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11 February 2020

The Commissioner  
Anti-Dumping Commission  
Level 35, 55 Collins Street  
Melbourne  
Victoria 3000

By email

Dear Commissioner

## Reinvestigation concerning ADRP Review No 107 Ammonium nitrate from China, Sweden and Thailand

This submission is made on behalf of Downer EDI Mining - Blasting Services Pty Ltd ("DBS") and Yara AB ("Yara"), who are applicants in the abovementioned Anti-Dumping Review Panel review.

We refer to the request made by the Review Panel for you to reinvestigate certain findings that formed the basis of the reviewable decision to publish notices under Section 269TG(1) and (2) of the *Customs Act 1901* ("the Act") on ammonium nitrate exported from Sweden and Thailand ("the Section 269ZZL notice"). The Review Panel's requirements in this regard are set out in its letter dated 19 November 2019.

Under Section 269ZZL(2), it is incumbent on you to conduct the reinvestigation in accordance with the Review Panel's requirements in the Section 269ZZL notice, and not otherwise.

In this regard we note that Section 269ZZL notice does not require you to seek or accept any new information. More affirmatively, it is clear from that notice that the Review Panel has required you not to do so, and instead to conduct the reinvestigation only with reference to the information on the record of your original investigation.

This is readily apparent on careful consideration of the Section 269ZZL notice, as we explain below.

Finding	Review Panel requirement	Observation
1 That any injury caused by dumping was material	The Review Panel draws attention to ADC's assessment of materiality at Confidential Attachment 17 to the Final Report	The Review Panel indicates that Confidential Attachment 17 contains the information to which the Commission is to have reference

a. Separation of analysis of IP profit foregone and post-IP profit foregone	To examine the IP profit foregone and the post-IP profit foregone as separate injury factors and assess materiality separately	The IP profit foregone and the post-IP profit foregone are definitions on information that the Commission already has
b. Examine the evidentiary validity of post-IP profit foregone	To take into consideration all other interested parties' submissions to the Review Panel commenting on this issue, as well as conference summaries and other relevant information and documents	The Review Panel has confined the requirement to the information on its record and on the Commission's record, and has not required or implied that the Commission should seek, obtain or consider new information. Further, and by definition, examining the value of existing evidence for the substantiation of a finding does not call for nor require new information to be obtained.
c. Alternate methodology comparing the applicants' profitability	To present the alternative method of comparing profitability in the absence of dumping with the actual profitability, separately for IP profit foregone and post-IP profit foregone.	The Review Panel has asked the Commission to apply an alternative methodology, suggested by the Commission, to its existing information.
d. Reassessment of materiality of injury with regard to profits foregone	To reassess the materiality of injury finding, taking into account the outcomes of reinvestigating 1a, 1b and 1c above.	This is a derivative requirement. We refer to our observations with respect to 1a, 1b and 1c above.
e. Possibility of double counting if still aggregate IP and post-IP profits	To ensure that if the Commission continues to aggregate IP profits foregone and post-IP profit foregone there is no double counting.	This is a derivative requirement. We refer to our observations with respect to 1a, 1b and 1c above.
2. The finding that exports from Sweden should be cumulated with other exports to Australia	To reinvestigate its finding of cumulation by considering Yara's comments during the Conference of 7 November 2019 and Yara's subsequent written submission, as well as information contained in Confidential Attachments 1 and 2 of the ADC's s.269ZZJ submission. To take into consideration other interested parties' submissions to both the Commission and the Review Panel on this issue, as well as all other relevant information and documents.	The Review Panel has confined the requirement to the information on its record and on the Commission's record, and has not required or implied that the Commission should seek, obtain or consider new information.

The Section 269ZZL notice closes by stating, in its penultimate paragraph:

*If you have any issues in relation to the reinvestigation or if you consider that a conference under s.269ZZHA of the Act would assist in obtaining the further information the subject of the reinvestigation, please contact the Secretariat.*

We note that:

- a) the Section 269ZZL notice does not, in its specific requirements, call for the obtaining of further information by the Commission;
- b) the penultimate paragraph draws attention to a power of the Review Panel to obtain further information, not a power of the Commission;
- c) the Review Panel may have regard to further information obtained under Section 269ZZHA, not the Commission;
- d) under Section 269ZZHA(2)(a), the further information to which regard may be had is only further information to the extent that it relates to the relevant information; and
- e) relevant information in the present circumstance is information to which you had regard or were required to have regard when making the findings set out in the Final Report.

A “Note for File” has been placed onto the public record of your reinvestigation, entitled “Meeting with Orica Australia Pty Ltd - 14 January 2020”. In that document it is revealed that the Commission has actively approached all of the Australian industry members and requested them to provide financial data for the period 1 April 2018 to 30 September 2019. According to the Note for File, this was done “[i]n order to reassess the materiality of the profit forgone in the post-investigation period”.

We understand that this inquiry on the part of the Commission goes to the reinvestigation of the finding that any injury caused by dumping was material. However, we have established, as explained in the table set out above, that the Commission made no requirement and gave no direction for the Commission to obtain and consider new information. The only “further information” that the Section 269ZZL notice contemplates is:

- i. information obtained by the Review Panel pursuant to a conference held under Section ZZHA; and
- ii. being information to which regard may be had (by the Review Panel) only to the extent that it relates to information that was on the Commission’s record on 18 April 2019, being the date on which you appear to have made the findings set out in the Final Report.

In our view it is clear that the Commission’s request for information from the Australian industry members is unlawful. Not only was it contrary to the requirements of the Section ZZL notice for that request to be made, the actual content of the request – “*financial data for the period 1 April 2018 to September 2019*” – covers a period that is almost wholly after the date on which the Final Report was provided to the Minister.

The situation is not only at odds with the Section 269ZZL notice and the legislation. It is also contrary to the rules of natural justice. The process that we see unfolding has deprived our clients of their due process rights and, unless corrected, will continue to deprive them of those rights. It is an embarrassment to the rule of law to find that the Commission intends to remake its findings using information that it is not entitled to consider, which was not in existence at the time that it made its findings with respect to the decision under review, and which is not related to the relevant information that it was entitled to consider when those findings were made.

DBS and Yara insist that the Commission:

- confine itself to the information on the record of the original investigation and on the Review Panel's record, as made clear by the Section 269ZZL notice;
- put out of its consideration any information it might have received in breach of the requirements of the Section 269ZZL notice and the Act; and
- acknowledge and confirm to us, within five days of the date of this letter, that it will behave in the manner insisted.

Failing such acknowledgement and confirmation our clients will take further action.

Yours sincerely



**Daniel Moulis**  
Partner Director

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