GLENCORE

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The Director
Investigations 2
Anti-Dumping Commission
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Canberra ACT 2601

By email: investigations2@adcommission.gov.au

Dear Director

Continuation 565 – ammonium nitrate from Russia

Glencore Coal Assets Australia and Mount Isa Mines (collectively, **Glencore**) has reviewed the submission made by the representative of the Australian industry producing ammonium nitrate that was placed on the public record on 21 January 2021 (the **Industry Submission**).

The Industry Submission provides some commentary regarding the recently published EU Regulation 2020/2100 (the **Regulation**) and its relevance to the present continuation inquiry. Glencore considers the Industry Submission does not adequately explain the scope of the Regulation and draws incorrect parallels between the findings contained in the Regulation and the circumstances subject to the Commissioner's inquiry. This letter aims to provide additional information so that the Commissioner can reach correct conclusions with respect to the relevance of the Regulation to the current inquiry.

Before we address those points, it is important to re-emphasise what the relevant test is in this inquiry. That is, recommendation that the measures continue cannot be made

> *…unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.*[1]

In our submission of 7 October 2020 Glencore provided an extensive explanation of the factors that militate against the continuation of these measures for the fourth time since they were originally imposed in May 2001. Glencore has further assisted the Commission in this inquiry since that date.

That submission was made four months ago. None of the three members of the Australian industry that support the continuation of these measures have responded to Glencore's submission in any meaningful manner. The only attempt to further what was said in their application was by way of the recent Industry Submission. For the reasons discussed in this letter, the Industry Submission does not assist the Commissioner in attaining any satisfaction that it is likely that dumping or material injury will recur if the measures are revoked.

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[1] Customs Act 1901 (**Act**), section 269ZHF(2).

What is the relevance of the EU Regulation?

The Industry Submission characterises the Regulation as relating to ammonium nitrate.[2] This is not entirely accurate. The Regulation actually relates to *solid fertilisers with an ammonium nitrate content exceeding 80 % by weight*.[3] This is important to understand because, as the Commissioner has found on previous occasions:

> *Ammonium nitrate is classified as a dangerous good and has limited usage in Australia as a fertiliser, mainly due to the security protocols required for its transport and storage relative to other nitrogenous fertilisers such as urea and urea ammonium nitrate solution.*[4]

Imports of ammonium nitrate into Australia tend to relate to explosive grade ammonium nitrate, which we will refer to as "technical ammonium nitrate" (**TAN**) rather than fertiliser containing ammonium nitrate.[5] This distinction is something that Australian industry members have previously commented on:

> *The Australian market for AN is supplied predominantly from locally produced goods and imports that is primarily used as a raw material in the manufacture of explosives predominantly used by the mining, quarrying and construction industries.*
>
> *AN is also used as a fertiliser in agricultural applications, although the market for this application in Australia is relatively small. This is due to the handling protocols required for the transport of AN relative to other nitrogenous products such as urea and urea ammonium nitrate.*[6]

In terms of the product characteristics, TAN and solid fertilisers with an ammonium nitrate content exceeding 80% are different. We note the following:

- TAN will generally have an ammonium nitrate content in excess of 97%, whereas, as per the description of measures, the EU Regulation deals with fertiliser with an ammonium nitrate content in excess of 80%.[7]

- TAN is used in the production of bulk explosives and emulsion-based explosives and so is much more sensitive to impurities, such as additives or coatings (including anti-caking agents). Only certain additives and coatings can be used when producing TAN to ensure that its use in producing emulsion and bulk explosives does not result in product quality issues resulting from the impurities' interaction with other chemicals used to produce the explosives

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2 Industry submission dated 19 January 2021, page 1 - https://www.industry.gov.au/sites/default/files/adc/public-record/565_-_017_-_submission_-_australian_industry_-_industry_public_file_submission_on_eu_an_sunset_review.pdf.

3 Paragraph 3 of the Regulation.

4 Anti-Dumping Commission Report 473, page 24. Similar findings were included in Anti-Dumping Commission Report 312 at page 16 and Anti-Dumping Commission Exemption Inquiry Report: EX0066 at page 7.

5 In referring to fertiliser containing ammonium nitrate, we refer to fertilisers of the type considered by the EU Regulation, being that with an ammonium nitrate content of 80% or greater. This is not intended to be a reference to other fertiliser products with lower ammonium nitrate content, such as urea ammonium nitrate.

6 *Application for the Publication of Anti-Dumping and/or Countervailing Duty Notices -Ammonium Nitrate Exported from the People's Republic of China, Sweden and Thailand*, page 13

7 We note further that the Regulation relates directly to CN codes 3102 30 90 and 3102 40 90. Porous prill ammonium nitrate with an ammonium nitrate content greater than 99% is classified under CN code 3602 00 00. While the scope of EU measures is defined by the definition of the "product concerned" rather than tariff classification we query whether LDAN falling within CN code 3602 00 00 could be characterised as "fertiliser".

and to avoid the risk that impurities will dirty or block the process equipment used in the manufacture of emulsion. In contrast, the ultimate use of fertiliser containing AN is that it be spread on the ground. It does not have the above discussed sensitivity to impurities.

- Fertiliser producers will usually add an anti-caking agent, which allows the product to be safely shipped in bulk (directly in the hold of a ship, without big bags). The anti-caking agents used are typically incompatible with the production of emulsion and bulk explosives.

Accordingly, the Regulation and this inquiry are focussed on different matters. Given this further context, Glencore submits that the Regulation has no direct relevance to this inquiry and considers it would be misguided for the Commissioner to give it any weight in discharging his role under s 269ZHF(2)

The EU Regulation is not relevant to whether dumping is likely to recur

In discussing the likelihood of dumping, the Industry Submission cites three matters discussed in the Regulation, as being pertinent to the continuation inquiry. These are:

- Russian exports to third countries;
- Production capacity and spare production capacity in Russia; and
- Attractiveness of the EU market.

The Industry Submission does not justify how these considerations in the Regulation are meant to inform the Commissioner for the purposes of s 269ZHF(2), and we fail to see how such a position could be justified.

Given the distinction between fertiliser containing ammonium nitrate and TAN, any finding of price differentiation between sales of that fertiliser to different countries seems irrelevant to the present inquiry.[8] Indeed, the market for fertiliser containing ammonium nitrate is also substantially different from that relating to TAN. Due in part to the above noted product differences and end-use differences, fertiliser containing ammonium nitrate exported from Russia will be sold at a lower price than TAN, rendering any observations in the Regulation regarding prices irrelevant to the present inquiry.

The Commission has found on a number of occasions that there are legal barriers to the importation and sale of AN fertiliser in Australia. These severely curtail import volumes of such product. It is Glencore's understanding that there are no meaningful imports of AN fertiliser into Australia.

Further, in the hypothetical that fertiliser containing AN was imported into Australia, it would face significantly different market dynamics to TAN. The Commission has previously found that fertilisers including ammonium nitrate has many substitutes such urea ammonium nitrate and compound fertilisers.[9] However, there are no commercially viable substitutes for explosives grade ammonium nitrate.[10] So again, any findings in the Regulation regarding pricing are simply not applicable to Australia's ammonium nitrate market.

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8 The submission refers to exports of the relevant fertiliser to third countries as being made at "dumped prices". That is not the case. At paragraph 93, the Regulation states that "[t]he Commission did not have a finding of dumping into the EU…and it did not conduct a dumping calculation…"

9 Anti-Dumping Commission Report 473, page 27.

10 Anti-Dumping Commission Report 473, page 27.

The question of capacity is one the Commission will be able to consider on the basis of verified information, which we are sure will support the Russian Government's statements that the Russian ammonium nitrate industry is at close to full capacity.[11] In any regard, it is not apparent that any underutilised capacity would necessarily be taken up in the production of TAN. As Glencore notes in its initial submission, Russian producers of ammonium nitrate are primarily fertiliser producers, which have limited ability to alternate between fertiliser and TAN products.

Finally, the "attractiveness of the EU market" also lacks relevance to the current inquiry. The Australian market and the EU market are substantially different markets. There are no substantial imports of Russian fertiliser containing ammonium nitrate into Australia. Australia is simply not a key market for Russian exports, specifically because of the large distance between Australia and Russia. This is directly contrary to the Regulation, which found the attractiveness of the EU market was in part because of the geographic proximity to Russia.[12]

At a high level, what the Industry Submission is proposing is that the expiry of measures will make it likely that Russian producers of ammonium nitrate will undertake the capital work and incur the expenses required to pivot any underutilised capacity to TAN production, incur the substantial freight costs associated with exporting the goods to Australia and then sell to Australian customers more cheaply than they can sell ammonium nitrate in their own market, because the attractiveness of the Australian market for TAN is somehow analogous to the attractiveness of the EU market for solid fertilisers with ammonium nitrate. This is entirely unrealistic.

The Commissioner's satisfaction under s 269ZHF(2) of the Act needs to be based upon a consideration of facts as they apply to the Australian market. The EU Regulation does not assist in this task. The Australian industry has provided no rational, evidence-based argument for asserting the measures should continue.

The EU Regulation is not relevant to whether injury to the Australian industry is likely to recur

The Submission suggest that the EU's findings regarding the recurrence of injury are "relevant" to the Commissioner's consideration and that the economic impact the Regulation found would be incurred by the EU industry would be "replicated" in Australia were the measures allowed to expire.[13] This is peculiar. Whatever findings the Regulation has made with regard to the EU fertiliser industry provide zero insight into the performance of the Australian ammonium nitrate industry.

The likelihood of the recurrence injury to the Australian industry needs to be assessed with regard to the particular circumstances of that Australian industry. In this regard, we recall:

- The proponents have submitted that the volume of imports of AN into Australia from all sources in 2019/20 was 139,166 tonnes.[14] Conservatively, we consider the Australian market to consist of 2.3 million tonnes of ammonium nitrate. Total imports therefore account for only 6% of the Australian market.

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[11] Government of Russia submission at page 4 - https://www.industry.gov.au/sites/default/files/adc/publicrecord/565_-_003_-_submission_-_foreign_government_-_government_of_the_russian_federation__regarding_initiation_of_continuation_inquiry.pdf

[12] Paragraph 118 of the Regulation.

[13] Industry submission, page 3.

[14] Application, page 6.

- The application indicates that only 5,478 tonnes of ammonium nitrate were imported from Russia in the inquiry period.[15] Accordingly, Russian ammonium nitrate only accounted for 0.24% of the Australian market.

- As we assume the Commission has now verified, the Australian industry has a pattern of importing and/or consuming Russian produced ammonium nitrate, in addition to its well-established pattern of importing ammonium nitrate from other countries.

- The Australian industry reports an observable increase in sales, production volumes, prices, revenue and profit and profitability.

- The Australian industry indicated the Australian market has grown over the last five years and is likely to continue to grow over the next five.[16]

- The Australian industry tends to make sales via contracts which generally have a term of three to five years.[17] None of the information on the public record suggests these agreements have been impacted by Russian ammonium nitrate imports, so the prices that have been set in these agreements cannot be influenced by Russian prices, whether dumped or otherwise. Given the absence of imports of Russian imports to Australia, outside of AN consumed by the Australian industry itself, we fail to see how the expiry of measures could have any impact, material or otherwise, on the Australian industry in the medium-term.

We understand the pragmatism behind the Australian industry's application. If they can limit even the remotest possibility of import competition from another source, why would they not? However, in arguing for this, the Industry Submission attempts to frame the Australian industry as meekly vulnerable to import competition. This is not the case. We ask that the Commission ignore such histrionics in favour of the facts. The Australian industry is market dominant, its profit margins are more than robust, it is geographically and regulatorily protected from any significant competition. These facts should be established by the Commission through the verification of the Australian industry data, and from them the conclusion should easily be drawn that the recurrence of material injury is unlikely in the event that the measures expire.

Conclusion and necessary outcome

In essence, the Industry Submission suggests the Commissioner should be satisfied that there is a need for the measures to continue, because the EU decided to continue some anti-dumping measures against fertiliser from Russia. This would amount to an impermissible outsourcing of the Commissioner's decision-making power. For the reasons discussed in this letter, Glencore submits that the findings in the Regulation are entirely distinguishable from the circumstances in this continuation inquiry. It is not relevant to the Commissioner's satisfaction under s 269ZHF(2).

Anti-dumping measures are not by their nature permanent. They respond to a need established during an investigation. With each passing year of operation that need becomes less and less apparent. In arguing that these measures should continue for a further five years the Australian industry is arguing it has required ongoing protection from Russian imports for a quarter of a century. Any understanding of the financial performance of the Australian industry should clearly convey how unnecessary that is. We do not consider they have made any rational evidence-based case for the excessive form of protection for which they ask.

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[15] Application, page 6.

[16] Orica response to supplementary questionnaire, page 12.

[17] CSBP response to supplementary questionnaire, page 14.

Nothing on the public record suggests there is a positive case that a further continuation of the measures is necessary or preferable. To the contrary, the information before the Commissioner establishes that the expiry of the measures will not lead, and is not likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury those measures were intended to prevent.

Accordingly, Glencore respectfully submits that there is no basis to continue the measures for a further five years, and so they should be allowed to expire as of 24 May 2021, some twenty years after they were initially imposed.

Yours sincerely

Darren Oliver
Glencore Coal Assets Australia Pty Ltd, on behalf of all Glencore's Australian mining businesses