Canberra
6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
Australian Capital Territory 2609

Brisbane
Level 4, Kings Row Two
235 Coronation Drive
Milton, Brisbane
Queensland 4064

Melbourne
Level 39, 385 Bourke Street
Melbourne
Victoria 3000

Australia

Canberra +61 2 6163 1000
Brisbane +61 7 3367 6900
Melbourne +61 3 8459 2276

www.moulislegal.com

moulislegal

commercial + international

27 September 2018

The Director
Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra
Australian Capital Territory 2601

By email

Dear Director

Yara AB - ammonium nitrate from Sweden
Rebuttal of allegations regarding injury to the Australian industry

As you know, we act on behalf of Yara AB and its related entities (collectively "Yara") in this investigation.

Yara supports the injury rebuttal submissions made by BHP Billiton Iron Ore Pty Ltd, Downer EDI Mining and Blasting Services Pty Ltd and the Moncourt Group in relation to this investigation.

This investigation should not have been initiated. We request that it be terminated at the soonest possible instance. There is no "material injury" case for exporters or importers to answer. With respect, the propositions put by the applicants as to whether there is any injury at all, if so what has caused that injury, and its required materiality, are far-fetched. They cannot withstand careful scrutiny, as we now elaborate on behalf of our client in this submission.

A Background – what is actionable "material injury"

Section 269TG(2) of the *Customs Act 1901* ("the Act") outlines the key factors that the Minister must find to have been satisfied before prospective anti-dumping measures can be imposed in relation to any goods or like goods.

As a starting position, it needs to be established that dumping has occurred. But this, in itself, is not sufficient cause to justify the imposition of measures. It must be established that because of dumping *"material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be*

materially hindered". This investigation was initiated based on an allegation that the alleged dumping had *caused* material injury during 2017.[1]

Section 269TAE of the Act outlines how the Minister should approach the question of whether material injury has been or is being caused for the purpose of Section 269TG(2). The relevance of Section 269TAE to this question is manifold:

- Section 269TAE(1) provides a non-exhaustive list of factors to which the Minister may have regard when considering whether material injury has been or is being caused to the Australian industry *"because of any circumstances in relation to the exportation of goods to Australia",* for the purpose of Section 269TG(2);

- Section 269TAE(2A) provides that any injury caused by factors other than the exportation of the goods must not be attributed to the exportation of the goods; and

- Section 269TAE(2AA) provides that a determination for the purposes of Section 269TAE(1) must be based on facts and not merely on allegations, conjecture or remote possibility.

In other words, what must be established under Section 269TG(2) is that material injury has been or is being caused *because of* the circumstance of the exportation of the dumped goods to Australia. This finding needs to be based upon facts, and not merely on allegations, conjecture or remote possibility. Injury caused by other factors simply cannot be attributed to the subject goods.

The material injury consideration is further narrowed by other Sections of the Act:

- in particular Section 269TG(2) provides that the "material injury" that has been or is being caused must be found to have occurred *because of* the dumping established in Section 269TG(2)(a);

- Section 269TACB prescribes how the occurrence of dumping can be determined, and specifically limits that determination to the period of investigation; and

- Section 269T(2AE) prevents the Minister from finding that dumping has occurred by reference to the exportation of goods exported to Australia before the start of the period of investigation.

The Act does not allow for a finding that dumping occurred prior to the commencement of the period of investigation, and therefore measures cannot be imposed in relation to material injury that the Australian industry might allege to have been caused by exports prior to the commencement of the period of investigation. To the extent that the Application refers to circumstances which occurred prior to the period of investigation, these cannot be considered to be relevant to a determination under Section 269TAE(1).

Having outlined the relevant law, we will now discuss the circumstances of the exportation of goods from Sweden during the period of investigation.

---

[1] *Application for the Publication of Dumping and/or Countervailing Duty Notices – Ammonium nitrate exported from the People's Republic of China, Sweden and Thailand* ("the Application"), page 40. We note that the Application expressly states that it does not rely on "*threat*" of injury as a basis for claiming the need for protection.

B Exportation from Sweden was not injurious to the Australian industry

The Application sets out a "theory" as to why exports of ammonium nitrate were made to Australia in the period of investigation. That theory is as follows:

> *In 2017, however, there is a regional over capacity in AN that results in significant excess production capacity circulating on global markets. The Applicants' contend that the exports to Australia involve tonnes that cannot be consumed in the exporter's home market and, in order to maintain high production utilisation rates, the producers' [sic] turn to selected export markets to sell goods at distressed, dumped prices (with export prices from China, Sweden and Thailand at levels well below non-dumped Russian AN export prices).*[2]

In the case of Sweden, from where the bulk of the complained-of exports originated, this is blatantly incorrect. As noted in Yara's Exporter Questionnaire response, some [CONFIDENTIAL TEXT DELETED – percent] of Yara's exports to Australia during the period of investigation were [CONFIDENTIAL TEXT DELETED – circumstance of export].

When any new ammonium nitrate plant comes on-line, it needs to be sufficiently loaded in order to run efficiently. [CONFIDENTIAL TEXT DELETED – details of Australian operations].

Those are the relevant circumstances of the exportation. Not only are they are beneficial to the Australian industry producing like goods, but they were created by the Australian industry producing the like goods. Rather than causing any injury – a far-fetched proposition in itself – they have actually supported the Australian industry and Australian industry investment. The conditions of competition with regard to the sales under the supply agreement were entirely different to any spot sales that Yara assumes would make up all of the sales from the other countries that are subject to this investigation.

C If there is any "injury" it could not be considered to be "material"

A starting point for the examination of the alleged material injury is the allegations surrounding profit. As *Consideration Report No. 437 – Application for a Dumping Duty Notice in relation to Ammonium Nitrate Exported to Australia from the People's Republic of China, Sweden and the Kingdom of Thailand* ("the Consideration Report") notes, profit is a function of both sales volume and profit margin (by which, presumably, the Consideration Report means price).[3] It is therefore a good basis to understand what level of impact the applicants are seeking to redress.

The average profit of Australian ammonium nitrate manufacturers is [CONFIDENTIAL TEXT DELETED – percent].[4] If we take this as indicative of the profit margin in 2016 (prior to the alleged impact of the goods under consideration), then the decline complained of would be as follows:

Year	2016	2017
Profit variation (from Application)[5]	92.8	87.5

2 The Application, page 28.

3 Consideration Report, page 38.

4 As per, **[CONFIDENTIAL TEXT DELETED – report from independent source]**, however we suspect that the Commission will be able to confirm this to its own satisfaction, based on the information from the applicants submitted in their participation in this investigation.

5 As per page 20 of the Application.

Impact on margin	[CONFIDENTIAL TEXT DELETED – percent]	[CONFIDENTIAL TEXT DELETED – percent]

Essentially, the impact complained of is a decrease in margin of [CONFIDENTIAL TEXT DELETED – percent] to [CONFIDENTIAL TEXT DELETED – percent]. A profit margin of or about [CONFIDENTIAL TEXT DELETED – percent] is very high, in the plain meaning of those words. Is it really being suggested that achieving a margin of [CONFIDENTIAL TEXT DELETED – percent], rather than [CONFIDENTIAL TEXT DELETED – percent], is materially injurious? Without wishing to presume what the Australian industry might think, the man in the street would probably consider a [CONFIDENTIAL TEXT DELETED – percent] profit to be more than acceptable, for any industry.

So, as a starting point, our client strongly disagrees that there is any material injury case to be answered here, quite apart from the question of whether the allegedly dumped imports have caused any injury, a question to which we now turn.

D Volume injury has not been caused by imports from Sweden

To frame the picture in its full perspective, the Australian Industry has not suffered, and is not suffering, any injury, let alone material injury, as a result of imported ammonium nitrate.

During the period of investigation, [CONFIDENTIAL TEXT DELETED – number] metric tonnes of ammonium nitrate was imported into Australian from Sweden. This constitutes a mere [CONFIDENTIAL TEXT DELETED – percent] of the total Australian market.

The Application suggests that the applicants have suffered injury in the form of a decline in production volumes and in sales volumes. We observe that this claim is rather self-serving given that Australian industry members are some of the biggest importers of ammonium nitrate into Australia. Is it legitimate to import ammonium nitrate and then complain that imports have taken away production and sales volumes? This must be considered to be self-harm, to the full degree of the Australian industry's own imports, and not injury caused by independently imported ammonium nitrate.

We see absolutely no linkage between the moderate reduction in production volumes and exports from Sweden. The application puts the decline in production volumes between 2016 and 2017 at 4.2%.[6] However publicly available information indicates that:

- Orica's volumes actually increased during this period, and this is corroborated by the Application, which shows that Orica's sales volumes increased over the same period;[7] and.

- CSBP and QNP had lower production volumes over the period of investigation, due to Cyclone Debbie and "production issues" (in the case of QNP) and a planned shutdown (in the case of CSBP). Despite this, CSBP reported strong demand for ammonium nitrate in FY 2018, which resulted in increased revenues.[8]

The Application also complains of a reduction in sales volumes, which is quantified to be a 2.6% fall from the previous year. Again, from the Application, this reduction appears to have been borne by CSBP and QNP, but not by Orica. As a matter of logic, we would suggest that this was caused by the reduction in production volume by these entities for the simple reason that the Australian industry members sold all the ammonium nitrate that they produced and, axiomatically, did not sell any

6 Application, page 19.

7 Application, page 15.

8 http://www.wesfarmers.com.au/docs/default-source/asx-announcements/2018-full-year-results-briefing-presentation.pdf?sfvrsn=0, page 42.

ammonium nitrate that they were unable to produce. Again, there is no linkage demonstrated between exports from Sweden and this moderate reduction in sales volume experienced by some Australian industry members.

At most, the case for causation appears to be the coincidence of a trivial increase in imports from the countries subject to this investigation and a decrease in the production and sales volume of two of the applicants. But coincidence does not establish causation. The applicants themselves have cited non import-related reasons as to why their production and sales volumes were *slightly* less impressive during the period of investigation than in previous years, outside the context of this investigation. They now expect the Commission to disbelieve those previously offered reasons, and instead to replace them with a theory that blames these reductions on the price of imports.

Another factor that Yara believes undoubtedly would have impacted CSBP's sales volume is that of over-supply in the West Australian market, as referred to in the annual reports of CSBP's parent company. Traditionally, CSBP has been a monopolist supplier of ammonium nitrate in the West Australian market. However other Australian industry members, principally Orica and Yara, through the Burrup joint venture, have disrupted this *status quo*. This is also confirmed by CSBP's subsequent reactive selling of ammonium nitrate shipments into eastern Australia, particularly into the Queensland coal markets. These markets are traditionally supplied by Orica, QNP and Dyno who have nearby ammonium nitrate plants. We suggest that this has had a deleterious effect on CSBP's earnings and, potentially, its sales volumes.

No Swedish product has gone to the Western Australian market. All such exports were destined for [CONFIDENTIAL TEXT DELETED – markets]. Thus, Yara's ammonium nitrate has not contributed to the situation being faced by CSBP in the West Australian sub-market.

Finally, to re-emphasise, the minor volumes imported from Sweden during the period of investigation will be "taken over" by the Australian industry once the YPN joint venture at Burrup is able to service the obligations it has assumed to Yara Aust, being the obligations that led to the Swedish imports in the first place.

E Price injury has not been caused by imports from Sweden

Other interested parties have pointed out how illogical it is to allege that the imports have prevented the Australian industry from raising its prices. Yara supports this sentiment. The prices achieved by the Australian industry *in the period of investigation* were pre-fixed by pricing mechanisms in sales agreements that the Australian industry agreed to *before the period of investigation*. Prices that, we remind, achieve the same Australian industry a profit margin of over [CONFIDENTIAL TEXT DELETED – percent] on average. These pricing mechanisms mean that the Australian industry is unable to lift its prices freely as and when it wants. There can be no price depression or price suppression or revenue reduction caused by imports if the Australian industry's prices are unchangeable, or are changeable but only with reference to factors that are not import-related. The applicants' inability to directly reflect all of its costs in its prices and to maintain a [CONFIDENTIAL TEXT DELETED – percent] profit margin certainly has not been caused because of any circumstances in relation to the exportation of the goods from Sweden during the period of investigation.

The applicants have also tried to suggest that the usage by end-customers of import intelligence or feedback during tender processes is a cause of injury. Presumably the accusation is that the Australian industry had to reduce or consider reducing its first-offered prices because the party that issued the tender suggested, by its words or actions, that the tenderer's offer was unlikely to be accepted. The specific circumstances are not indicated to interested parties, because of the level of redaction in the Application. However, the accusation is dangerously misleading in its simplicity, and should be rejected for at least the following reasons:

1. Most of the tenders being referred to are for the provision of explosive services as a "bundled" proposition, rather than for ammonium nitrate. This is not the correct level for price

comparison, and in this regard we refer to our comments above with respect to the fixed prices and price formula that were already in effect with respect to the Australian industry's ammonium nitrate sales prior to the period of investigation.

2. In any case such tenders do not represent an accurate price for ammonium nitrate, in that they do not represent a price for ammonium nitrate from which any conclusions about price depression or suppression can reliably be formed. This is because the price for ammonium nitrate is only one of a host of considerations that the end-user would have in awarding the tender. The Commission's inquiries will establish that the ammonium nitrate "price" quoted in a tender offer of this nature is not a "price" at all. It is an inducement to the party who called the tender to score the tenderer highly on that aspect of its tender, on the basis that it will value the services also to be provided in the context of different non-price criteria, such as value, past performance, reliability and relationship. For the same reasons a quoted "ammonium nitrate price" in a downstream tender proposal cannot be considered a circumstance of exportation of ammonium nitrate, because it is not ammonium nitrate that is being sold to the end user. Instead, an end user is typically purchasing blasting services and bulk explosives. This is a sale of local services, deploying a product (bulk explosive) that is locally produced by the service provider concerned.

3. The tender process is essentially a negotiation. It is a common tactic for a participant in such a process to initially quote a higher price than that which they expect to receive, to allow some room to revise the price downward during the process.

4. It is not apparent that whatever information it is that is communicated between the party who called the tender and the tenderer is in fact an accurate representation of the price quoted by other parties. The tendering party is trying to achieve its highest price, the principal its lowest cost. It is an environment conducive to puffery and exaggeration.

5. Further, a proposed pricing mechanism in a tender proposal cannot be a *"circumstance[ ] of the exportation of the goods*" in circumstances in which the goods are not exported. Take, hypothetically, the circumstance where a tender was entered based on proposed supply of ammonium nitrate from Vietnam at a competitive price. This proposal could be used by the end-user to negotiate a lower price from the Australian industry. If the Vietnamese proposal was not accepted, then there would be no imports from Vietnam at the proposed price. In the absence of any related exportation, the tender proposal is simply not a circumstance of exportation.

6. With specific regard to the majority of imports from Sweden, we again note that the price for these was set subject to the specific pricing principle. [CONFIDENTIAL TEXT DELETED – circumstances of sale].

7. The members of the Australian industry are responsible for over 97% of the ammonium nitrate sold in Australia. They are their own largest competitors. The impact of the imported goods, if any, pales in significance to the force and effect of competition between the Australian industry members themselves. That competition has been fierce. For example, during the period of investigation Orica won quite massive contracts to supply ammonium nitrate to BHPIO and Roy Hill Iron Ore. These contracts had previously been held by Incitec-Pivot, which had been supplying CSBP-purchased ammonium nitrate to service those contracts. Incitec-Pivot then won contracts to supply Fortescue Metals, being contracts which had previously been held by Orica. If it is the case that price pressure has impacted tender outcomes, then the main source of that price pressure will be the members of the Australian industry. If a non-attribution exercise was undertaken under Section 269TAE(2A) to quantify the impact of intra-Australian industry competition then it will become obvious that the subject imports have had next to no impact on the performance of the Australian industry.

Accordingly, we submit that the proposition that imports of ammonium nitrate from Sweden have caused price injury to the Australian industry should be rejected entirely.

***

The injury claimed to be suffered by the Australian industry applicants is, on the face of the record, not material.

There is nothing to link the export of the goods from Sweden to the injury claimed to be suffered by the Australian industry.

Other reasons for the minor impacts of which the Application complains are clearly evident and plainly obvious.

Exports from Sweden during the period of investigation were supportive of the Australian industry producing like goods, rather than being detrimental.

Our client respectfully asks that this investigation against its exports to Australia be terminated at the soonest possible opportunity.

Yours sincerely

Alistair Bridges
Senior Associate