australia represented [CONFIDENTIAL TEXT DELETED – percent] of its sales of the goods under consideration.[9] But, this needs to be understood in context. Yara's production of solid ammonium nitrate is a small portion of its business. The goods under consideration exclude ammonium nitrate solution,[10] which is by far the preferred product in Sweden.[11] But Yara is not solely focused on sales of Swedish produced ammonium nitrate, it also provides a sales channel for a diverse range of broader Yara products including NPK fertilisers, chemicals for wastewater treatment and civil construction applications, and NOx abatement products for the transport and power sectors. By value, the goods under consideration sold to all markets – Australia, Sweden and third countries alike – represented only [CONFIDENTIAL TEXT DELETED – amount] of Yara's turnover during the Original Investigation. By value, exports to Australia represented only [CONFIDENTIAL TEXT DELETED – small number] per cent of Yara's turnover in that same period.[12] The Australian market, and exports to Australia, was marginal to Yara's business.

As such, we disagree with the Applicants' belief that, without anti-dumping measures, Yara would "likely export at dumped prices".[13] This appears to be premised on the assertion that Australia is an "attractive market" for exporters.[14] But what is the basis for this assertion? The circumstances regarding Yara's previous exports have been articulated above. Presently, Yara has frictionless existing distribution channels in numerous markets around the world, none of which face the ongoing threat that the local industry will be found to be injured because they refer to import data in negotiations that did not relate to the imported product. Nowhere else in the world is it likely that exports that represent less than 1 per cent of the market will be considered materially injurious. When the supply agreement with [CONFIDENTIAL TEXT DELETED – party] expired in September 2018, the volume of exports going to Australia was easily absorbed into other markets. In the current inquiry period, Yara's largest third country sales were to [CONFIDENTIAL TEXT DELETED – markets and sales volumes].

We are not foreclosing the possibility that Yara will export ammonium nitrate to Australia in the future. If the circumstances are right, if the price is right, they may well do so.[15] But this unexamined assertion that the Australian market is somehow more attractive than any other market accessible to Yara is not a credible starting point for this inquiry. Nor is it one upon which a recommendation for the continuation of the measures can be based.

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9 Attachment 10 to Yara's exporter questionnaire in the Original Investigation.

10 Being, as it is, not in a "solid form" or otherwise prilled or granular.

11 See page 30 of Yara's exporter questionnaire. In the inquiry period, Yara sold **[CONFIDENTIAL TEXT DELETED – number]** metric tonnes of ammonium nitrate solution domestically, whereas its sales of ammonium nitrate only amounted to **[CONFIDENTIAL TEXT DELETED – number]** metric tonnes.

12 Attachment 10 to Yara's exporter questionnaire in the Original Investigation.

13 Attachment A to the application for this inquiry, page 7.

14 *Ibid*. Page 6.

15 Note, this is purely hypothetical. Yara has no supply agreements with any Australian customers presently. Nonetheless, if it was economically beneficial and operationally appropriate to do so at some point in the future, it could occur. It should be noted, of course, that the Original Investigation was Yara's first direct exposure to anti-dumping law, and the way Australia determines if dumping has occurred. The supply agreement, negotiated two years before the initiation of the investigation, was not done so with an informed understanding of Australia's dumping laws. Things would be very different if Yara was to ever resume supply to Australia.

The fact that Yara has not recommenced exports to Australia in recent years establishes this. The Commission is well aware of the recent and significant increases in the price of imports to Australia.[16] As we understand it, the non-injurious price for Swedish ammonium nitrate – being the current minimum price necessary which Swedish ammonium nitrate could be exported to prevent material injury[17] – is approximately [CONFIDENTIAL TEXT DELETED – number]. Even with 14.4 per cent interim duty included a per ton price of AUD of [CONFIDENTIAL TEXT DELETED – number] would have been a very compelling offer to any Australian ammonium nitrate consumer. If Yara wished to buy-up market share without concern for profit, it could have done so in the last 24 months by exporting at the non-injurious price level. It did not do so. Why would the removal of the measures change this?

This is a matter of some significance when the following is noted:

[CONFIDENTIAL TEXT DELETED – details of production issues facing Australian industry]

Yara has not exported to Australia despite these facts.

Yara remains focussed on global market opportunities across its entire range of fertilisers and industrial products including ammonium nitrate. Yara continues to expand its ammonium nitrate supply chain models to meet the growing demands of the blasting mining and civil blasting sectors. This, and supply gaps caused by geopolitical events such as the Russian/Ukrainian conflict, COVID-19, Brexit has resulted in sales expansion in [CONFIDENTIAL TEXT DELETED – markets]. Yara's exports to Australia were not a significant part of Yara's business. Australia was not, and is not, a key market for Yara's ammonium nitrate.

3 Yara's exports to Australia had no link to Yara's capacity utilisation

The Applicants have argued that Yara possesses excess capacity to supply the Australian market, and that this would somehow compel them to export to Australia.[18] But Yara's capacity utilisation rate was not a driver of exports during the Original Investigation period, and so capacity utilisation is not a predictor of what may occur if the measures were revoked.

Specifically, in the Original Investigation period, Yara submitted data indicating it was operating at a [CONFIDENTIAL TEXT DELETED – big number] per cent production capacity utilisation rate. The basis for this figure was discussed with the Commission during verification on 17 September 2018, with the relevant calculations provided to the verification team. Yara's exports to Australia were not caused by any shortfall in production capacity.

As we have discussed, the measures currently in place are not a bar to Yara exporting to Australia. Indeed, there is ample opportunity for Yara to do so. In Investigation 605, the Commission acknowledged that since 2018, Australian demand for ammonium nitrate has increased and has the potential to continue rising.[19] Australian importers in that investigation also referred to the Australian industry's lack of capacity to meet domestic demand.[20] So, if Yara wanted to re-enter the Australian market in any meaningful capacity, it would have already done so.

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16 *Statement of Essential Facts No. 605 Alleged Dumping of Ammonium Nitrate Exported to Australia from the Republic of Lithuania and the Socialist Republic of Vietnam* ("SEF 605"), page 85.

17 Section 269TACA(a) of the Act.

18 Attachment A to the application for this inquiry, page 5.

19 EPR number 51 of EPR 605, pages 30 and 32.

20 EPR number 57 of EPR 605.

The Applicants note that Yara's export volumes account for more than 50 per cent of its plant output.[21] It is unclear on what basis this figure has been determined. Nonetheless, assuming it is accurate, the relevant fact is that none of these exports have gone to Australia. The current measures do not prevent Yara from exporting to Australia if they had the desire to. However, by geography, Yara has easy access to Europe, Africa, and the Baltic nations. It is far easier for Yara to sell to its local neighbours than it is for Yara to sell to Australia. The revocation of the measures would not alter that basic reality.

4 Yara has not dumped ammonium nitrate into third countries

The Applicants have argued that, in 2018, Yara exported to other destinations at free on board ("FOB") prices lower than export prices to Australia and that, on this basis, it is "reasonable to conclude" that Yara would again dump ammonium nitrate into Australia.[22] We have not been provided a copy of the information upon which this statement is based and so cannot provide a detailed critique of it. Nonetheless, we disagree with the position entirely.

Yara has not been subject to any anti-dumping cases in any other country it has exported to. Its product has never been found to have been dumped in any other market. But significantly, Yara has never been required to complete information relating to sales to other countries that would allow for a like-for-like comparison with its domestic sales.[23]

Yara is justifiably concerned that the Applicants have been able to accuse Yara of dumping ammonium nitrate into third countries without providing sufficient non-confidential evidence regarding same. To provide Yara with a proper opportunity to address and respond to this damaging allegation, we respectfully ask the Commission to provide Yara a copy of the "data" which supposedly demonstrates Yara's third country exports have been dumped. This will enable Yara to respond in full.

We also query the relevance of data from 2018. The relevant question in this case is what is likely to occur because of measures expiring in August 2024. Data that precedes that date by six years is of little probative value. In any event, we will address Yara's third country sales generally. The Applicants have specifically referred to Chile, Peru and Malaysia as destinations that benefitted from FOB prices lower than export prices to Australia in 2018. Yara can clarify that during the current inquiry period:

- Yara did not export any Swedish ammonium nitrate to Chile or Malaysia.
- Yara exported ammonium nitrate to Peru. However, [CONFIDENTIAL TEXT DELETED – price details]. This does not infer any dumping during the inquiry period.

Nevertheless, it goes without saying – *if* Yara were to transact with Australian buyers in the future, it would do so in accordance with the WTO's anti-dumping principles. Through its interactions with the Commission, Yara understands Australia's anti-dumping framework and will uphold anti-dumping principles in any future contract negotiations.

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21 Attachment A to the application for this inquiry, page 5.

22 *Ibid.*

23 Note, for example, that in Yara's exporter questionnaire response it expressly cautioned that "[t]here are a broad range of factors which may affect the comparability of sales to third countries with sales to Australia, including different product mix, different levels of trade, different market dynamics and different customer relationships."

D There is no evidence to suggest material injury would recur

We reiterate that Yara is not likely to export ammonium nitrate into Australia because of the revocation of the measures. If Yara ever does resume exporting ammonium nitrate to Australia, it would seek to avoid doing so at dumped prices. Given this, the question of whether the revocation of measures would result in a recurrence of material injury is irrelevant.

Nevertheless, the Applicants' have argued that there is a likelihood of material injury recuring. For the sake of completeness, we address those now.

The Applicants have argued that the measures imposed by Investigation 473 were effective in curtailing material injury,[24] but that the threat of material injury remains.[25] It is unclear what is meant by this. The measures were not imposed in response to a threat of material injury, and threat, as a concept, is not explicitly relevant to the test in section 269ZHF. The measures cannot be continued due to a finding that their expiry is likely to result in a recurrence of a threat of material injury, but, rather, a recurrence or continuation of material injury itself.

That outcome is not probable. The Applicants' arguments are lacking in detail and do not reflect the true economic condition of the Australian industry.

5 The spectre of contract negotiations does not justify the continuation of measures

In the Original Investigation, the Commission found that Australian industry members suffered material injury through seven contracts/transactions negotiated before and during the investigation period. The supposed "material injury" suffered by the Applicants was "profit foregone" resulting from price suppression that the Commission found was caused by the dumped imports being referred to in a set of negotiations in which some of the Applicants were parties. Yara was not a party to, or even privy to, any of these negotiations. To the extent that any Yara price data was considered, it was without Yara's knowledge or consent.

It is worth noting that, in Investigation 605, the Commission has found only two instances where Australian industry negotiations were impacted by import prices. We understand that these examples were drawn from a period of three years. In the language of the SEF, these impacts were "isolated".[26] Further, the Commission found that there was no clear trend or relationship between the Australian industry's prices and import prices between 2019 and 2022.[27]

These findings are important for assessing the likelihood of future injury. If there are only isolated impacts on the Australian industry over a three-year period, and if there is no general relationship between the Australian industry's prices and imports, what exactly is the need for the measures? It would not appear that material injury is a likely result of the expiry of the measures.

Ultimately, the Australian industry could simply choose not to regard export pricing in negotiating contracts. They could set base prices or undertake pricing reviews based on some other metric; the outcome of Investigation 605 implies they do frequently, as presumably there were more than two negotiations over those three years. Consequently, we submit that the Commission should discount the

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24 Attachment A to the application for this inquiry, page 8.

25 Attachment A to the application for this inquiry, page 11.

26 SEF 605, page 61.

27 SEF 605, page 69.

argument that material injury would result because of the revocation of the measures. The Applicants simply have not provided any evidence to support their claims.

More generally, the Australian industry's predominant use of long-term supply agreements actually shields them from the impact of imports. It is the terms of these contracts that drive the economic performance of the Australian industry.[28] We encourage the Commission to have regard to the findings reached in Investigation 605 when considering this inquiry. In doing so, it will become patently clear that the Applicants have not substantiated any likelihood that material injury would result from a revocation of the measures.

6 The economic condition of the Australian industry has improved

The Applicants argue that "in 2021 the Australian industry's economic performance had deteriorated further from the profit and profitability levels determined in Invest 473".[29] To support their claim, the Applicants refer to their own submission provided in Investigation 605. Unfortunately, their claim does not acknowledge the Commission's findings in the SEF to Investigation 605, nor present an accurate picture of the Australian industry's current economic condition.

Whilst the Commission accepted in Investigation 605 that the Australian industry had experienced a reduction in profit and profitability over the injury analysis period (1 April 2018 to 31 March 2022), the Commission noted that there was "no downwards trends in the Australian industry's prices, sales volumes or market share".[30] With this in mind, we suspect that the Applicants might not be entirely truthful as to their predicted economic performance.

In Orica's own annual report for FY2022, Orica states that "our improved financial performance in FY2022 reflects solid volume growth, increased utilisation… improved commercial discipline in both customer and supply contracts and increased customer preference for premium product", and that the profitability of the Australia Pacific and Asia region is up 31 per cent on the prior corresponding period.[31] In IPL's own annual report for 2022, IPL states "Dyno Nobel Asia Pacific delivered EBIT [earnings before interest and tax] of $162m, up 16%, reflecting strong volumes and growth from technology sales" compared to the prior year.[32] Whilst we have been unable to obtain publicly available data regarding the predicted economic performance of CSBP and QNP, we encourage the Commission to request this data from them.

E Conclusion

As we have expressed on behalf of Yara, the Applicants' arguments do not hold merit and should not withstand the Commission's careful scrutiny.

For there to be dumping, Yara must first export ammonium nitrate to Australia. Yara has not exported to Australia since 2018, and has little incentive to resume supplying to such a highly protected market, where local producers already hold a strong commercial advantage. A finding that a "continuation" of dumping is likely if the measures are revoked cannot be made in these circumstances.

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28 SEF 605, page 66.

29 Attachment A to the application for this inquiry, page 8.

30 SEF 605, page 8.

31 Page 6 of the 2022 Orica Corporate Governance Statement: https://www.orica.com/Investor-Centre/company-reports.

32 Page 16 of the IPL 2022 Annual Report 2022: https://investors.incitecpivot.com.au/static-files/33fa0cd7-7a08-4df6-9637-fe72ed00d996.

Yara patently rejects the Applicants' assertions that it has been dumping goods into third countries. The Applicants' allegations are undisciplined, ill-informed and risk tarnishing Yara and Yara Group's premier standing in the global market. There is no basis for the Commission to consider a "recurrence" of dumping is likely if the measures were revoked.

The original basis upon which "material injury" was found to have been suffered by the Australian industry was, in Yara's view, flawed. The Applicants cannot simply refer to that finding to justify the continuation of measures, particularly when more recent investigations establish that the relevance of imports to the Australian industry's performance is very limited. Contrary to the Applicant's claims, the Australian ammonium nitrate industry's condition is improving, not deteriorating.

Finally, Yara would like to emphasise that while the volume of imported ammonium nitrate is a fraction of the 2.7 million tonnes produced in Australia, imported ammonium nitrate plays a critical role in the extraction of resources that form the backbone of Australia's economy. The ongoing predisposition to discourage ammonium nitrate imports into Australia represents a risk to that economy. Australia risks cutting itself off from global ammonium nitrate supply networks because it is gaining a reputation as a "difficult market to deal with". The adverse impacts of this will significantly outweigh any imagined benefit to the Australian industry would gain from a continuation of these measures.

For the reasons we have set out in this submission, Yara respectfully asks that this continuation investigation find there is no basis for the continuation of the measures. The exceptional circumstances in which measures can be continued have not been met in this instance.

Yours sincerely

Alistair Bridges
Special Counsel

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