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20 March 2020

**The Director  
Investigations 2  
Anti-Dumping Commission  
GPO Box 2013  
Canberra  
Australian Capital Territory 2600**

**By email**

Dear Director

## **ADRP review - ammonium nitrate from China, Sweden and Thailand Preliminary reinvestigation report comments of Downer EDI Mining**

We refer to the above matter and the Preliminary Reinvestigation Report (“the Preliminary Reinvestigation Report”) published by the Anti-Dumping Commission (“the Commission”) on 6 March 2020.<sup>1</sup>

Our client Downer EDI Mining-Blasting Services Pty Ltd (“DBS”) is concerned to find that the findings now proposed to be made are no different to those in Final Report 473.<sup>2</sup> This much is obvious from the summary in Section 1.3 of the Preliminary Reinvestigation Report. The findings are the same findings that DBS has cogently and consistently objected to since the Statement of Essential Facts was published in the original investigation (Investigation 487).

In its letter to the Commission dated 19 November 2019, the Anti-Dumping Review Panel (“ADRP”) raised significant concerns and issued clear requirements for the reinvestigation. Respectfully, we submit that those concerns have not been properly addressed and the requirements not properly met.<sup>3</sup>

Nor can the Preliminary Reinvestigation Report be accepted as a proper report, for the reasons we have explained in our letters dated 11 February 2020 and 3 March 2020. The Preliminary Reinvestigation Report has relied on evidence that was not relevant information in the original investigation, that was not required by the ADRP to be obtained, and that was not sought by the ADRP through its conference

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<sup>1</sup> EPR 473, Doc 071

<sup>2</sup> EPR 473, Doc 065

<sup>3</sup> We believe it is of some relevance to note that there has not been, or at least we are not aware of, a reinvestigation report made under Section 269ZZL of the *Customs Act 1901* pursuant to which the Commission has advised the ADRP that, on reconsideration, material injury was not caused to the Australian industry by dumped imports.

procedures. We submit that the Commission was not and is not entitled to consider information of that character in this investigation.<sup>4</sup>

In our interested party submission dated 21 October 2019 we noted our concerns with the Commission's post-investigation period findings.<sup>5</sup> Our concerns related to the Commission's decision to seemingly *extend* the investigation period into the "post-investigation period" and to make findings about that latter period without the facts required to support those findings. In that submission we stated that:

*...the Review Panel should reject the Commission's post-investigation period conclusion from this review, and limit its consideration of what the "correct or preferable decision" should be to the Commission's conclusions with respect to the investigation period.<sup>6</sup>*

The Commission has evidently sought and obtained new information, being information that was not relevant information in the original investigation, and the Preliminary Reinvestigation Report has relied on that information in affirming the findings. The Preliminary Reinvestigation Report contends that

*The Commission is not limited in a reinvestigation under section 269ZZL of the Act to considering a specified body of information or submissions.<sup>8</sup>*

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<sup>8</sup> *The Review Panel is limited in a Division 9 review to only considering a certain body of information. Namely, relevant information, any conclusions based on the relevant information (section 269ZZK(4)(a)) and further information obtained in a conference held under section 269ZZHA. Relevant information is defined in section 269ZZK(6)(a) as the information the Commissioner had regard to or was, under section 269TEA(3)(a), required to have regard, when making findings set out in the report to the Minister under section 269TEA in relation to the making of the reviewable decision. However, section 269ZZK(4A) requires the Review Panel to have regard to any report made to it by the Commissioner under section 269ZZL(2). Under section 269ZZL(3), the Commissioner's report is to 'affirm' any of those findings that the Commissioner thinks should be affirmed, and 'set out any new findings that the Commissioner made as a result of the reinvestigation'. Additionally, under section 269ZZL(3)(b) the report may propose new or different conclusions based on the material that has been examined under reinvestigation. Therefore, the Commissioner, is not limited in a reinvestigation to only considering a certain body of information or submissions and it is open to the Commissioner to considering new information, in particular where that information is relevant to a finding the subject of reinvestigation<sup>7</sup>*

Footnote 8 as extracted above recites a number of provisions of the Act that relevantly pertain to the question of how a reinvestigation is to be conducted, the information to be considered, and the findings that can be made. However, it appears that the only statement in the footnote that is offered as justification for the proposition that new information can be sought by the Commission in a reinvestigation, in and of its own volition, is this:

*Additionally, under section 269ZZL(3)(b) the report may propose new or different conclusions based on the material that has been examined under reinvestigation.*

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<sup>4</sup> This submission is separate and distinct from the question of whether the new information justifies the findings in the Preliminary Reinvestigation Report. We say that the information, what little has been disclosed, does not.

<sup>5</sup> ADRP public record, *Downer EDI Mining – Blasting Services Pty Ltd - Published 24 October 2019*

<sup>6</sup> *Ibid*, page 04

<sup>7</sup> EPR 473, Doc 07, page 6

This statement is not authority for what that “material” is. Section 269ZZL(3)(b) does not define the material that may be examined, it only describes how the Commission must report its new findings to the ADRP. We submit that there is nothing in the legislation which states that the Commission can have regard to such new information. What the legislation does say is that the Commission must carry out the reinvestigation in accordance with the ADRP’s requirements.

The entire purpose of a review of a decision made by the Minister is to examine the decision that was made. It would be contrary to the letter and purpose of the legislation if a *reinvestigation* were to be conducted as if it was a *resumed investigation*. Resumed investigations are the result of the revocation of a Commissioner’s decision to, say, terminate an investigation. In that situation a directive is issued to the Commission, by the ADRP and pursuant to law, “*to publish a statement of essential facts... in relation to the application for a dumping duty notice... that is related to the review... and [resume] the investigation of the application*”.<sup>8</sup>

A reinvestigation of what was already decided is different to a resumed investigation. A resumed investigation is subject to the procedures that apply under the Act with respect to investigations, reviews and inquiries, and to the procedural safeguards that those procedures require and permit.<sup>9</sup> Further, there is a clear distinction between being required to “reinvestigate” information that was relevant information in the original investigation, and seeking and subsequently newly “investigating” information that was not relevant information.

Accordingly, we respectfully submit that:

- the findings in the Preliminary Reinvestigation Report continue to be erroneous, for the reasons our client has previously maintained;
- the Preliminary Reinvestigation Report has not been prepared in accordance with the Act or the ADRP’s requirements, including as to the consideration of new information; and
- whether or not new information may be taken into account in such a reinvestigation, the manner in which that information was sought and considered by the Commission has denied our client procedural fairness.

Yours sincerely



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Partner Director

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<sup>8</sup> Section 269ZZT(2)(a).

<sup>9</sup> All that appears on the public record of the reinvestigation maintained by the Commission with respect to the new information sought from each of the three Australian industry members concerned is a short file note of a meeting between the Commission and Orica, one of the Australian industry members. That file note refers to updated data, but that data is neither disclosed nor summarised in a non-confidential manner. Data provided by CSBP or QNP has not been disclosed or summarised, and the Preliminary Reinvestigation Report itself does not disclose nor meaningfully summarise the post investigation period data relied upon by the Commission.