

# GLENCORE

10 December 2018

The Director - Investigations 2  
Anti-Dumping Commission  
GPO Box 2013  
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Dear Mr Wickes,

## **Investigation 473 – Dumping - Ammonium Nitrate exported from China, Sweden and Thailand**

### **1. INTRODUCTION AND PURPOSE OF CORRESPONDENCE**

- 1.1 We refer to your email to Mr Darren Oliver of Glencore Coal Assets Australia (**Glencore**) on 8 November 2018 in relation to the investigation by the Anti-Dumping Commission (**ADC**) into alleged dumping of ammonium nitrate ex-China, Sweden and Thailand (**Investigation**). We also refer to the meeting attended by ADC staff and Glencore on 29 November 2018.
- 1.2 The purpose of this correspondence is to re-iterate a number of key matters that Glencore believes are relevant and that need to be considered further by the ADC as part of the Investigation and to address questions put to Glencore by the ADC in respect of its procurement process. Glencore's responses to the ADC's questions are set out at **Confidential Annex 2**.
- 1.3 Confidential commercial information has been redacted for the purposes of allowing the ADC to place this submission on the public register.

### **2. EXECUTIVE SUMMARY**

- 2.1 As we set out in this submission, Glencore has significant concerns with the factual context that appears to have been presented to the ADC, which is not consistent with Glencore's experience with the Australian Ammonium Nitrate (**AN**) Industry that is characterised by very limited imports and [**CONFIDENTIAL TEXT DELETED – supply**]
- 2.2 In these circumstances, anti-dumping duties will lead to and/or exacerbate, what is in our view an inefficient and uncompetitive Australian AN Industry.
- 2.3 Glencore also believes that the Preliminary Affirmative Decision (**PAD**) fails to articulate a sufficient or reasonable factual or evidential basis upon which to impose duties on imports of AN from China, Thailand and Sweden in a manner that is consistent with the

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ADA, SCM Agreement and *Customs Act 1901* either in respect of a material injury or threat thereof.

## 3. OVERVIEW OF KEY ISSUES AND RELEVANT BACKGROUND

### (A) Glencore's current AN supply arrangements

3.1 Glencore has had an ongoing relationship with Orica for more than 10 years.

3.2 Glencore currently has **[CONFIDENTIAL TEXT DELETED – information about contracts between Glencore and Orica]** that are relevant to the ADC's Investigation. **[CONFIDENTIAL TEXT DELETED – information about contracts between Glencore and Orica]**

3.3 **[CONFIDENTIAL TEXT DELETED – nature and description of contracts between Glencore and Orica]**

3.4 **[CONFIDENTIAL TEXT DELETED – nature and description of contracts between Glencore and Orica]**

3.5 **[CONFIDENTIAL TEXT DELETED – nature and description of new contracts between Glencore and Orica]**

3.6 Glencore's experience as a customer globally and our market intelligence of the industry suggests this is some of the highest pricing for AN anywhere in the world and higher than current import parity pricing to Australia (estimated at **[CONFIDENTIAL TEXT DELETED – price]** on a CIF basis and **[CONFIDENTIAL TEXT DELETED – price]** on an ex works basis in Australia when supplied from countries other than Russia, China, Sweden and Thailand). Indeed, **[CONFIDENTIAL TEXT DELETED – hypothetical pricing]**. As a significant and important reference point for countries similar to Australia, AN can be purchased in the USA or Canada for approximately **[CONFIDENTIAL TEXT DELETED – price]**. As with Australia, there are no material imports of AN for use in explosives into the USA or Canada.

3.7 In the current circumstances, Glencore has a significant concern that **[CONFIDENTIAL TEXT DELETED – hypothetical pricing]**. Glencore is not aware of the basis or justification of Orica's pricing and does not believe that imports from the countries in question are capable of resulting in the alleged declines in profitability. Accordingly, Glencore recommends that the ADC further investigate Orica's pricing model in order to ascertain and determine the extent to which other market factors have influenced Orica's profit margins. As we explain in this letter based on factual data, it is submitted that no material injury as it relates to pricing or profitability can be established on the available facts.

### (B) **[CONFIDENTIAL TEXT DELETED – supply capacity]**

3.8 **[CONFIDENTIAL TEXT DELETED – supply capacity and imports]**. Glencore is of the view that the non-competitive freight cost associated with Orica's product produced at

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Yarwun is a direct result of Orica's own investment decision to develop production facilities that are a substantial distance from mine sites.

- 3.9 **[CONFIDENTIAL TEXT DELETED – supply capacity]** and in light of the high costs to import because of import restrictions), Glencore has been compelled to take steps to seek to negotiate more commercially balanced supply arrangements to create security and availability of supply in Australia. **[CONFIDENTIAL TEXT DELETED – supply capacity and imports]**
- 3.10 On this basis alone, it remains unclear to Glencore how a "material injury" or "threat of material injury" can be established by the Applicants when customers such as Glencore **[CONFIDENTIAL TEXT DELETED – supply capacity]**

**(C) Insufficient connection between available facts and alleged material injury**

- 3.11 Anti-dumping or countervailing measures can only be imposed where it is established that goods exported to Australia have been dumped or subsidised and because of that dumping material injury to an Australian industry producing like goods has been or is being caused or threatened. Whilst material injury is not defined in Australia's legislation, Article 3.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (**ADA**) requires that a determination of injury be based on positive evidence. Injury to the Australian industry caused by other factors must not be attributed to dumping or subsidisation. The Ministerial Direction on Material Injury specifies that:

*"It must be shown that the industry is suffering injury and that the injury caused by dumping is material in degree"; and*

*"In cases where dumped or subsidised imports hold a small market share, it may be difficult to demonstrate material injury".*

- 3.12 Based on the facts available on the ADC's public register and as set out in the PAD, Glencore is of the view that material injury is not capable of being established in this matter. This view is in part based on the following matters, which do not appear to have been advised by the Applicants to the ADC as part of the ADC's investigation to date:
- (a) **As a result of the mining boom, the Australian Industry invested in over 1 million t/year of new production capacity over the last 10 years**, far out-pacing the demand for AN in Australia. As a result, the Australian Industry has been competing amongst itself, leading to lower pricing until recent times with the uptake in the mining industry – this is not linked to imports of AN<sup>1</sup>;
- (b) **The Australian Industry independently chose to limit the production available to the domestic market** and so encouraged imports to ensure that end demand was met while maximising its own capacity utilisation. Orica's partial moth-balling of capacity and scaling back of production of its Yarwun

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<sup>1</sup> Refer to page 6, FN 11 page 7, page 9 and FN 29 page 14 of Submission to ADC from Moncourt dated 17 August 2018.

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facility resulted in significant AN shortages that have driven the need to look to imports including by the Australian producers themselves<sup>2</sup>;

- (c) **The Australian Industry, including the Applicants themselves, import AN accounting for approximately [CONFIDENTIAL TEXT DELETED – number] of all imports into Australia.** Glencore estimates that Orica's imports from its own plant in Indonesia alone account for [CONFIDENTIAL TEXT DELETED – number] of all Australian imports. The ADC should note that exports made from this plant to India resulted in dumping duties being applied in India to protect the Indian domestic market against AN imports from Indonesia;
- (d) **China, Thailand and Sweden account for minimal imports of all AN not imported by the Australian AN Industry.** The countries from which imports are currently the subject of the ADC's investigation account for only an estimated [CONFIDENTIAL TEXT DELETED – number] of all Australian AN imports that were not made by the Australian AN Industry<sup>3</sup>. Of this, only [CONFIDENTIAL TEXT DELETED – number] tonnes came into NSW which was not imported by Orica. When considered in the context of an industry that typically operates on the basis of exclusive long-term supply contracts, it is not apparent how such a small volume of short-term imports could impact pricing or production (past or future) in a manner capable of inflicting material injury;
- (e) **Orica has announced to the ASX (prior to the release of the PAD) that it's plant utilisations are approaching full capacity and that pricing is improving.** This is [CONFIDENTIAL TEXT DELETED – insufficient capacity]. It is also inconsistent with any claim that Orica is being forced to reduce prices in the face of imports<sup>4</sup>;
- (f) **Prices in comparable international markets where there is no import competition is significantly lower** than what the Applicants are currently charging customers in Australia (with the difference being [CONFIDENTIAL TEXT DELETED – number]). For example, a comparable price in North America would be approximately [CONFIDENTIAL TEXT DELETED – number and pricing].
- (g) **Proposal for new AN manufacturing capacity illustrates the excessiveness of current margins earned by Australian AN manufacturers.** [CONFIDENTIAL TEXT DELETED – proposal for new ammonium nitrate plant] This proposal demonstrates the existing ability of

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<sup>2</sup> See page 17 & 39 of Orica's 2015 Half Year Results Presentation whereby Orica state: " Options to flex plant capacity to balance the east coast" and "Net transformation benefits more than offsetting one-off costs associated with Yarwun production curtailment". Also refer to Orica's ASX Impairment Announcement dated 7 August 2015: We have demonstrated a willingness to take action, with recent announcements of partial production curtailment planned at our Yarwun operation" (Attached at **Annex 1**).

<sup>3</sup> Based on analysis of figures from the Australian Bureau of Statistics.

<sup>4</sup> See page 6 of Orica's 2018 Full Year Results Presentation regarding strong volume growth and improving pricing. [CONFIDENTIAL TEXT DELETED – expansion plans].

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the Australian AN Industry to invest in future capacity as well as the excessiveness of their existing margins and super-profits relative to what would be viewed as a commercially reasonable return.

- 3.13 The ADC's reasoning in the PAD appears to rely almost exclusively on the information provided by the Applicants and it would appear imports sourced by the Applicants themselves create alleged harm or pricing pressure. There is also a notable absence of any explanation as to the nature of material harm allegedly caused and the causal factors for this. More specifically, Glencore questions the ADC's preliminary conclusion that there is sufficient evidence to establish that it was necessary for the Australian industry to reduce prices in order to retain or win supply contracts and that this resulted in material injury in terms of price depression, reduced revenues and profitability in the past or future, particularly when the ADC acknowledges that there was no material injury that occurred during the investigation period..
- 3.14 For context and in addition to the factors outlined above, it must be emphasised that at no stage during negotiations between Glencore and Orica was **[CONFIDENTIAL TEXT DELETED - margins]**.

**(D) Threat of material injury not established on totality of factors**

- 3.15 Notwithstanding that the application for the publication of a dumping duty notice does not include or reference a 'threat of material injury' as a basis for seeking dumping duties, we understand that the ADC's investigation is now focused on determining whether there is a threat of material injury rather than actual injury. This focus appears somewhat peculiar given that the alleged injury is said by the Applicants to have occurred during the 2017 calendar year (and that there are no compelling facts presented as to the likelihood of imminent future injury). **[CONFIDENTIAL TEXT DELETED - contractual relationship between Glencore and Orica]**.
- 3.16 A determination of threat of material injury is subject to stringent tests requiring a totality of factors to lead to the conclusion that unless action is taken, material injury will occur. For the reasons outlined at 2(C), particularly when these additional facts provided by Glencore are taken into account, there is not a reasonable factual or evidential basis upon which to conclude that there is a meaningful threat of material injury to the Australian AN industry.
- 3.17 Additionally, having regard to factors set out in article 15 of the Agreement on subsidies and countervailing measures (**SCM Agreement**) and articles 3.4 and 3.7 of the ADA, the following factors support the view that a threat of material injury is not capable of being reasonably supported:
- (a) **A significant rate of increase in dumped imports into Australia indicating the likelihood of substantially increased importation cannot be established.** Figure 1 of the PAD appears to represent, at most, a marginal increase in imports from China, Sweden and Thailand. The ADC's analysis of market size is not sufficiently detailed to reasonably assess the extent to which imports from these countries have increased. More importantly, the PAD fails to address the causal factors driving the described increases. It must be recognised that AN is a dangerous good

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that is subject to strict regulatory controls. Accordingly, whilst there may be an increase in supply capacity globally, the ability to freely import AN is extremely limited and continues to provide Australian suppliers and manufacturers with considerable leverage and control over price and supply terms. For example, within NSW there is only one licenced storage facility for AN which can be accessed by 'independent' (i.e. non-AN Manufacturers) purchasers of AN with the required capacity to fully unload 6,500t of AN at the Port of Newcastle and that is located sufficiently close to the port in order to allow the discharge to occur without becoming cost prohibitive. See **Confidential Annex 2** for more details regarding restrictions that affect the ability to import AN into Australia.

- (b) **No evidence of imports entering at prices that will have a significant depressing or suppressing effect on domestic prices and would likely increase demand for further imports.** As noted above, Australian domestic AN prices are substantially higher than other comparable markets globally even when adjusted for the increasing cost of natural gas in Australia. In addition, due to the additional risk associated with importing AN internationally, the main factor driving further imports are the domestic supply constraints within Australia.

4. **Conclusion: insufficient evidentiary basis upon which to establish material injury (or threat of) or to impose duties**
- 4.1 For the reasons set out above, Glencore believes that the PAD fails to articulate a sufficient or reasonable factual or evidential basis upon which to impose duties on imports of AN from China, Thailand and Sweden in a manner that is consistent with the ADA, SCM Agreement and *Customs Act 1901* either in respect of a material injury or threat thereof.
- 4.2 In light of the fact that the AN price in other comparable global markets is significantly lower than AN pricing in Australia and the findings of the study detailed at paragraph 3.3 below, Glencore believes that the Applicants are using the ADC process as a way of legitimising and insulating their ability to generate and maintain super-profits for AN. Accordingly, it is submitted that the ADC must investigate the Applicants' pricing and motives more closely.
- 4.3 Glencore's responses to the ADC's questions of 8 November 2018 are contained at **Confidential Annex 2.**
- 4.4 Glencore would be happy to discuss any aspects of this submission further and should the ADC believe that any documentary evidence that might impact the final decision is missing, we encourage you to request that from us.

Yours sincerely,



Darren Oliver

Group Manager - Procurement

## Annex 1

**ASX Announcement**

7 August 2015

**REVIEW LEADS TO EXPECTED IMPAIRMENT OF ASSETS AND OUTLOOK UPDATE**

Melbourne: Orica (ASX: ORI) has conducted a full review of its business and its operating model in the context of the ongoing challenging conditions facing the mining sector and the oversupplied ammonium nitrate market. As a consequence, the Company advises that it expects to recognise a non-cash impairment charge of certain property, plant, equipment and intangibles in the range of \$1.35 billion to \$1.65 billion (after tax) in its 2015 full year financial results.

A summary of the expected, approximate impairment charges is outlined below:

<b>Asset</b>	<b>Impairment (after tax)</b>	<b>Comments</b>
Ground Support	\$730-870 million	Separation into a stand-alone business unit has resulted in a reassessment of its carrying value, as required under accounting standards.
Ammonium Nitrate (AN) assets	\$500-600 million	Largely the Bontang (Indonesia) asset and feasibility work on an AN manufacturing facility in Peru
Portfolio refinement	\$120-180 million	Revaluation of assets across the business as a result of the changed longer-term operating conditions.

The impairment outcomes are subject to finalisation of the full year accounts, which will be released on 18 November 2015.

Orica Managing Director and Chief Executive Officer Alberto Calderon said:

“When I was appointed CEO, the Board asked me to undertake a thorough analysis of every part of the business in the context of the challenging operating conditions facing the mining sector. This followed a commitment I made at our interim financial results to provide greater transparency to the market and bring a different style of leadership to Orica.



“Market conditions remain extremely challenging and in this environment there is an increased need to further reduce costs and increase efficiency. The business review has been the first step in this process.

“Orica is a resilient business that is well positioned to deliver long term, sustainable earnings, but action is needed on the elements of our business that are not working as well as we would like.

“As a result of the business review, we are introducing greater visibility of the performance lines within each business and region, and aligning accountabilities and authorities so our leaders have more control and drive better performance. Importantly, this includes re-establishing Ground Support as a separate business unit to give it greater focus, to better assess its performance and provide greater optionality for its future. A broader review of our business model will also ensure the same accountability for each part of the Orica business.

“The issue of oversupply in the ammonium nitrate market has been well flagged by Orica. We have demonstrated a willingness to take action, with recent announcements of partial production curtailment planned at our Yarwun operation. Additionally, we are assessing a range of strategic options for how we manage our Bontang ammonium nitrate manufacturing facility in Indonesia for the medium and longer term. While there are several options, each implies a lower asset valuation.

“Today’s announcement is disappointing but it demonstrates decisive action in response to a changed operating environment. These are critical steps in our commitment to fostering a culture of transparency, performance, collaboration and respect.”

Commenting on today’s announcement, Orica Chairman Russell Caplan said a business review was a clear expectation set by the Board upon CEO transition:

“Any impairment is always disappointing but today’s announcement does not reflect the quality of Orica’s broader business or strategy. What it reflects is an expectation from the Board and the CEO of an increased focus across the company on performance, reporting and decision making in the best interest of shareholders. These decisions, combined with a continued focus on transformation, provide a strong platform to best position Orica through the cycle for the long term,” Mr Caplan said.

### **Share buy-back**

In light of today’s announcement, Orica is reviewing the on-market share buy-back that was announced on 2 March 2015, in the context of the business environment, Orica’s cash flow, progressive dividend and gearing position. The total number of shares purchased under the buy-back to date is 2,629,765 for a total consideration of \$53.5 million.

Since the announcement of the sale of the Chemicals business to funds advised by Blackstone on 19 November 2014, a further \$66.8 million has been applied to the on-market purchase of shares outside of the buy-back program. These shares were purchased to satisfy shareholder participation in the Dividend Reinvestment Plan in connection with the FY14 full year dividend and the FY15 interim dividend.

## Outlook

The Company does not generally provide profit guidance. However, upon receiving the latest July operating figures we now have a clearer view of the likely full year outcome.

There remains divergence in the market around expectations for Orica for FY15. The mean point of broker reports (excluding outliers) for full year Net Profit After Tax (NPAT) is around \$490 million. With the latest data, the Company is now able to say that it expects FY15 NPAT to be between 10% and 15% lower than this, based on the following assumptions:

- Orica remains on track to deliver global explosives volumes of around 3.75 million tonnes (+/-100kt).
- Sodium cyanide volumes are expected to increase by approximately 7% at the full year results on the prior year, slightly under the outlook provided at interim results.
- The adverse impact of price resets being fully felt in the second half.
- A range of one off impacts, including increased environment provisions and reduced asset sales compared to the prior year, that are forecast to have a negative year on year NPAT impact of approximately \$40 million.
- Gross benefits from the transformation program will be above the target range of \$140 million to \$170 million for FY15. One-off cash costs will be slightly higher in FY15 than anticipated, due to the acceleration of the program.

Orica expects FY16 earnings to be in line with FY15, subject to no further deterioration in global economic or mining sector conditions.

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