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John O'Connor and Associates Pty Ltd

(ABN 39098650241)

PO Box 329

Coorparoo QLD 4151

Telephone: 07 33421921

Fncsimile: 07 33421931

Mobile: 0411252451

Email: jmoconnor@optusnet.com.au

13 July 2012

Ms Joanne Reid
Director, Operations 2
International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Dear Ms Reid

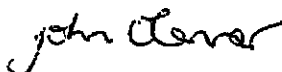
For Public File

Re: Statement of Essential Facts No. 183 – Response by Applicant Companies Accensi Pty Ltd and Nufarm Limited

Please find attached for your consideration a submission on behalf of Accensi Pty Ltd and Nufarm Limited addressing Statement of Essential Facts No. 183 on formulated glyphosate exported from P R China.

If you have any questions concerning the attached submission please do not hesitate to contact me on (07) 3342 1921.

Yours sincerely



John O'Connor
Director

Cc: Mr Bernard Lee, Nufarm Limited
Mr Craig Ellis, Accensi Pty Ltd

Key Points

The Applicants' (Accensi Pty Ltd and Nufarm Limited) seeking the imposition of anti-dumping measures on formulated glyphosate exported from the People's Republic of China ("China") robustly challenge the Australian Customs and Border Protection Service's ("Customs") preliminary findings contained in Statement of Essential Facts No 183 ("SEF No. 183").

Accensi and Nufarm reject Customs' preliminary findings that there has been no dumping of formulated glyphosate from China during the Period of Investigation ("POI"). The determination of normal values and dumping margins is flawed for each of the cooperative exporters and, as a consequence, Customs' recommendation for the termination of the investigation is incorrect.

Submissions by the Applicants in respect of each of the exporter's visit reports have been provided to Customs. The issues raised in the respective submissions also impact the determination of normal value for each Chinese cooperative exporter.

Whereas the determination of normal values for the Chinese exporters represents a significant area of concern, the following preliminary findings are similarly rejected by the applicants, namely:

- the automatic allowance of a 5 per cent tolerance for the active ingredient in formulated glyphosate, thereby sanctioning a reduced cost of production for Chinese formulated glyphosate manufacturers;
- the acceptance of inferior quality surfactants by Chinese producers in the exported formulated glyphosate, resulting in lower costs of production for Chinese producers/exporters;
- the conclusion that "formulated glyphosate with any registered surfactant" are covered by the goods description and by inference, any formulated glyphosate with a non-registered surfactant is excluded;
- the exclusion of 62% IPA salt from the goods under consideration ("GUC");
- whilst recognizing that price is the primary driving factor in the Australian formulated glyphosate market, Customs acceptance that the importers selling imported Chinese products as a loss over a sustained period are not receiving any additional benefits from the Chinese exporters (other than for payment of invoices);
- Normal values cannot be determined for Jiangsu Good Harvest-Weien Agrochemical Co., Ltd ("Good Harvest") under s.269TAC(1) due to a lack of suitable sales;
- Normal values for Shandong Weifang Rainbow Chemical Co., Ltd ("Rainbow") cannot be determined under s.269TAC(1) using domestic sales in China by another seller (i.e. Zhejiang Xinan Chemical Industrial Group Co., Ltd and Zhejiang Wynca Import and Export Co., Ltd ("Wynca")); and
- The claims by Customs that Wynca's domestic sales and costs information cannot be used as a basis for normal values under s.269TAC(1) for other Chinese exporters (i.e. Rainbow and Good Harvest) on basis of confidentiality is inconsistent with the legislative requirements of s.269TAC(1).

Accensi and Nufarm reject the preliminary findings on dumping margins assessed for each of the Chinese cooperative exporters. Following full account of the Applicant's submissions in response to the Exporter Visit Reports and the contents of this submission, Customs must make a finding and recommendation to the Minister that the Australian industry has suffered material injury from dumped Chinese exports of formulated glyphosate during the POI.

Customs is therefore requested to recommend to the Minister that notices be published under s.269TG(1) and (2) of the Customs Act to prevent further injury to the Australian industry from Chinese exports of formulated glyphosate at dumped prices.

1. Like Goods

Active ingredient – glyphosate technical

- 1.1 Customs indicated at Section 5.4.2 of SEF No. 183 that the regulatory requirements permitted a 5 per cent tolerance on the active ingredient used in the production of formulated glyphosate. It further stated that *"interested parties claimed that reducing the ingredient strength (within allowable tolerances) reduces production costs and that there may be no discernible difference identified by the end user."*
- 1.2 The applicants reject the claimed position of Chinese exporters that they manufacture formulated glyphosate to the "minimum" requirements permitted by the regulations. That is, it cannot be automatically assumed and accepted by Customs that Chinese manufacturers produce formulated glyphosate with 95 per cent of the active ingredient – this must be confirmed by laboratory analysis.
- 1.3 The APVMA's manufacturing tolerance relate specifically to offences against the Agricultural and Veterinary Chemicals legislation. APVMA tolerances do not mean that manufacturers or distributors having goods manufactured overseas or in Australia are permitted to deliberately manufacture products to be under strength. The products are labeled at a particular concentration and Australian consumer law requires that the goods be delivered at the labeled concentration.
- 1.4 In the absence of laboratory analysis the active ingredient must be included in the manufacturer's cost of production at the 100 per cent equivalent, and a 5 per cent "tolerance" discount in the exporter's cost of production must be denied.
- 1.5 In light of the preliminary dumping margins determined for each of the three cooperative exporters, a discount of 5 per cent on the cost of the active ingredient consumed in the manufacture of formulated glyphosate exported to Australia, is material to the final dumping margins determined.
- 1.6 Customs is requested to re-calculate normal values for the three exporters based upon a zero tolerance of a reduction in the active ingredient used in formulated glyphosate manufacture.

Inferior quality surfactants

- 1.7 Customs includes discussion of inferior quality surfactants used in Chinese-manufactured formulated glyphosate at Section 5.4.2 of SEF No. 183. The following comments reflect the issue of the inferior surfactant used:

"Interested parties claimed that products are prevalent in the Australian market that contained inferior quality surfactants or where the ingredient level is less than 120g/L (as it is diluted). Production costs are reduced if inferior quality (and hence cheaper) surfactants are used. These parties claimed that Chinese manufacturers also exported products to Australia containing lower quality surfactants. Importers claimed that the impact of the inferior surfactant may not be identifiable by the end user, although if the end user (i.e. farmer) was not satisfied with product effectiveness, it can be assumed that they would cease sourcing from the relevant supplier."
- 1.8 Customs then concluded *"formulated glyphosate with any registered surfactant (applied in accordance with regulatory standards) are covered by the goods description and that the Australian industry produces like goods in respect of these goods."*

- 1.9 By inference, any formulated glyphosate with a non-registered surfactant is excluded from the goods coverage. The Applicants do not consider that Customs can readily exclude goods that incorporate a non-registered surfactant from the goods coverage of this investigation. Furthermore, it is not clear on what basis Customs confirmed whether a surfactant was equivalent or not, to a surfactant used in a product registered in Australia.
- 1.10 The Applicants' claimed in its application that the quality of surfactant used by Chinese manufacturers in exports to Australia was superior to the surfactant used in sales on the domestic market in China. The Applicants' claims are supported by other interested parties in submissions made to Customs.
- 1.11 In its submission to Customs, Agronomiq, on behalf of AIRR, states:
- "Agronomiq/AIRR's premium Glyphosate contains Huntsman TERWET 3780 Tallow Amine wetter produced in the USA and exported to China. There are several other wettors on the market (in China) such as APGs, Betaines and Chinese produced Tallow Amine. None are as efficient as TERWET 3780 or suitable for Australian conditions, but can be up to 20 cents/litre less expensive."*
- 1.12 Pacific Agriscience Pty Ltd in submission dated 7 March 2012, confirm claims by the Australian Industry about the different quality surfactants used by the Chinese manufacturers. They state *"formulations sold within China are incorporated with a domestic surfactant whereas those sold/exported into Australia are incorporated with an "imported surfactant."* Pacific Agriscience go on to say that *"no farmers in Australia and no importers and traders of Glyphosate in Australia would ever accept Chinese surfactant....."*
- 1.13 In its visit report to Titan Ag, Customs notes: *"Titan Ag claims that the Huntsman TERWET 3780 surfactant that is used in exports to Australia is not used in Chinese formulations and that cheaper and lower concentrations of surfactants are used. ...the cost difference at the same concentration between Huntsman and generic (Chinese) was \$0.28US/L."*
- 1.14 The use of a lower quality surfactant for Chinese domestic use was also claimed in other interested party submissions.
- 1.15 Notwithstanding the weight of the above claims, universally expressed by the applicants and other interested parties, Customs confined its reporting on this matter in the SEF at Section 5.4.2 to say that interested parties claimed that there was also a prevalence of Chinese product in the Australian market containing lower quality surfactants. Having made this comment the SEF is silent as to whether Customs assessed how prevalent was the relative incidence of Chinese exports containing a lower quality surfactant.
- 1.16 In light of the above, Customs' findings in relation to Good Harvest, in particular, make no sense. The Customs finding in the Exporter Visit Report that Good Harvest uses the same surfactants for production of both domestic and export IPA salt products invite the following queries not pursued by Customs:
- What quality of surfactant was used by Good Harvest? It would seem unlikely, based on the overall comments by interested parties, that ALL Good Harvest exports to Australia contained a lower quality surfactant.
 - Or, did Good Harvest use a higher quality surfactant for exports to Australia? If so, why would Good Harvest use this same higher quality surfactant for its domestic sales? This practice would have been unnecessary for Chinese market conditions of use and would have contributed to the majority of its domestic sales being made at a loss? As noted above, the cost differential is said to be between \$0.20US/L and \$0.28US/LI

- 1.17 These points are obviously critical to normal value calculations. The use of different quality surfactants, raised by both the Australian Industry applicants and the Chinese exporters' own Australian customers, required Customs to challenge claims to the contrary. Yet no due allowance adjustments were made on this matter.
- 1.18 All formulated glyphosate manufactured by the exporters – including formulated glyphosate incorporating a non-registered surfactant are considered like goods and must be included in the sales and cost information of the exporter the subject of verification by Customs. Furthermore, adjustments to uplift normal values for the higher-cost surfactant (as confirmed by importers participating in the inquiry) used in export sales of formulated glyphosate is required.

IPA Salt 62%

- 1.19 The application for anti-dumping measures on formulated glyphosate exported from China included the following outline of the goods under consideration ("GUC"):

The imported product the subject of this application is formulated glyphosate; a non-selective herbicide, imported in varying strengths of the active glyphosate acid ingredient ("glyphosate technical"). A non-selective herbicide is one that controls weeds in all situations.

Further, the application also stated:

"the Application is concerned with imported Glyphosate in all its fully formulated liquid forms including Glyphosate 360, Glyphosate 450 and Glyphosate 570 and the fully formulated dry forms including Glyphosate 680."

ACDN No. 2012/05 further confirmed:

"Therefore, the goods covered by the application and the investigation, includes formulated glyphosate in any form (i.e. not limited to liquid forms) and at any concentration (whether described according to weight of glyphosate technical by volume or percentage of glyphosate technical)."

The goods excluded from coverage of the application were identified in ACDN No. 2012/05 as follows:

"Glyphosate acid is the primary ingredient in the manufacture of formulated glyphosate. Glyphosate acid is not the subject of the investigation."

ACDN No. 2012/05 makes it clear that the only goods excluded from coverage of the investigation is glyphosate technical.

- 1.20 The Applicants' consider that IPA salt 62% glyphosate is a like good and is covered by the application. Nufarm provided a submission on this issue dated 19 March 2012. Nufarm indicated that IPA salt 62% is a like good as it is applied in the same end-uses as formulated glyphosate.
- 1.21 Section 5.4.2 of SEF No. 183 canvasses the various competing submissions regarding whether formulated glyphosate with different salt bases and surfactants are "like goods". The SEF notes that the various salts of glyphosate "all form part of the final fully formulated product with the same end use"; that Nufarm's submissions claimed that all salts of glyphosate are like goods and that, according to advice provided by Nufarm, formulated glyphosate with an ammonia salt base in liquid form is currently not registered in Australia, although it is sold domestically in China (p15). The SEF concludes that "all formulated glyphosate with any registered salt base" are like goods (P.15). The SEF reaches a similar conclusion in relation to surfactants: "formulated glyphosate with any registered surfactant (applied in accordance with regulatory standards)" are like goods (P.16). Contrary to Section 8.5.3 of the SEF, there is no

reasoning in Section 5.4.2 of the SEF, or elsewhere in the SEF, to support the converse of those conclusions — namely, that unregistered formulated glyphosate are not like goods.

1.22 At Section 5.4.3 of SEF No. 183, Customs states that the IPA salt 62% is "currently subject to a TCO application". The Applicants assert that this is of little relevance and highlight that the TCO is opposed by the industry. Whilst it is recognized that the IPA salt 62% requires the addition of water and a surfactant prior to use, it does not exclude IPA salt 62% from being a "like good" to formulated glyphosate. Further, IPA salt 62% was not specifically excluded from the goods description included in the application or ACDN No. 2012/05 (as was glyphosate technical).

1.23 Customs' preliminary decision to exclude IPA salt 62% from the goods coverage is not based upon any clear assessment that supports a conclusion that IPA salt 62% cannot be substituted for formulated glyphosate. The end-user can quite simply blend the required volumes of IPA salt 62%, appropriate surfactant and water, to arrive at a formulated glyphosate product. The IPA salt 62% product is therefore substitutable for formulated glyphosate and is considered a like good to exported formulated glyphosate from China.

1.24 The Applicant's contend that IPA salt 62% glyphosate is a like good to formulated glyphosate and should be included within the coverage of the GUC in inquiry No. 183.

2. Australian industry

2.1 It is noted that Cheminova (Aust) Pty Ltd ("Cheminova") is a local manufacturer of formulated glyphosate and indicated its support for the application for measures. Customs, however, elected not to visit Cheminova despite the company's willingness to have its data verified as:

- its proportion of the market was not significant; and
- given the preliminary recommendation to terminate the investigation¹.

2.2 The Applicants understand that Customs was notified in advance of its visits to Chinese exporters of Cheminova's willingness to accept a visit from Customs. The exporter visits did not commence prior to the end of April and, exporter visit outcomes were not released prior to early June 2012.

2.3 It would be expected that Customs would have visited Cheminova to confirm the substance of Accensi's and Nufarm's claims, given that Cheminova was not an applicant company involved in the preparation of the application. Customs' claimed decision not to visit Cheminova would have preceded the preliminary recommendation to terminate the investigation and therefore cannot be used as a basis for explaining why Customs did not visit Cheminova.

2.4 As a minimum, Cheminova's data could have assisted Customs understanding of the impact of the Chinese exports on a further member of the Australian industry and aided in the assessment of an appropriate unsuppressed selling price for the industry.

3. Importer visits

3.1 Customs completed seven importer visits, including with the following companies:

- Landmark Proprietary Products Group ("Landmark");
- 4Farmers Pty Ltd (4Farmers);
- Titan AG ("Titan");
- CMS Trade Pty Ltd ("CMS");

¹ Refer Section 6.2 of Statement of Essential Facts No. 183, P.23.

- Farmoz Pty Ltd ("Farmoz");
 - Conquest Crop Protection Pty Ltd ("Conquest"); and
 - Australian Independent Rural Retailers Pty Ltd ("AIRR")
- 3.2 Of these, Customs identified Landmark, 4Farmers, Titan and Farmoz as "major" importers. It would appear from the Titan importer visit report that it sells its imported formulated glyphosate profitably. However, it would also appear that a significant proportion of sales by 4Farmers and Farmoz were at a loss, and of 13 selected shipments for Landmark, 4 were at a loss.
- 3.3 In respect of two importers AIRR and CMS, the former had sales at a loss across 5 of 12 selected shipments, and the latter did not suggest it sold at a loss. Customs was unable to verify sales data at Conquest as its accounting system did not distinguish between sales of imported and locally-produced formulated glyphosate.
- 3.4 Comments are included in the Importer Visit Reports suggesting that pricing in the Australian market is very competitive² and margins are very low³, suggesting that there is a broad incidence of sales at a loss.
- 3.5 In these circumstances, the Applicants question how Customs can accept that sales of imported formulated glyphosate from China can be considered arms length in all circumstances when the reality is that Customs has merely observed that the only consideration received by the applicable importer related to price.
- 3.6 The relative incidence of sales at a loss of imported formulated glyphosate from China across a number of importers raises the question as to why the importers would continue to sell at a loss if they were not being compensated for doing so. Customs has not adequately investigated the incidence of sales of formulated glyphosate across the identified importers.
- 3.7 The arms length provisions in s. 269TAA *Customs Act 1901* (the Act) provide a safeguard against sales dumping and allows the Minister to deem sales not to be at arms length when the imported goods are sold at a loss. In these circumstances, the provisions do not require Customs to find actual evidence of rebates, reimbursements or other benefits accruing to the importer. Sub-section 269TAA(2) provides a statutory inference that rebates, reimbursement or other benefits were received by the importer (or an associate of the importer) when the imported goods are sold at a loss. In enacting this provision, the Parliament has acknowledged that identifying rebates, reimbursements and other benefits in granted to a customer by a seller in the course of international trade will be difficult to find.
- 3.8 In each case where sales were at a loss Customs simply asserts that it found no evidence to suggest that the importer received any rebates, reimbursements or other benefits were received by the importer. The applicants question how Customs satisfied itself that:
1. Rebates, reimbursements or other benefits were not received by third parties associated with the importer either in Australia or overseas; and/or
 2. the price of other goods purchased by the importer was not or is not altered or adjusted as part of an arrangement that effectively compensates the importer for the "apparent" loss made in relation to sale of formulated glyphosate in Australia. (This may explain why importers making a loss on formulated glyphosate products were nevertheless profitable.)

² CMS Trade Pty Ltd Visit Report, P.23; Conquest Crop Protection Visit Report, P.15.

³ AIRR Visit Report, P.21, 4Farmers Visit Report, P.21, Conquest Crop Protection Visit Report, P.11.

3.9 The proper application of 269TAA(2) would result in lower export prices and positive dumping margins on a large volume of formulated glyphosate products exported to Australia.

4. Normal Values

The Applicants contend that Customs has erred in its assessment of normal values for Good Harvest and Rainbow. Customs has determined normal values for Good Harvest and Rainbow under s.269TAC(2)(c) based on the exporter's cost-to-make-and-sell the GUC.

Good Harvest

4.1 Customs considered it could not calculate normal values for Good Harvest under s. 269TAC(1) because:

- (a) a substantial quantity (as defined in s 269TAA(2)) of Good Harvest's domestic sales were unprofitable and therefore excluded from consideration under s 269TAC(1) on the basis that those sales were not in the ordinary course of trade ("OCOT");
- (b) however, Good Harvest still had some quantity of domestic sales in the OCOT (albeit of a low volume) and this meant that regard could not be had to other sellers' information under s 269TAC(1);
- (c) Good Harvest's domestic sales of "like goods" in the OCOT were of a low volume (under s 269TAC(14)) and not large enough to permit a proper comparison.

4.2 Customs' considered that Good Harvest's low volume of relevant domestic sales satisfied s 269TAC(2)(a)(i) and therefore the normal value was calculated under s 269TAC(2)(c) of the Act.

4.3 The dumping margin calculated for Good Harvest was -2.0%.

Rainbow

4.4 Customs considered that Rainbow made no domestic sales of like goods during the investigation period. As discussed further below, this followed from Customs' view that formulated glyphosate with a surfactant not registered in Australia was not "like goods" (refer comments above rejecting this finding).

4.5 The domestic sales information obtained from other sellers was then considered in accordance with s 269TAC(1). Customs identified Wynca as the only other participating exporter with verified information that had made sufficient domestic sales of like goods in the OCOT. However, Wynca's information was considered unsuitable for establishing normal values for Rainbow. This was because Wynca's sales of the like goods, made in the OCOT, represented less than 5% of the volume of like goods exported to Australia by Rainbow. Pursuant to s 269TAC(14)(c), the sales were considered too small to permit a proper comparison.

4.6 The SEF also stated that even if Wynca's sales had been sufficient to allow a comparison, Customs would be unable to ensure a fair comparison because Wynca's verified information is considered highly commercially sensitive. Rainbow would not be able to make a claim in respect of relevant adjustments due to their limited access to Wynca's information. This is also discussed further below.

4.7 Rainbow's lack of domestic sales of like goods (and the comparative unsuitability of Wynca's sales) satisfied s 269TAC(2)(a)(i) and therefore normal value was calculated under s 269TAC(2)(c) of the Act.

4.8 The dumping margin was calculated as -0.8%.

Good Harvest & Rainbow Discussion

Customs has erred in the application of Section 269TAAD with respect to the finding that Good Harvest sold any goods in the OCOT.

4.9 Normal value is ascertained under s 269TAC(1) on the basis of the price for goods sold domestically in the OCOT. In assessing normal values for Good Harvest, Customs found that certain domestic transactions were profitable and others were not (SEF No. 183, P. 38). Customs proceeded on the basis that the profitable transactions were in the OCOT, whereas the unprofitable transactions were not in the OCOT. The finding that there were some (albeit a small volume) of sales in the OCOT by Good Harvest meant that, under s 269TAC(1), Customs did not have regard to sales by other sellers of like goods (such as Wynca).

4.10 The Applicants submit that Customs approach is not consistent with the legislation. Section 269TAAD provides that the price paid for goods is taken not to have been paid in the OCOT if certain conditions are met. Those conditions include that the goods are sold in substantial quantities during an extended period at a price that is less than the cost of such goods. Further, s 269TAAD(2) provides that goods are taken to have been sold at less than the cost of such goods if during an extended period at least 20% (by volume) of the total volume of sales was at a price below cost. Accordingly, the correct approach is to evaluate all of the exporter's sales of like goods (and see whether at least 20% (by volume) of those sales were at a price that was below cost. If at least 20% (by volume) of all the like goods were sold at a price below cost, then all of those goods are taken, under s 269TAAD, not to have been sold in the OCOT.

4.11 The Good Harvest Exporter Visit report of May 2012 indicates that Good Harvest's domestic sales of glyphosate made an overall loss of 9.15%⁴. Based on this, the Applicants would expect that at least 20% (by volume) of those sales were at a price less than the cost of those goods. Accordingly, Good Harvest's domestic sales of like goods are taken, under s 269TAAD, not to have been in the OCOT and Customs should have then had regard, under s 269TAC(1), to the price paid for like goods sold by other sellers of the goods (such as Wynca) in the OCOT.

Sections 269TAC(2)(a)(i) and 269TAC(14) are not restricted to goods sold in the OCOT

4.12 Similarly, in relation to Good Harvest, s 269TAC(14) was applied to the "remaining volume of domestic sales" — that is, those sales considered to be in the OCOT — and those remaining sales were held to be a low volume (SEF No. 183 P. 38). Also, in relation to Rainbow, s 269TAC(14) was applied to Wynca's "like goods made in the OCOT" and those were held to be a low volume (SEF, P 42). In both cases, s 269TAC(14) was applied only to goods sold in the OCOT, not all the relevant seller's goods. Properly understood, however, s 269TAC(14) cannot be confined to goods sold in the OCOT. Section 269TAC(14) applies to the volume of sales referred to in paragraph (c) of the section, which is "the volume of sales of like goods for home consumption in the country of export by the exporter or another seller of like goods". By ordinary language, that means all of the volume, not merely that part of the volume sold in the OCOT or the portion selected by Customs to determine the normal value of the other seller (e.g Wynca).

4.13 The SEF also indicates that the sales selected by Customs for the purpose of applying 269TAC(14) in respect of Rainbow were limited to those sales used to determine the normal value for Wynca. As stated above, 269TAC(14) requires Customs to look at all sales of like goods by the exporter or other seller. Wynca made substantial sales of like goods on the domestic market of China during the POI.

⁴ Good Harvest Exporter Visit report, P. 28.

4.14 The underlying rationale is that s 269TAC(14) is designed to deal with situations where a low volume is being sold domestically (relative to the volume exported), not situations of goods not being sold in the OCOT. That is clear from the wording of s 269TAC(14), which refers to low volume but says nothing about goods being sold in the OCOT. Similarly, s 269TAC(2)(a)(i) refers to low volume but says nothing about goods being sold in the OCOT. Rather, s.269TAC(2)(b), which functions as an alternative criterion to s 269TAC(2)(a), does refer to goods being sold in the OCOT but s 269TAC(2)(b) only applies where no like goods are sold in the OCOT. It is not consistent with the legislation to introduce the concept of OCOT into s 269TAC(2)(a)(i), via s 269TAC(14), in order to water down the requirement in s 269TAC(2)(b) of no sales in the OCOT to make that requirement merely a low volume of sales in the OCOT.

4.15 Accordingly, in the case of both Good Harvest and Rainbow, SEF No. 183 does not provide a proper basis for applying s 269TAC(2)(a)(i) and, assuming that the total volume of sales of like goods for home consumption is not a low volume (as opposed to merely the part of that volume sold in the OCOT), then s 269TAC(2)(a)(i) ought not to have been applied. The normal value in each case should therefore have been determined in accordance with s 269TAC(1) — namely, the price paid or payable for like goods sold by Wynca.

Section 269TAC(2)(a) only applies where the normal value of goods cannot be ascertained under subsection (1)

4.16 Moreover, even if the "low volume" requirement in s 269TAC(2)(a)(i) were satisfied, that by itself is not sufficient to enable normal value to be determined in accordance with s 269TAC(2)(c) or (d). The introductory and final words of s 269TAC(2)(a) make clear that there is a further requirement: the Minister must be satisfied that, because of the low volume, "*the normal value of goods exported to Australia cannot be ascertained under subsection (1)*" (emphasis added). The word "cannot" connotes prevention and impossibility. It creates a high threshold. It is insufficient if a low volume merely makes it more difficult or seemingly less appropriate to ascertain normal value under s 269TAC(1). A low volume, as with a complete absence of sales (which is the other alternative under s 269TAC(2)(a)(i)), must prevent or make it impossible for normal value to be ascertained under s 269TAC(1).

4.17 SEF No. 183 does not come close to demonstrating that the asserted low volume prevents normal value being determined under s 269TAC(1). In relation to both Good Harvest and Rainbow, it is simply asserted that, on the basis that there is a low volume of sales, that volume is "not considered large enough to permit proper comparison" (SEF No.183 P. 38 and 41). As explained above, the test is not whether the low volume permits a comparison that, in the opinion of Customs or even the Minister, is "proper"; the test is whether the low volume means that the normal value cannot be ascertained under s 269TAC(1). There is nothing in the SEF to suggest that, because of the asserted low volume, normal value cannot be ascertained under s 269TAC(1). Accordingly, on the basis of the matters set out in the SEF, s 269TAC(2)(a)(i) ought not have been applied in relation to Good Harvest and Rainbow.

4.18 This provides a further, independent reason why the normal value should have been determined in accordance with s 269TAC(1) as the price paid or payable for like goods sold by Wynca.

Confidentiality of cost information

4.19 It is contended in the SEF that Zhejiang Xinan's cost information could not be used to establish normal values for Rainbow because, due to confidentiality, Rainbow could only be given limited access to the information and would therefore be inhibited in their ability to safeguard their commercial interests (SEF No. 183 P 42–43). It is understood that Customs is concerned with ensuring fairness and protecting confidentiality. The difficulty, however, is that the legislation dictates that the normal value be ascertained in a particular way, including the use of the domestic prices of other sellers. In particular, s

269TAC(2) permits departure from ascertaining normal value in accordance with s 269TAC(1) only in limited circumstances. Those circumstances do not include concerns regarding the confidentiality of cost information.

4.20 It is respectfully submitted that concerns regarding confidentiality should be addressed, to the extent that it is possible to do so consistent with the legislation, through the mechanisms such as confidentiality regimes and external experts. Confidentiality concerns do not, however, permit departure from the requirement to determine normal value in accordance with the legislation. There is no suggestion in SEF No. 183 that Customs, having access to all of the confidential information provided to it, is not in a position to use that information to determine normal value in accordance with the legislation.

4.21 Further, an interested party aggrieved by a normal value determination, can seek merits review by the Trade Measures Review Officer.

4.22 In summary, Customs approach to Confidentiality in the SEF is completely at odds with the requirements of s 269TAC(1) and s 269TAC(2)(b) which both envisage the use of other sellers confidential information as the basis for determining normal values.

Comments re Wynca

4.22 The Applicants have separately addressed the Wynca exporter visit report and have challenged the following:

- The determination of certain costs included in Customs' verification of Xinan's costs for the product packs (domestic and export) such as S,G&A and packaging expenses;
- The specification adjustments to normal values for surfactants (differing quality, source and quantity) and formulation grade (360 g/L domestic v 450 g/L for export);
- Costs associated with packaging from a related party that have not been tested for arms length as to whether representative of "market prices".

4.23 It is imperative that the normal value(s) for Wynca are comparable with Wynca's export prices to Australia, including appropriate adjustments to ensure surfactants used in the exported goods are fairly compared with adjusted normal values based on domestic selling prices.

5. Unsuppressed Selling Price

5.1 SEF No. 183 confirms that Customs has not determined unsuppressed selling prices ("USP") for the Australian industry. It is noted that the discussion at Section 11.3 of the SEF considers a USP based on the applicant's CTM&S data. The Applicants consider that in the absence of market selling prices from a period unaffected by dumping, the industry's CTM&S would seem a reasonable basis upon which to calculate USPs.

5.2 In terms of an appropriate level of profit to be applied to the industry's CTM&S, the applicants consider an average level of profit achieved by Accensi and Nufarm from 2008/09 is appropriate.

5. Conclusions

5.1 Accensi and Nufarm dispute Customs' preliminary finding that exports of formulated glyphosate to Australia during the POI were at non-dumped prices and do not support the proposed recommendation to terminate the investigation.

5.2 The Applicants have detailed the following in this submission:

- a concession to the Chinese exporters allowing for a 5 per cent tolerance of the active ingredient used in formulated glyphosate should not be accepted;
- the use of inferior surfactants in the exported goods is contrary to the knowledge of market participants and should not be accepted in the absence of laboratory analysis of the exported goods;
- IPA salt 62% is a like good to formulated glyphosate exported to Australia;
- Customs should have conducted a verification visit with Cheminova (to attest to the industry's claims of industry and to obtain information in support of a USP);
- the prevalence of sales of imported formulated glyphosate at a loss should have raised concerns that the sales were not arms' length sales between the relevant importer(s) and exporter(s);
- domestic sales by Good Harvest should not have been ruled as "low volume" and normal values determined under s.269TAC(1) – either using Good Harvest selling prices or the selling prices of another seller (i.e. Wynca);
- normal values for Rainbow should have been determined using the sales of another seller on the Chinese domestic market (i.e. Wynca);
- Wynca's normal values require adjustment for fair comparison with the goods exported to Australia (as appropriate for Xinan or Wynca).

5.3 Following full account of the matters applicable to normal value determination for each of the three Chinese cooperating exporters, it is submitted that the export prices for Chinese formulated glyphosate to Australia during the POI were at dumped prices greater than negligible levels.

5.4 Customs' analysis at Section 9 of SEF No. 183 confirms that the Australian industry has experienced material injury during the POI in the following forms:

- lost sales volume;
- reduced market share (for total sales);
- price depression;
- price suppression;
- reduced revenue;
- reduced profits and profitability;
- reduced production capacity utilization;
- inadequate returns on investment;
- increased inventory levels (Nufarm only);
- reduced employee numbers (Nufarm only); and
- reduced total wages bill (Nufarm only).

5.5 The Applicants' furnished Customs with examples of price undercutting of prices for locally supplied formulated glyphosate by imported Chinese formulated glyphosate. Customs has verified the price undercutting evidenced by the Applicant companies.

- 5.6 Customs is also in possession of the Applicants' CTM&S data and is able to construct USP prices for the Australian industry. The calculated USP's when adjusted to non-injurious prices will further demonstrate that the Australian industry has suffered material injury from the exports of Chinese formulated glyphosate at dumped prices.
- 5.7 The applicants submit that the Australian industry manufacturing formulated glyphosate has experienced material injury from exports of Chinese formulated glyphosate exported to Australia during the POI at dumped prices. Anti-dumping measures are necessary to remove the effect of injurious dumping on the Australian industry manufacturing like goods. Customs is requested to take full account of the matters raised in this submission and make a report and recommendation to the Minister that interim duties be applied to future exports of formulated glyphosate from China.