

GLENCORE

PUBLIC RECORD

7 April 2021

The Director
Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

By email: investigations2@adcommission.gov.au

Dear Director

Continuation Inquiry 565: File Note placed on the Public Record 31 March 2021

We write to you with respect to the meeting held between Orica Australia Pty Ltd (Orica) and the Anti-Dumping Commission (the Commission) on 30 March 2021.

From the file note of the meeting, which was placed on the public record on 31 March 2021, we understand that the subject of that meeting was “Confidential Annexure A” and that additional confidential information regarding Confidential Appendix A was provided to the Commission during this meeting.¹

Glencore has significant concerns regarding this meeting given the potential that Orica may have provided additional evidence to the Commission after the date upon which responses to the Statement of Essential Facts were due to be lodged (25 March 2021).

Confidential Annexure A was provided along with the Orica’s submission dated 25 March 2021, but is characterized as being a separate submission, for which no non-confidential summary has been provided. From descriptions in the 25 March 2021 submission, Glencore understands that

Confidential Annexure A relates to “price impacts” associated with “two significant contracts” that contain a “price adjustment” of some description.

Glencore wishes to state clearly that it does not consider the “non-confidential summary” of Confidential Annexure A included in the submission of 25 March 2021 provides sufficient detail to allow a reasonable understanding of the substance of the information included in that annexure.² To the extent that such information was orally discussed during the meeting between Orica and the Commission on 30 March 2021, the file note of 31 March 2021 provides no clarification or further detail regarding its substance. To the extent that further confidential information was provided during that meeting, or subsequently, no detail nor summary has been given.

¹ Please correct us if this is incorrect, or other matters were discussed during the meeting.

² As required by S 269ZJ(2)(a)

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As a result, Glencore is denied the ability to make any substantive submissions regarding the representations Orica has made in Confidential Annexure A, during the 30 March meeting or subsequently.

If the Commission is considering having regard to Confidential Annexure A or information provided during the 30 March meeting or subsequently, notwithstanding s 269ZHF(4), then any critical issues or factor raised there-in needs to be disclosed on the public record in sufficient detail to allow a reasonable understanding of it. Interested parties need to be provided the opportunity to respond to the substance of those representations. Failure to do so would breach established standards of procedural fairness in the context of Australia's anti-dumping laws.³ If such disclosure cannot be adequately made before the final report is due to the Minister, than the Commission should disregard any information provided by Orica after 25 March 2021 under s 269ZHF(4).

It is a matter of significant concern that that there is no indication as to who the other parties are to the contracts Orica has discussed with the Commission at this late juncture of the inquiry. Those unidentified parties would be in a special position to correct, clarify or confirm the representations Orica has made confidentially. At an absolute minimum, the Commission should seek comment from these counterparties. Orica's representations regarding these contracts cannot be claimed to be "confidential" to those parties specifically. Those entities would know the detail and commercial context of both the contracts and related negotiations. If these counterparties are denied the opportunity to comment on Orica's representations, the Commission cannot form the view that the information provided by Orica in Confidential Appendix A or during the meeting of 30 March 2021 is correct.⁴ And so, absent that opportunity, we would submit that Confidential Annexure A must be disregarded in its entirety.⁵

We understand that the Commission seeks to treat all parties equally and wishes to ensure its proposed recommendation in the Statement of Essential Facts is the correct one. We also note that the Australian industry as a whole has been provided over 220 days to substantiate its call for these measures to continue. Given that presently there is no way for other parties to have any form of scrutiny or comment over Orica's submissions on 30th March 2021, we respectfully request that the Commission ensure the principles of procedural fairness are adhered to. If this is not possible and to avoid falling into jurisdictional error, the Commission should disregard these late submissions as it is entitled to do so under ss 269ZHF(4) and 269ZJ(5) or (6) of the Act.

Yours sincerely



Darren Oliver

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

³ See para 113 of *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice & Customs* [2008] FCA 443, for example.

⁴ As required by section 269ZJ(5) or (6)

⁵ As per the sections above.