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PUBLIC RECORD

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The Director, Investigations 1,
Anti-Dumping Commission,
GPO Box 2013
Canberra ACT 2601
Australia

Re: Covering Statement to Chevron Phillips Chemical Company LP
Exporter Questionnaire Submission Regarding Investigation No. 515
Into Alleged Dumping of High Density Polyethylene exported from the
Republic of Korea, the Republic of Singapore, the Kingdom of
Thailand and the United States of America.

Dear Director:

This covering statement is submitted on behalf of Chevron Phillips Chemical Company LP ("CPChem US") in support of its submission responding to the Exporter Questionnaire ("Questionnaire") issued by the Australian Antidumping Commission ("Commission"). As set forth below, CPChem US answered each question and produced documents and data responsive to the Questionnaire to the extent they were in its possession, custody or control, or could reasonably be determined from information maintained in the ordinary course of its business. CPChem US also provided information and data in pre-submission communications with the Commission, facilitated disclosures by its affiliates, and scheduled a September 2019 site and verification visit for the Commission. CPChem US is willing to meet and confer with the Commission on any additional data requests and reserves all rights with respect to the Questionnaire including, without limitation, the right to supplement and modify its responses, to request additional modifications, and all rights to appeal.

PRELIMINARY STATEMENT

This response should not be construed as an admission concerning the reasonableness of the Questionnaire, or any part thereof. Rather, CPChem US specifically reserves and maintains its prior objections to the Questionnaire, or parts thereof, to the extent that the requests were unreasonably overbroad, unduly burdensome, vague, or *ultra vires*. Among other things, CPChem US specifically objects to the MCC structure and to any characterization of its HDPE products as "like goods" with the products produced by the Applicant Qenos Pty. ("Qenos"). CPChem US also objects to the Questionnaire to the extent that it seeks the disclosure of competitively sensitive information without regard to the irreparable harm that CPChem US and its customers would suffer if that identifying information were inadvertently disclosed.

I. RESPONSE OVERVIEW

As set forth in greater detail in Section VII, *de minimis* quantities of only two grades of high density polyethylene ("HDPE") produced by CPChem US were imported to Australia during the Relevant Period. Those products and the more than [REDACTED] other HDPE products produced by CPChem US appear to have different properties, applications, additive packages, and regulatory approvals than the HDPE products produced by Qenos. Further, while CPChem US has endeavored to provide data in the form requested by the Commission, several requests sought data that CPChem US does not record or maintain. In these instances, as an

accommodation to the Commission, CPChem US has provided good faith estimates or other equally responsive data. In another instance, the Questionnaire sought a list of customer names in connection with the disclosure of certain sales data. CPChem US has provided the sales data, but anonymized non-affiliated customer names to meet its confidentiality obligations to those customers and mitigate the irreparable harm that would follow from an unauthorized disclosure.

II. DOCUMENT IDENTIFICATION

Documents lodged with the Questionnaire have been marked with document control numbers. In numbering the documents, CPChem US used "CPChemUS" as a prefix to identify the documents. The documents are numbered CPChemUS-00000001 to CPChemUS-00000186.

III. RESERVATION OF ALL PRIVILEGES

CPChem US will not produce information or documents subject to the attorney-client privilege, the work product doctrine, or any other applicable privilege. While CPChem US has not redacted or withheld documents based on any privilege, the Commission should not construe any inadvertent production of a privileged document as a waiver of any relevant privilege, as it is the Company's intent to maintain privilege with respect to all such documents. Likewise, the provision of any documents and the listing of any documents on the master index does not constitute an admission on any subject matter. CPChem US requests that the Commission immediately return any privileged document inadvertently produced by CPChem US.

IV. INFORMATION PREVIOUSLY SUBMITTED TO THE COMMISSION

CPChem US and certain of its affiliates have provided the Commission with information in other written and verbal submissions as have other importers and end users, including, without limitation, Martogg Group, Shamrock Poly Pty Ltd., Iplex Pipelines Australia Pty Ltd., Dow Chemical Australia Pty Ltd., Pact Group, and Redox Pty Ltd. that respond to the Application lodged by Qenos. CPChem US adopts and incorporates by reference each of these submissions herein to the extent that they object to the investigation and imposition of duties.

V. CONFIDENTIAL TREATMENT REQUESTED

Much of the information contained in the answers, data, and documents provided in response to the Questionnaire, and incorporated by reference, contains proprietary, competitively sensitive, and highly confidential information regarding CPChem US and its operations. CPChem US requests that the Commission and its staff afford these responses (and the documents and information contained therein) the fullest confidentiality protections available under all applicable laws and regulations. CPChem US further requests that the Commission: (1) provide CPChem US with all legally required notices prior to any disclosure of the information or documents contained in any of its submissions and (2) return all material (and any photocopies thereof) designated as confidential upon completion of its investigation.

VI. THE COMMISSION LACKED A REASONABLE BASIS FOR COMMENCING AN INVESTIGATION BASED ON THE FRIVOLOUS ALLEGATIONS IN THE APPLICATION AND OTHER AVAILABLE INFORMATION.

The Commission lacked reasonable grounds to commence an investigation based on the allegations in the Application and other information readily available from public sources. The *Dumping and Subsidy Manual* provides that "Decisions made by officers must be based on the facts of each individual case using the principles outlined in this Manual." *Dumping and Subsidy Manual* at p. 6. The Manual also expressly refers to Section 5(2) of the Administrative Decisions (Judicial Review) Act 1977 which prohibits the Commission from:

- a) taking an irrelevant consideration into account in the exercise of a power;
- b) failing to take a relevant consideration into account in the exercise of a power;

- c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
- d) an exercise of a discretionary power in bad faith;
- e) an exercise of a personal discretionary power at the direction or behest of another person;
- f) an exercise of a discretionary power in accordance with a rule of policy without regard to the merits of a particular case;
- g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
- h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- i) any other exercise of a power in a way that constitutes abuse of the power.

In this case, the Commission failed to take into account that Qenos has a long history of improvidently blaming its poor financial performance on dumping¹ and that Qenos made several key concessions in its Application which rendered its dumping claim for HDPE economically implausible. For example, Qenos conceded in its Application that “very little material has landed in Australia directly from the USA” and that “Qenos has experienced an increase in energy costs in the last two-year period, including all increases in feedstock costs.” In its Application, Qenos also admitted that it has experienced “production outages that have impacted production output” and that a “sharp reduction in production volumes” should be attributed to “raw material cost increases associated with LPG not being economic in the HDPE production process.” In other sections of its Application, Qenos admitted that its production volume “was reduced in 2018/19 due to a range of factors including (i) a shortfall of raw material ethane in 2018 first half and operational consequential disruptions...” Even the Commission expressed skepticism that any price depression exists since “prices overall have risen during the period.”

Had the Commission undertaken a full and impartial assessment of the Application, it also would have discovered published reports in which Qenos squarely pegged its financial challenges to its lack of access to low-priced feedstocks. For example, on 15 September 2017, the *Financial Review* published an article “Qenos looks at job cuts to ease gas price shock” in which it quotes Stephen Bell, the Qenos CEO, as stating that the “company had suffered a 60-70 percent increase in energy costs this year.” Mr. Bell further explained that “We are facing more increases and clearly we can not absorb them or pass them on to our customers ... We have to find efficiencies and our overseas competitors are not facing this problem. They can buy (ethane) at the international price.” Mr. Bell blamed the employee layoffs not on worldwide competitors acting unfairly but on Australian government natural gas production policies.

More recently, Mr. Bell has continued to rail against government policies as the sole cause of Qenos’ lack of competitiveness in the marketplace. On 16 May 2019 – approximately one month before Qenos filed its Application in this matter – Australian media quoted Mr. Bell as again conceding that importers face lower costs generally and that Australian government policies, not dumping, were to blame for his company’s inability to compete effectively:

Chief executive Stephen Bell said the power bill at just one of its plants, at Port Botany in New South Wales, provided a sense of the problem.

“In 2016 we paid \$8 million dollars for electricity and in 2018 we paid \$18 million dollars,” he said.

¹ For example, on 25 November 2009, the Australian Customs and Border Protection Service terminated an investigation initiated by Qenos on linear low density polyethylene originating in the United States and Canada without imposing any measures stating that “the injury, if any, to the Australian industry, or the hindrance to the establishment of an Australian industry, that has been, or may be, caused by that dumping is negligible.” Similarly, on 20 January 2011, Australian Customs and Border Protection Service terminated another investigation initiated by Qenos on low density polyethylene from Canada, Korea and the USA.

“That’s just for the commodity; that doesn’t include network charges and other costs.”

“We’ve taken more than \$60 million of cost increases over that time. We can’t pass a dollar of that on to our customers because our competition, who all come from overseas, don’t have any of those increased costs.”

“The gas shortage is a long way past being a theoretical problem. Qenos has let go of 15 per cent of its workforce in just the past year-and-a-half.”

“If we don’t address the issue we’re going to see a lot of jobs and a lot of industrial manufacturing disappear off the east coast of Australia,” he said.

“It’s a consequence of a failure of government policy at all levels — state and federal, Liberal and Labor — over a long period of time.”

“We have plenty of gas in this country, we have an abundance of hydrocarbon, we’re blessed and there’s more than enough of those domestic and export customers.”

Daniel Ziffer, ABC, “Gas exports blamed for soaring electricity prices and job losses” (16 May 2019) available at <https://www.abc.net.au/news/2019-05-17/gas-exports-blamed-for-electricity-price-rises-job-losses/11121120>.

These admissions strongly suggest that Qenos – the sole Australian HDPE producer – is not competitive or viable. This undisputed evidence that Qenos cannot compete effectively in the face of more efficient, lower-cost overseas producers should have led the Commission to reject the Application summarily and its failure to do so raises serious questions about whether its investigation is protectionist and ultra vires.

VII. THE COMMISSION IMPROPERLY REJECTED THE CPCHEM US’S REQUESTS TO NARROW THE SCOPE OF ITS QUESTIONNAIRE AND MCC.

In confidential communications with the Commission, CPChem US raised several objections to the scope of the Questionnaire and MCC. Namely, the Commission requested data for more than 100 HDPE grades produced by CPChem US as reflected in the table below:

HDPE Segment	Prime	Off Spec	
Blow Molding	[REDACTED]	[REDACTED]	
Coating	[REDACTED]	[REDACTED]	
Film	[REDACTED]	[REDACTED]	
Geo	[REDACTED]	[REDACTED]	
Inj Molding	[REDACTED]	[REDACTED]	
Pipe	[REDACTED]	[REDACTED]	
Roto	[REDACTED]	[REDACTED]	
Sheet	[REDACTED]	[REDACTED]	
Scrap	[REDACTED]	[REDACTED]	
			TOTAL
TOTAL	[REDACTED]	[REDACTED]	[REDACTED]

CPChem US informed the Commission that compiling data for each of its HDPE products would impose a substantial burden on CPChem US, that the data sought by the Commission would not be relevant to its investigation or final determination, and that the Commission would be ignoring its own procedural rules by refusing to narrow the scope of its data request. Among other things, CPChem US informed the Commission of the following facts:

- [REDACTED]

- [REDACTED]
- [REDACTED]

While the Commission granted CPChem US a limited extension of time to lodge its response, the Commission declined to narrow the scope of its data requests without a legitimate or even reasoned cause or justification. Instead, the Commission encouraged CPChem US not to cooperate by saying that "Chevron is under no obligation to cooperate with the investigation if it considers that burden is too great." See 31 July 2019 email from Ryhs Piper to John Cadis, et al.

CPChem US maintains and reasserts its objections to the scope of the Questionnaire as stated in its prior communication with the Commission. Further, in declining to narrow the scope of its data requests or engage in a meaningful dialogue with the Company, the Commission acted unreasonably and in a manner inconsistent with due process and its own procedural rules. Page 60 of the *Dumping and Subsidy Manual* provides that: "In cases where different models of the goods exist, it is necessary to select the domestically sold models that are most directly comparable to the particular models exported to Australia. This allows for a proper comparison between the normal value and export price of the goods for the purposes of working out the dumping margin ... Appropriate model matching of the goods exported to Australia to like goods sold on the domestic market is therefore critical when ascertaining normal values under subsection 269TAC(1)." Commission, *Dumping and Subsidy Manual* at p. 60. Similarly, the Antidumping Notice issued by the Commission expressly required the Commission to "have regard to differences in physical characteristics that give rise to distinguishable and material differences in price" in developing the MCC structure. The Commission ignored its own rules.

For example, the Commission knew that a de minimis volume of only two products produced by CPChem US were exported to Australia and that further exports of HDPE produced in the United States was unlikely. The Commission also knew that Qenos, produces fewer than 25 HDPE grades (see <http://www.qenos.com/internet/home.nsf/web/Products>) and that those products have substantially different properties and applications than most HDPE products produced by CPChem US. Qenos products lack the additive packages and regulatory approvals of most products produced by CPChem US. Qenos also lacks the know-how and production facilities to manufacture the HDPE products produced by CPChem US. The MCC structure thus lacked an economically plausible rationale and should have been modified by the Commission.

By imposing unwarranted data demands on CPChem US, not adhering to its own procedural rules and the Antidumping Notice itself, and encouraging CPChem US not to cooperate, the Commission discouraged and deterred CPChem US and other stakeholders from participating in this dumping investigation. These actions raise serious questions about whether the Commission will conduct an objective and impartial investigation. Nonetheless, subject to this objection, CPChem US has undertaken the extraordinary task of providing full and complete responses to each item in the Questionnaire. The sole limitations on its response relate to non-affiliated customers names which have been anonymized and to Items D.2.1 and G.3.1 where CPChem US provided information for the specific grades that were exported to Australia and other similar products in its HDPE portfolio. Compiling this information required a substantial commitment of man hours by more than a dozen senior-level employees and forced CPChem US to incur tens of thousands of dollars in professional fees and costs. CPChem US will consider producing sales and cost data for additional grades should the Commission provide adequate justification for its need for the data and the scope of the request is not disproportionate to the burden and costs that would be imposed on CPChem US in compiling the data.

VIII. THE COMMISSION IS LEGALLY REQUIRED TO TERMINATE ITS INVESTIGATION IMMEDIATELY AND WITHOUT DELAY.

Anti-dumping or countervailing measures only may be imposed when the Commission finds that goods exported to Australia have been dumped or subsidized and because of that dumping material injury to an Australian industry producing like goods has been or is being caused or threatened. Article 3.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA) further requires that a determination of injury must be based on positive evidence. Further, the Ministerial Direction on Material Injury specifies, among other things, that the injury caused by dumping must be "material in degree" and that it may be difficult to demonstrate material injury where imports hold a "small market share." Finally, Section 25 of the

Dumping and Subsidy Manual mandates termination of an investigation when there is insufficient evidence of either dumping or subsidization or of injury.

In this case, no credible evidence exists to support a finding that HDPE from the United States has been dumped or subsidized or that Qenos has been injured by reason of same. Neither the Commission nor the Applicant has undertaken a credible quantitative economic analysis² to establish that the Applicant has been materially injured by reason of any low-priced HDPE exports from the United States or other countries subject to investigation, that any overseas producer has depressed or suppressed prices for any relevant HDPE product line, that the CEO of Qenos incorrectly attributed his company's downturn to factors other than HDPE imports, that exports from the United States to Australia were material or likely to recur,³ or that the market share and financial losses allegedly suffered by Qenos should be attributed to factors other than inefficient operations, limited production capabilities, and a non-viable cost structure.⁴

To the contrary, as set forth above, the Commission commenced this investigation without an economically plausible dumping theory. The Commission has known from the outset that any volumes attributable to the United States were de minimis and that further shipments by CPChem US were unlikely. Moreover, Qenos itself has publicly admitted that the downturn in its business and inability to compete effectively were not caused by dumping but rather high energy costs and Australian natural gas policies. These facts are further corroborated by the data submissions of CPChem US and by the written responses to the dumping notice by Chevron Phillips Chemicals Australia Pty Ltd, Martogg Group, Shamrock Poly Pty Ltd., Iplex Pipelines Australia Pty Ltd., Dow Chemical Australia Pty Ltd., Pact Group, and Redox Pty Ltd. Under these circumstances, the CPChem US respectfully requests that the Commission terminate its investigation immediately in accordance with Section 25 of the *Dumping and Subsidy Manual*.

CONCLUSION

Should the Commission have any questions or would like to meet and confer on any point, I encourage you to contact me or our representative John Caldis.

Yours truly



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² The report and notice do not contain meaningful information to support the initiation of the investigation. The Commission failed to comply with Article 6.5.1 of the ADA and failed to conduct any quantitative analysis that would support a finding of material injury based on price depression and reduced profits under Article 3.2 of the ADA when it has not accounted for other relevant economic factors impacting Qenos as set forth in Article 3.4 of the ADA.

³ In its Application, Qenos describes the volume of exports from the United States as "very little." Qenos alleges elsewhere in its application that it faces competition from a United States distributor Montachem which Qenos claims obtains its product from CPChem US. However, CPChem US does not sell HDPE product to Montachem for resale under a different brand.

⁴ In addition to the public statements of its CEO, Qenos admits in its application that "it experienced an increase in the unit cost to produce HDPE due to energy cost increases coinciding with oil price increases driving catalyst and chemical input costs in 2018/19."