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03 March 2020

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

By email

Dear Commissioner

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

We refer to our letter in this matter on behalf of Downer EDI Mining - Blasting Services Pty Ltd ("DBS") and Yara AB ("Yara") dated 11 February 2020, and to the file note regarding this reinvestigation published on 17 February 2020.

The file note indicates that the Commission intends to consider *"all relevant information, including the Australian industry applicants' updated financial data for the period 1 April 2018 to 31 March 2019, and any submissions made in response to the preliminary reinvestigation report"*.

If that is to be the case, then the concerns we expressed on behalf of DBS and Yara in our 11 February letter have not been addressed.

In particular:

1 The file note makes it plain that the Commission will be considering financial information gathered from the Australian industry members in circumstances where you were not directed to obtain such further information and have no power or right to do so, whether by direction or otherwise. We still do not understand the claimed legal basis for considering additional information that was not before you when making the findings set out in Report 473.

2 The file note characterises this updated financial information as being *"relevant information"*. This is a statutory term defined, in the context of this reviewable decision, to mean:

> *…the information to which the Commissioner had had regard or was, under paragraph 269TEA(3)(a), required to have regard, when making the findings set out in the report under section 269TEA to the Minister in relation to the making of the reviewable decision.*

> Clearly, the updated financial information – being information that was not before you when you made your findings – is not relevant information. Again, we see no legal basis for it to be considered.

Quite apart from the legality of the consideration of this updated financial information, the procedure adopted by the Commission in undertaking the reinvestigation is cause for deep concern. To recount:

(a) at some undisclosed point after the reinvestigation was ordered, the Commission has sought information from the Australian industry;

(b) no interested parties, with the exception of the Australian industry, knows the scope of the information that was sought nor the terms upon which it was sought;

(c) no interested parties, with the exception of the Australian industry, has sufficient knowledge of the information sought or the information provided to make submissions to the Commission regarding how this information is to be interpreted; and

(d) the only opportunity provided to interested parties, with the exception of the Australian industry, to make submissions regarding this information is after the Commission has made its preliminary findings.

We note that any investigation requires the Australian industry to provide financial information in an indexed form in its application for measures, and to justify its claim of material injury caused by dumping. That information, and any later submitted financial information and argumentation, must also be sufficiently disclosed on the public record to enable other interested parties to know and understand what is being put forward.

We do not resile from our position with respect to the request for the information and its consideration by the Commission – which is that the information *cannot* be requested and *cannot* be considered. Nonetheless we see no reason why such disclosures would not equally apply to information provided to the Commission in this reinvestigation, whether requested by the Commission erroneously or not. For example there has evidently been correspondence between the Commissioner and the Australian industry, none of which has been included on the public record of the reinvestigation.

We do not think it is contentious to suggest that the members of the Australian industry want the measures to stay in place, and would frame their submissions accordingly. By basing your preliminary findings on reinvestigation on the views of the Australian industry you are denying all other interested parties the right to be heard.

DBS and Yara continue to 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 relevant provisions of the *Customs Act 1901* and by the Section 269ZZL notice;

- put out of its consideration any information it might have received in breach of the requirements of the Act and the Section 269ZZL notice; and

- in any event, ensure that requirements of procedural fairness are adhered to while the reinvestigation is being conducted.

Yours sincerely

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