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

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19 March 2019

Mr J Wickes
Director Operations 2
Anti-Dumping Commission
Level 35
55 Collins Street
Melbourne
Victoria 3000

By email

Dear Director

Downer EDI Mining-Blasting Services ("DBS")
Ammonium nitrate investigations - comments on SEF 473

The above-referenced investigation was initiated on 25 June 2018. At that time DBS instructed us to make an urgent submission on its behalf with respect to the investigation, on the basis that the allegations in the application were seriously unfounded.[1] It was thought by DBS at the time that if the true facts were known to the Commission the investigation could be summarily dismissed, by way of termination, in a relatively short time.

Our client and ourselves are incredulous that, over eight months later, a Statement of Essential Facts ("SEF 473") has been published indicating an intention on the part of the Commission to recommend to the Australian Government Minister concerned that a protective "price wall" should be erected against imported ammonium nitrate ("AN"). It is proposed that this price wall will be designed to ensure that at the point of FOB export the exporter's prices must be the average price enjoyed by CSBP and Orica from 2015 to 2017 in the Australian market with the deduction of only certain limited costs after that point. Those costs are to be overseas freight, marine insurance, and port handling and customs charges. There are to be no deductions for importer costs nor any allowance for importers to make a profit.

On behalf of DBS we respectfully submit that the proposed recommendation is unfair in the broadest sense – legally, factually and commercially.

This submission is in two parts. The first explores the purported justification for the proposed measures from a legal and logical perspective – have dumped imports caused injury and has that amounted to

[1] EPR 004.

material injury? The second considers the legitimacy of the "price wall" - technically referred to as the non-injurious price ("NIP") - that is proposed by SEF 473.

A Injury and causation

The causation and injury finding in SEF 473 is based on the Commission's consideration of the pricing behaviour of the applicants in their direct AN offers in certain negotiations or tenders in which they became the successful contract supplier or, in two cases, were not successful.

This is said about the subject contracts:

> *Only one of the contracts that the Commission reviewed (refer section 9.2.1 of this chapter – example 9) was for a bundled product and service. The injury claimed by the applicant in relation to this contract negotiation has not been included in the Commission's injury assessment due to other reasons, as stated in that section. All other contracts reviewed were for ammonium nitrate supply only, and one bundled contract separately identified the ammonium nitrate pricing.*[2]

This paragraph suggests that no contract examples involving bundled blasting services are amongst the subject contracts relied upon for the injury finding. It is however confusing because it also says that *"one bundled contract separately identified the ammonium nitrate pricing"*, suggesting that amongst the contract examples that were relied upon one was indeed for bundled blasting services. We do not know what to make of this but it is not important to the point we would now like to make on behalf of our client, which is the following – DBS is a blasting services provider that does not typically sell AN "on its own" to its customers.

DBS directly sold **[CONFIDENTIAL TEXT DELETED – number]** MT of AN imported from Sweden into the Australian market during the investigation period. It is the only importer of AN from Sweden. Of that, **[CONFIDENTIAL TEXT DELETED – number]** MT was sold by DBS to **[CONFIDENTIAL TEXT DELETED – customers]**. The remainder was sold to **[CONFIDENTIAL TEXT DELETED –customers]**. The supply to **[CONFIDENTIAL TEXT DELETED – customer]** took place under a contract entered into prior to the investigation period. The supply to the others are considered by DBS to have been in the nature of spot sales, because DBS is not aware of any call for tenders or other formal invitation to tender process being involved in those sales. None of the example contracts that the Commission has considered in making its injury assessment are familiar to DBS, and DBS has made no **[CONFIDENTIAL TEXT DELETED – type of sales and company name]**.

From this we take it that DBS as a *supplier* of Swedish AN is not relevant to the injury and causation conclusions in the SEF. The volume of DBS's direct supplies was **[CONFIDENTIAL TEXT DELETED – number]**% of a market estimated by some at 1.97m MT.

That leaves two possible scenarios involving Swedish AN as an alleged source of injury to the Australian industry. The first of these is that DBS might have purchased Swedish AN in preference to AN produced by the Australian industry, thereby causing a loss of sales volume to be suffered by the Australian industry. However, SEF 473 does not base its finding on a loss of sales volume, **[CONFIDENTIAL TEXT DELETED – pre-investigation period supply arrangements]**. The second of

[2] SEF page 80.

these scenarios might be a claim that DBS forced the prices that the Australian industry offered to DBS for the supply of AN down because it was being supplied with more competitively priced AN from Sweden. This also cannot be the case, for the same reason – **[CONFIDENTIAL TEXT DELETED – pre-investigation period supply arrangements]**. In any event the Commission has concluded in SEF 473 that there were no price effects on Orica, and of the three CSBP contract examples in SEF 473 two involve supply in WA and the other is unfamiliar to DBS.

We said that there were "two possible scenarios". The Commission might think there was a third, namely that DBS's import prices of AN from Sweden formed part of the "import parity price" that two of the Australian industry members coincidentally started to implement in the investigation period and who now argue supports their claim of injury.

This brings us to a consideration of the contract **[CONFIDENTIAL TEXT DELETED – parties to contract]** for the supply of AN. **[CONFIDENTIAL TEXT DELETED – nature of contract]**:

- **[CONFIDENTIAL TEXT DELETED – contractual provision]**;
- **[CONFIDENTIAL TEXT DELETED – contractual provision]**;
- **[CONFIDENTIAL TEXT DELETED – contractual provision]**;
- **[CONFIDENTIAL TEXT DELETED – contractual provision]**.

The significance of this is at least twofold.

First, if Swedish AN prices were used as an input to CSBP and QNP's opportunistic "import parity pricing", then the Commission will find **[CONFIDENTIAL TEXT DELETED – comment about price offer]**. In so far as CSBP and QNP based their pricing under certain contracts on "fear" of low import prices, the Swedish import price was **[CONFIDENTIAL TEXT DELETED – comment about price offer]**. The foregoing pulls the rug out from underneath the claim that a Swedish price offer was in any way responsible for injury, **[CONFIDENTIAL TEXT DELETED – comment about price offer]**.

Secondly, in the rather unique circumstances that we have explained, and which we have fully evidenced on the Commission's record, Swedish imports are very clearly subject to different conditions of competition than the other imports under investigation. **[CONFIDENTIAL TEXT DELETED – commercial motivation]**. They are committed to blasting services contracts that DBS already had in place before the investigation period. **[CONFIDENTIAL TEXT DELETED – comment about price offer]**.

DBS submits that it is not appropriate to cumulate the effect of the Swedish imports with the exportations of goods to Australia from the other countries of export. We say this because the conditions of competition between Swedish imports and those other exportations and the conditions of competition and Swedish imports and domestically produced goods[3] mark Swedish imports as being different in their market interactions and therefore in their impacts, due to the dot-points we have listed above.

[3] Section 269TAE(2C)

Accordingly, DBS again requests the Commission to terminate its investigation against Swedish imports on the basis that they cannot be held accountable for any or any meaningful part of the injury that the Commission thinks was or will be caused to the Australian industry.

B Non-injurious price

As already noted, the Commission proposes to start its non-injurious price calculation *"at the level of the weighted average selling prices (at ex-works) for CSBP and Orica over a two-year period prior the investigation period (from 1 April 2015 to 31 March 2017)"*. The deductions the Commission proposes to make from there to arrive at an NIP for each exporter do not include importers' costs nor do they allow for profit.

In these respects we make the following submissions:

- it is not clear to us why a 24 month period has been chosen, and we note that this allows the calculation to include what appears to be the highest price for either of Orica and CSBP over those two years – if the Commission proceeds, over DBS's strongest objections, with its proposal to impose measures, DBS requests that the non-injurious period for the unsuppressed selling price be the 12 months prior to the investigation period;

- QNP's financial performance has been used for conclusions to be reached about injury, yet its data from a time that the Commission reckons injury was not being caused by the dumped imports has not been taken up in the non-injurious price calculation – we do not know why its prices would not be relevant in the same way as the Commission believes those of CSBP and Orica are relevant;

- the SEF's suggestion that amounts for importer SG&A and profit will not be deducted is discriminatory – it is unfair and non-commercial to reimburse the Australian industry for these amounts in the setting of the USP in the first place, while depriving those using imported AN of that same opportunity.

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In closing, we wish it to be known that DBS disagrees with the injury and causal link finding as it applies to all the subject exports, and the contrary must not be assumed simply because it has chosen to focus this submission on the circumstances that are directly applicable to Swedish imports.

A reasonable observer would view this finding - that imports of AN with such a small market share (2%, once the market-dominating Australian industry members' own usage of imports is removed from the import numbers) had caused material injury to the industry - with great concern. When that reasonable observer is further informed that the material injury has been explained on the basis of what might happen in the future because of the "fearful" price behaviour of certain Australian industry members, in a handful of recent contract negotiations, which for the most part they were successful in winning, and when other cogent competitive factors explaining market price dynamics are clearly evident, that concern is exacerbated.

Yours sincerely

Daniel Moulis
Partner Director
+61 2 6163 1000