29 July 2022
FOR THE PUBLIC RECORD

The Director, Investigations
GPO Box 2013
Canberra
ACT 2601

Dear Director,

RE: Investigation 605 – Ammonium nitrate from Lithuania and Vietnam – Whitehaven Coal interested party submission

Whitehaven Coal Mining Limited (Whitehaven) uses the goods the subject of this investigation, described in the initiating Anti-dumping notice No. 2022/050 to produce coal.[1] This submission is made under Section 269TC(4)(c) of the *Customs Act 1901* (Cth) (the Act).

On 4 April 2022, members of the Applicants, namely CSBP Limited (CSBP), Orica Australia Pty Ltd (Orica) and Queensland Nitrates Pty Limited (QNP) (collectively, the Applicants) applied for dumping duties (the Application)[2] based on the investigation period 1 April 2021 to 31 March 2022.

Pursuant to Section 269TG of the Act, dumping duty notices will not be published if dumped exports did not cause or threaten material injury to the Applicants during the period of investigation.

[1] EPR 605, Doc 003, ADN 2022/050 – Initiation of Investigation 605.
[2] EPR 605, Doc 001, Applicants – CSBP Limited, Orica Australia Pty Ltd, Queensland Nitrates Pty Ltd – Application for an Investigation.

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1. Our interest in the investigation

As a significant user of ammonium nitrate, and the dominant player in Australia's only emerging high-quality coal basin, Whitehaven has taken a keen interest in this investigation.

Whitehaven consumes approximately [number] tonnes of ammonium nitrate each year for mining operations located in New South Wales. Our ammonium nitrate consumption consists of both Low Density Ammonium Nitrate (LDAN) and Ammonium Nitrate Solution (ANSol) contained in Ammonium Nitrate Emulsion (ANE or bulk emulsion). Our mines require water resistant bulk explosives to break the rock and access the coal. The emulsion component provides water resistance to the bulk explosive whilst the LDAN provides certain desirable technical characteristics to the final bulk explosive as well as helping Whitehaven manage costs, since prices for ANE are more expensive than LDAN.

Please refer to our expected consumption of ammonium nitrate below:

[table showing forecasted amount of ammonium nitrate consumption]

Table 1 - Whitehaven expected annual AN consumption

The source of the ammonium nitrate we consume was, and continues to be, the Australian industry producing like goods.

2. Summary of submissions

We respectfully request the Commission to acknowledge the following difficulties facing the Applicants in discharging the burden of proof to evidence claims of material injury alleged in the Application:

- The injury determination must be based on facts and evidence pertaining to the investigation period;
- The market share of imports is insignificant, and so any finding that those imports have caused material injury must be based upon unambiguous evidence supporting the Applicants' claims; and
- The Commission's findings must align with Australia's international obligations to make positive injury determinations based on facts and *positive evidence*, especially in relation to the role of imported goods during tender negotiations either during the investigation period or afterwards.

In relation to the alleged injury, we submit that:

- long-term contracts for the supply of explosives and associated services shield the Australian industry from import competition for ammonium nitrate;
- long-term explosives supply contracts are not awarded because of the price of ammonium nitrate since contracts are for a bundle of goods and services; and
- injury, if any, sustained by the Applicants were caused by factors other than dumping including the effect of contractual "strike price" rise and fall provisions.

Whitehaven submits that the Australian industry, as a whole, has not suffered material injury because of the allegedly dumped exports from the subject countries.

We also do not see any foreseeable or imminent threat of material injury caused by dumping, such that the imposition of dumping duties is warranted.

Accordingly, we agree that the Commissioner should terminate the investigation with respect to the exporters from the subject countries under Section 269TDA(3) of the Act in the case of Chile.[3] Further, we submit that the Commissioner should also terminate the investigation under Section 269TDA(13) of the Act in the case of Lithuania and Vietnam.

[3] EPR 605, Doc 015, File Note – ADC Intention to terminate investigation in relation to Chile.

3. The Applicants' material injury allegations

Whitehaven is perplexed by the Applicants' insistence that they have suffered material injury as a result of the alleged dumped exports from the subject countries. The information in the Application shows a massive, profitable and growing Australian industry in comparison to steady and insignificant import volumes. A range of publicly available information details events unrelated to ammonium nitrate exported to Australia that have been responsible for material injury that the Applicants claim they have suffered. Further publicly available information suggests that the Applicants are not suffering material injury in the ways they have claimed.

We do understand that a finding that dumping has caused "material injury" is a condition precedent to the imposition of measures, but surely the Applicants calling for government protection need to make a factual case for that protection? Surely, the Applicants must clearly link the impact of dumped products to material injury suffered and demonstrate that the claimed injury does not result from other, unrelated factors? Afterall, what they are asking for is government intervention in a market which will have the effect of (a) imposing additional costs on consumers and/or; (b) reinforce their pricing power. Amongst other things, this will hurt smaller businesses operating in the ammonium nitrate market downstream. We do not see a compelling case for this form of market intervention in anything put forward by the Applicants.

Adding to the confusion is that the Applicants' material injury allegations have been made in ignorance of the statutory obligations and limitations inherent in the Minister's power to impose anti-dumping measures, as we discuss below.

1. Injury determination based on period of investigation

At present, there is a lack of clarity regarding what the material injury allegations actually are. We do not consider there to be an appropriate factual basis to ascertain that injury has been caused by the relevant imports. The allegations made to date do not have a clear relationship to the investigation period, are contrary to publicly available information and are contrary to the established practices of the Australian ammonium nitrate market. This does not illustrate any basis to impose anti-dumping measures.

The Applicants have claimed material injury in the form of:[4]

- Price suppression, particularly in 2019 and 2020;
- Diminution in profit during 2019, 2020, continuing in 2021;
- Deterioration in unit profit from 2018 to 2021.
- Deteriorations in each of the following indicators:
  - Revenues (FY19 and FY20): CSBP
  - Return on investment (FY21): CSBP
  - Capital investment (2020 and 2021): Orica
  - Revenues (2020 and 2021): Orica
  - Returns on investment (2020 and 2021): Orica
  - Employment numbers (2020 and 2021): Orica
  - Capital investment (FY21 and H1 of FY22): QNP
  - Less than adequate return on investment for reinvestment purposes: QNP

The alleged injury occurring outside of the investigation period, whether real or not, is not relevant to the Minister's discretion to impose measures under Section 269TG(2). There are two primary reasons for this.

Firstly, and fundamentally, only injury suffered during the investigation period as a result of dumping can justify the imposition of dumping duties. Dumping must be the *cause* of said injury, and a finding of dumping must be based on a

[4] Application, page 23.

comparison of the prices of ammonium nitrate exported to Australia during the investigation period with corresponding normal values during that period.[5] Any determination of dumping prior to the investigation period is not permitted.[6]

Consequently, whatever injury is said to occur prior to the start of the investigation period, namely 1 April 2021, cannot have been *caused* by dumping. Dumping is a finding that can only be made using the facts from the period of investigation. The allegations relate to circumstances that occurred prior to the investigation period. As such, much of the Applicants' injury claims cited above is not relevant to the Minister's decision to impose measures.

The second issue with these injury allegations is that the performance of the Australian industry is tied to ongoing explosives supply contracts, preceded by lengthy negotiations. There are two implications arising for the Commission's conduct of this investigation, depending on the timing of the negotiations.

- If negotiations occurred before the investigation period, these cannot be examined in this investigation since the key fact will be whether rival imports from the subject countries were proposed at dumped prices. Exports from Lithuania and Vietnam cannot be presumed to be dumped at that time.
- If negotiations occurred during the investigation period, the link between the allegedly dumped imports and the Applicants' claims of injury is still tenuous. There are many reasons why imports from the subject countries may not have had any impact at all on negotiations. We consider that the ADC would need to inform itself of the course of negotiations, to be able to ascertain whether imports had any impact on the ultimate agreed outcome. Even where import data is considered, there would likely be many intervening factors and consideration that were had between the parties before any agreement was arrived at. These would sever the causative link between the imports, if they were at dumped prices, and the Applicants' injury, if there was any injury at all.

In relation to the alleged claims of injury during the period of investigation, there is the question of accuracy to the allegations in light of publicly available information. For example, Orica's current levels of profit and profitability, which they complain is lower than they would like, have not stopped them from committing AUD37 million in investments at the Kooragang Island facility.[7] Orica is also considering access to hydrogen for its Kooragang Island facility and to locally produced ammonia for its Yarwun facility, which would involve further investment and likely off-take agreements.[8,9] Furthermore CSBP is considering a AUD500 million plus investment to expand the ammonia plant in Kwinana.[10] Where then, is the deterioration in capital investment? The logic behind these allegations needs to be revisited.

If any of the claimed trends in the Applicants' performance are verified by the Commission and confirmed to be correct, those declines might have been caused by factors other than dumping. If so, this must not be attributed to dumping so that the Australian government can intervene using trade remedies. Some examples of other factors are changes in demand and the effects of competition amongst the members of the Australian industry listed in Section 269TAE(2A)(c) and (d) of the Act respectively. We discuss this further at Sections 4 and 0 of this submission.

2. The market share of imports is negligible

The Customs Act includes certain minimum standards to control what may be investigated. As an example, termination of an investigation is mandatory under Section 269TDA(3) of the Act if imports from each subject country were less than 3% of total Australian import volumes. Think of this as a fail-safe, recognising that there is a point at which the volume of imports is so small that the question of whether they are injuriously dumped does not need to be investigated. The statutory obligation, the exercise of which is not tempered by any form of discretion, is that the investigation *must* be terminated in these circumstances.

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[5] Section 269TACB(1)(b) and (c) of the Act. Worth noting also is that the note to Section 269T(2AE) explains that *"a determination of whether dumping has occurred by reference to goods exported to Australia during the investigation period."*

[6] Section 269T(2AE) of the Act.

[7] Orica press release, 28 February 2022, <https://www.orica.com/news-media/2022/orica-and-origin-to-partner-on-hunter-valley-hydrogen-hub#.YsdCry_J1uU>.

[8] Ibid.

[9] Orica press release, 12 April 2022, <https://www.orica.com/news-media/2022/orica-and-h2u-group-team-up-on-gladstone-green-ammonia-project>, which notes:
Orica and H2U Group ("H2U") […] will explore opportunities for an exclusive domestic green ammonia offtake and supply agreement. The potential agreement would see green ammonia supplied directly to Orica's Yarwun manufacturing plant from H2U's proposed Yarwun green ammonia production plant.

[10] Business News, 30 June 2021, <https://www.businessnews.com.au/article/CSBP-considers-500m-ammonia-project>.

Whitehaven understands that Section 269TDA(3) of the Act relates to subject imports as a fraction of all imports. Due to the small volume of total imports, even the limited exports from Vietnam and Lithuania to Australia exceed the 3% threshold for automatic termination. Nonetheless, Australian law recognises that smaller volumes of imports are likely not materially injurious.[11]

One of the notable aspects of this investigation is the gaping discrepancy in market share between the Australian industry and imports of ammonium nitrate. The Australian industry, including the Applicants, represent a clear majority of the market, as illustrated below:

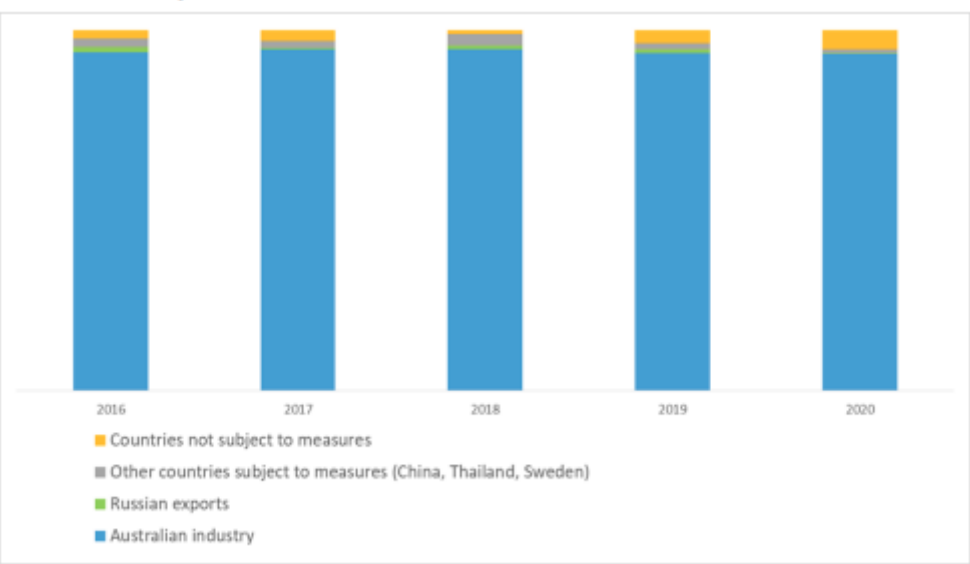

Figure 1- REP 565 Australian market share (%/FY)[12]

Imports are only a small component of the Australian market.

Further to this, the market share of the imports subject to this investigation has been trending downward since 2018. Total import volumes during the years 2016 to 2021 were reported in the Application at page 24 using ABS import data reported in a confidential attachment to the Application. We have summarised the information into a chart, below.

[11] While the *Ministerial Direction on Material Injury 2012* provides that there is no minimum standard for determining whether imports have sufficient share of the Australian market to cause material injury, it does also recognise that *"…in cases where the dumped or subsidised imports hold a small share of the Australian market, it may be difficult to demonstrate material injury".* This means material injury is a separate question to minimal market shares. The "no minimum standard" direction does not do away with the requirement that any material injury finding must be based on facts, nor the difficulty in making such a finding where the market share is tiny. Nor does it temper the Minister's direction that injury caused by dumping must be material in degree, and also greater than that likely to occur in the normal ebb and flow of business.

[12] REP 565, Doc 050, Final Report 565, page 34.

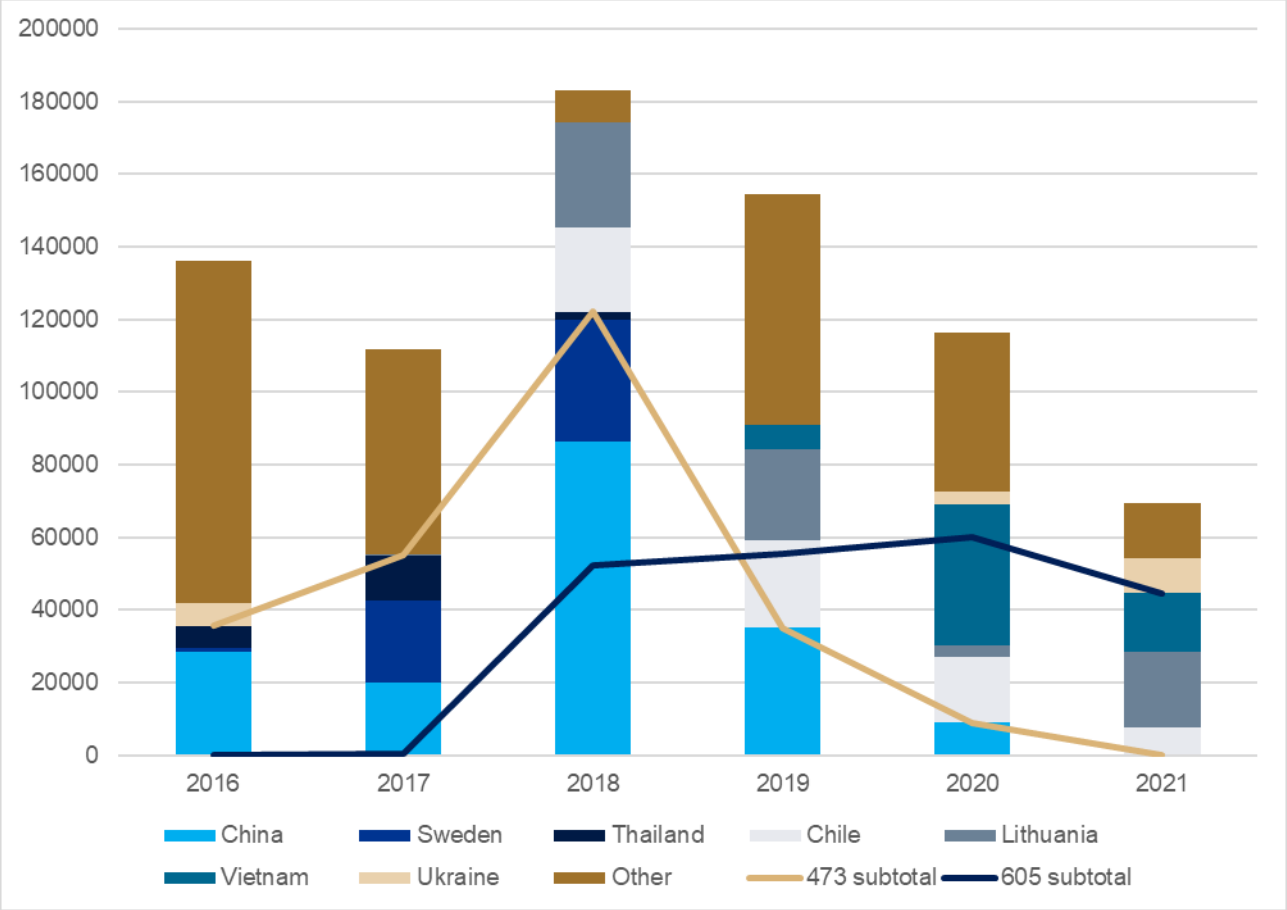

Figure 2 - Application Table A-9.1 changes in import volumes[13]

There are two things to note about the source of the data provided by the Applicants. Firstly, the volume of imports reported for Chile, Lithuania and Vietnam in table A-9.1 does not match the purported source of the data in table B-1.5. This was also noted in the submission from the European Commission and Ministry of Foreign Affairs of the Government of Lithuania as *"raising questions as to the purpose and legality of the dumping and injury allegations"*.[14] We agree with their observation that the discrepancy in the data raises doubts about the accuracy of the information provided to the Commission. Secondly, it is not clear whether the import volumes reported in the Application include imports made by members of the Australian industry themselves. The Commission has previously verified that members of the Australian industry import the goods as well as producing them.[15] If the imports of the goods made by the Australian industry were included in Table A9.1, this would be misleading because such imports cannot be injurious to the Australian industry. They should not be used to "inflate" the purported impact that imported goods have on the Australian market.

Assuming that the import volumes made by the Applicants were *not* included in the Application, we estimate that the market share for imports of the goods from Chile, Lithuania and Vietnam during calendar year 2021 was roughly 0.83%, 2.31% and 1.79% respectively. Please see the calculations below:

Breakdown	2016	2017	2018	2019	2020	2021
Chile % of total imports	0.02%	0.01%	12.61%	15.67%	15.49%	10.83%
Lithuania % of total imports	-	0.38%	15.98%	16.04%	2.81%	29.97%
Vietnam % of total imports	0.03%	-	-	4.34%	33.25%	23.28%

[13] Based on information provided in the Application, page 24.
[14] EPR 605, Doc 008, Foreign Government – European Commission submission in response to initiation, page 4.
[15] EPR 565, Doc 050, Final Report 565, page 26.

Australian industry market share	94.23%	93.27%	93.27%	92.31%	92.31%	92.31%[16]
Chile % market share	0.00%	0.00%	0.85%	1.21%	1.19%	0.83%
Lithuania % market share	-	0.03%	1.08%	1.23%	0.22%	2.31%
Vietnam % market share	0.00%	-	-	0.33%	2.56%	1.79%

Table 2 - Market share of imports[17]

It is also apparent that this trend continued into the investigation period itself. Both the Government of Chile and exporter Enaex S.A. confirmed that there were zero imports from Chile during the investigation period,[18] volumes from Vietnam appear to have completely halted, and volumes from Lithuania further decreased.

Given imports from these countries are really the smallest fraction of the Australian market, and the Commission has indicated that it will terminate the investigation in relation to Chile, we submit that only extreme circumstances could have materially injured the Australian industry as a whole. The impact of a small and further decreasing volume of imports would most likely be negligible to the Australian industry. The Applicants need to provide evidence and reasoned argument to support their position to the alternative.

Accordingly, we request that the investigation be terminated against imports from Lithuania and Vietnam under Section 269TDA(13) of the Act because there are no facts that support the conclusion that any injury caused by these miniscule volume of imports was material.

3. Minister's satisfaction of material injury based on facts

Due to the swath of information redacted due to confidentiality in the application it was difficult to decipher the Applicants' injury allegations. The Consideration Report provides some clarity on the general nature of those allegations:

> *On the information presented by the applicants, the presence of the dumped goods in the market have influenced contract negotiations and the prices payable under existing contracts. But for the dumped goods, the commission considers there are reasonable grounds for expecting that the Australian industry could have achieved higher prices.*[19]

Whitehaven is deeply concerned that the investigation may devolve into this zone of pure conjecture. Our view is that such a claim is an example of the type of speculation that cannot, and should not, form the basis of a positive injury determination. Indeed, the Minister's satisfaction, in Section 269TG(2) of the Act, that material injury was caused by dumping during the investigation period must be *"based on facts and not merely on allegations, conjecture or remote possibilities".*[20]

This terminology is taken from Article 3.7 of the Anti-Dumping Agreement (ADA), a treaty document, which deals with "threats" of material injury. However, in Australian law, the exact wording appears in Section 269TAE(2AA) of the Act which covers a determination by the Minister that material injury has been suffered by the Australian industry producing like goods as a result of any dumping. At the very minimum, we interpret this as applying the overarching obligations in Article 3.1 of the Anti-Dumping Agreement, being that such a determination be based on "positive evidence" and an "objective examination", in Australian law.

It is extremely important to clearly establish whether any injury was caused by dumping. In our view, the mere assumption that the Australian industry could have achieved higher prices in negotiations than it did is not sufficient for a determination of material injury to be made. From what we gather, the inability to achieve these hypothetical higher-priced outcomes is the "injury" suffered by the Australian industry. But these alternative outcomes are based purely on the allegations of the Applicants themselves. This is hardly "positive evidence". Further, the quantification of such injury is comfortably within the realm of conjecture, so any assertion that this injury is material to the Australian industry as a whole can hardly be "based on facts".

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[16] Assume the Australian industry's market share in 2021 was the same as in 2020.
[17] Based on information in Table A-9.1 of the Application, page 24.
[18] See EPR 605, Doc 004 – submission – Government of Chile and EPR 605, Doc 007 – submission – Enaex S.A.
[19] Page 24.
[20] Section 269TAE(2AA) of the Act.

The Panel's Report in *Mexico – Corn Syrup (Article 21.5 – US)* provides an apt example of the kind of limitations that apply to this form of speculative thinking. This dispute related specifically to the use of allegations, conjecture and remote possibility as envisioned by Article 3.7 of the ADA. In particular, the Mexican investigating authority had assumed that import volumes from the USA would increase and, based on simulations, forecasted declines in the economic factors of the Mexican corn syrup industry. However, these simulations were based on a series of untested assumptions regarding the substitutability between sugar and high fructose corn syrup, and so were based on conjecture and projections that had no basis in fact.[21]

This is relevant context for the interpretation of Section 269TAE(2AA) of the Act. Negotiations between supplier and customer are by nature adversarial – the supplier wants to achieve the highest price and the buyer wants to achieve the lowest price. This is the market mechanism at play. The Commission found that members of the Australian industry compete with each other, as well as with legitimate, i.e. not dumped, imports. The customers run the tender process, for explosives and services, over many years. There are many untested assumptions in the *mere assertion* that the Applicants could have negotiated higher prices if there were no imports from the countries subject to this investigation. At present, all that we see on the public record is assertion, untested speculation and oversimplification, which is no basis upon which to impose measures.

Further, Whitehaven urges the Commission to take care in considering what *exactly* is the subject of the negotiations. As we discuss below, in our experience, many negotiations with the Australian industry have limited dealings in the like goods produced by that industry.

4. The price of ammonium nitrate does not define the award of long-term contracts

The information on the public record provides very little detail regarding the "negotiations" that were cited as supporting the injury allegations. However, we take that some of those statements relate to Orica. Whitehaven is familiar with Orica's operations. We understand that many of Orica's negotiations with mining companies are generally for bundled supply of goods and services, rather than for supply of ammonium nitrate in isolation. We submit that the contract negotiations concerning a bundle of goods and services are not particularly relevant to this investigation into the pricing of ammonium nitrate imports, as described in the notice of initiation.

Whitehaven has experience with this form of bundled contract. It is our understanding that the prices offered by respondents (explosives companies) to these tenders are informed by the expected profitability generated from supplying all required products and services set out in the tender. Further, the customer will make the final purchasing decision based on its total cost of ownership.[22] So, the cost/profitability of each good and service in isolation is not determinative to the outcome for either the buyer or the seller.

Which is to say, if a component of a tender relates to the supply of ammonium nitrate (with other components relating to bulk emulsions, bulk explosives, services, equipment etc.), the price of that ammonium nitrate is influenced by the prices that can be achieved for the other goods and services within the bundle. As a result, the simple assumption that the price of explosives and down-the-hole services *may* be higher if imports were not present in the market cannot be sustained.

Whitehaven's experience in choosing a supplier is illustrative. This information demonstrates that there is a raft of considerations during negotiations that are far more relevant than the strike price of ammonium nitrate. As a result, the presence of imports while tenders are being negotiated in the Australian market is not, in and of itself and regardless of dumping, a reason to impose dumping duties.

Prior to [date], [supplier] supplied explosives and down-the-hole services[23] to Whitehaven. [Supplier and details of their ammonium nitrate supply]. [Supplier] produced explosives from this ammonium nitrate and supplied the explosives and down-the-hole services to Whitehaven.

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[21] This was also supported by the Appellate Body in *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States (WT/DS132/AB/RW)* at paragraph 92.

[22] "Total cost of ownership" refers not only to the out-of-pocket cash costs incurred to purchase goods and/or services but also takes into account non cash costs that may be incurred in terms of safety, product quality, supply risk, management time etc.

[23] Down-the-hole services relate to the delivery of bulk explosives down the blast hole. Typically, bulk explosives are loaded into bulk explosive manufacturing trucks ("Bulk Trucks") that head out to the mine-site and blend the bulk explosive product from its pre-cursors, prior to delivering it down the blast hole. Such services typically also involve the rental of fixed and mobile equipment to the mine (silos, pumps, site offices, pick-up trucks, magazines, Bulk Trucks etc) as well as the labour required to operate all the equipment and provide the service.

In [date], the term of Whitehaven's agreement with [supplier] was coming to an end and Whitehaven issued a request for tender. This was a tender for a contractor to provide bulk explosives and down-the-hole services. Three potential contractors were short-listed: [short listed potential suppliers].

The scope of the Whitehaven tender related to:

- Down-the-hole services, covering labour, mobile and fixed equipment;
- Supply of bulk explosives; and[24]
- Supply of the accessories necessary to control the detonation of the explosives (typically including a 'booster' and a 'detonator).

We want to emphasise, from Whitehaven's perspective, that the goal of the tender was to find the most suitable explosives and down-the-hole contractor with the lowest total cost of ownership for the required bundle of goods and services. This assessment was based on the entire tender offer, not merely just one aspect of that offer. To the degree that cost competitiveness was assessed, that assessment related to bulk explosives, equipment labour and accessories, as a whole.[25]

Ultimately, [supplier] was awarded the supply contract. A significant reason for this was [details of supplier's proposal]. The other parties to the tender could not match that offer.

We cannot be certain this is one of the negotiations cited in the Application. If it was, then it has been cited erroneously. [Commercial details]. Ultimately, all of the ammonium nitrate used under the new contract has been supplied by [manufacturer]. Thus, [manufacturer] is in the same position it was prior to Whitehaven's tender process [details of manufacturer's supply to Whitehaven].

So as you can see, these negotiations are complex. If it is the case that the applicants have cited Whitehaven's tender as one of the "negotiations" we would welcome the opportunity to address their allegations more fully. However, we do not consider the negotiations for bulk explosives as evidence of injury to the Australian industry producing like goods, i.e. ammonium nitrate in solid form. We urge the Commission to analyse the negotiations cited in the Application and obtain input from the counterparties to the Australian industry. Before any duties are imposed, the Commission should satisfy itself that the negotiations were in relation to (i) like goods supplied by the Applicants; and (ii) the relevant imports in this investigation. Reliance on negotiations that do not meet the conditions above will draw a tenuous link between the Applicants' alleged injury, if any, and the subject imports, if dumped.

4. Alleged price suppression is caused by contract terms

1. Rise and fall provisions more influential than strike prices

Increases in raw material prices that the Applicants have not been able to pass through to customers quickly enough or at all due to contractual rise and fall provisions are an example of injury caused by a factor other than dumping. This should not be attributed to dumping.

Orica explained that its Australian performance in the second half of 2021 was due, in part, to the time lag between rises in costs and the date that these costs could be passed through to customers:

> *EBIT impacted by lag in recovery of rising ammonia costs which increased ~85% in 2H21 on the pcp.*[26]

We would agree with Orica's assessment. Given the unprecedented levels and speed of international ammonia price rises, we think that the pricing mechanisms in the long-term contracts would have been the major drivers of the Applicants' material injury claims. The concept of "price suppression" is not informative in this case. Because of the use of long-term contracts to sell ammonium nitrate, variations to the Applicants' selling price necessarily trail variations in

[24] Whitehaven's understanding is that bulk explosives and ANE are not considered to be a "like goods" to ammonium nitrate and so are not subject to this investigation.
[25] [Details of Whitehaven's tender evaluation.]
[26] Orica Full year Investor Presentation, November 2021, <https://www.orica.com/Investor-Centre/results-presentations>, p10 & p44: *"EBIT impacted by lag in recovery of rising ammonia costs which increased ~85% in 2H21 on the pcp,"*

cost. Any perceived price suppression is caused by the contractual mechanisms the Australian industry has bound itself to, rather than any imports from the subject countries.

For context, a manufacturer of ammonium nitrate will either purchase ammonia at international prices or manufacture that ammonia on-site from natural gas. When negotiating long-term contracts with their customers, a “strike price” is agreed which is then subject to rise and fall provisions. This is how the manufacturer passes through variations in costs to its customers. If the manufacturer purchases ammonia and wishes to pass through the cost variations in that commodity to the customer, they will link the provisions to the price of international ammonia (in which case the price is “ammonia-backed”). Similarly, if the manufacturer produces their ammonia from natural gas and wishes to pass through that cost variation, the provisions will be linked to the price of gas (and the price is “gas-backed”). Additionally, ammonium nitrate producers that manufacture a portion of their ammonia and purchase a portion of it may also choose to offer rise and fall provisions that are a blend of both gas and ammonia indices.

These rise and fall price mechanisms govern the degree and timing of the pass through of ammonium nitrate raw material costs to a producer’s customer, causing the price suppression mentioned in the Application. When costs rise, the producer cannot pass on those costs immediately, which squeezes their margins. However, if the indexed costs fall, the producer may benefit from the pricing mechanisms if they chose to establish an exact pass through. Of course, this is not caused by imports – it is a mechanism the producers have freely agreed so that their risks can be managed.

We have noticed in previous investigations the Commission has focussed on the “strike price” in assessing injury. As we have noted above, these contracts are far more complex and detailed than that. The operation of the rise and fall mechanisms have a more fundamental impact on the price and profitability achieved over the life of the contract.

2. Divergence of ammonia and gas indices

Ammonia prices have risen higher and more quickly than gas prices. The divergence in input prices is a materialisation of inherent risks in the industry. This is not a form of injury, because pricing decisions have their own risks and rewards.

For example, under [contract], an adjustment formula based on [input for adjustment formula] was used for [product 1]. Whitehaven also purchased [product 2] from [supplier], based upon international ammonia prices. This led to prices that developed materially differently over the course of the contract. During that time, international ammonia costs were subdued and so [product 2] prices at times were below the strike price. However, [input for adjustment formula] increased, leading to a substantial increase in the cost for [product 1]. In the investigation period, [manufacturer’s input for adjustment formula] costs declined slightly while ammonia prices almost tripled. A contract that adopts rise and fall provision based solely on ammonia prices would lead to a significantly different outcome than a contract based solely on [input for adjustment formula] prices, as the below chart illustrates:

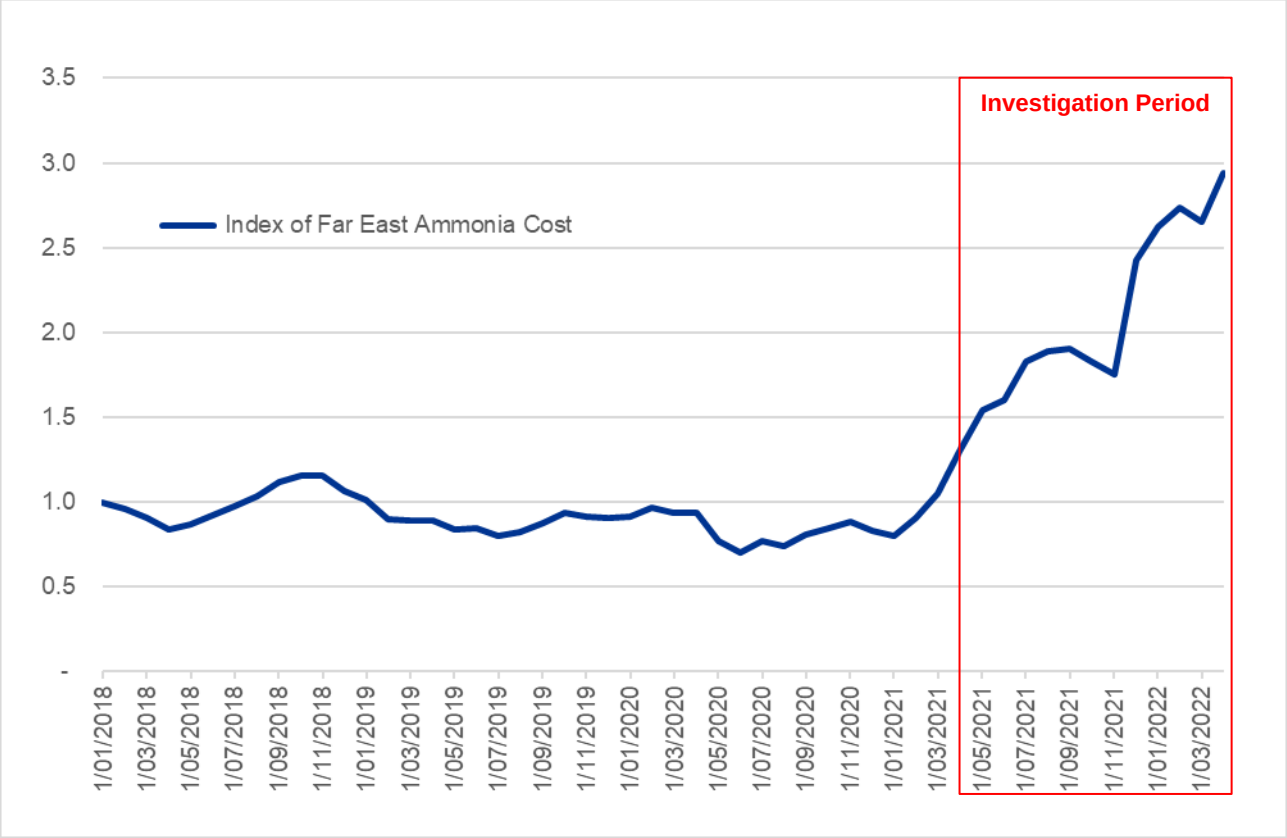

Figure 3 - Index of gas and ammonia price changes[27]

[Description of manufacturer's input prices for adjustment formula in Figure 3]. The dark blue line shows Far East ammonia prices on "cost and freight" terms (CFR) reported by Fertecon, which is the international ammonia price most relevant to the Australian market. The chart is an index of the data, with base period January 2018.

From January 2018 until January 2021, the cost of [manufacturer's input for adjustment formula] was increasing. Over the same period, and until March 2021, ammonia remained within a range of plus and minus 20%. From February 2021 onwards, [details of change in manufacturer's input for adjustment formula] which is a trend that continued at least to the end of the investigation period. Meanwhile, the ammonia price increased sharply from April 2021 onwards to a peak almost three times March 2021 prices in March 2022. The time period of the rapid increases in ammonia price matches the investigation period of this investigation.

3. No injury other than that caused by other factors

Orica and the other Applicants selling gas-backed volumes may not have actually suffered injury, since pricing decisions are simply a part of business, with its own risks and rewards.

Any negotiation will to some degree be based on the operation of the proposed rise and fall provisions. The parties to the negotiation will likely model out the impacts of proposed rise and fall provisions, to assess likely economic outcomes arising over the life of the agreement. Each party will be attuned to who bears the risk of rising costs, and will seek to achieve rise and fall provisions that minimise the risks they bear. As such, there is a balance struck – a supplier may choose a lower strike price where they consider the rise and fall variable provisions are favourable. So, once more, focussing on the strike price provides no insight into what outcomes were achievable in a negotiation.

We think that [manufacturer] adopts rise and fall provisions that are to some extent indexed to [input for adjustment formula]. Historically, this would allow for more stable profit margins, because prices of natural gas are generally more stable than prices of international ammonia. However, it also limits the supplier's ability to increase prices in response to increases in the price of ammonia. As we have noted above, the price of ammonia has significantly increased in recent

[27] [Source of manufacturer's input prices for adjustment formula] and Far East ammonia prices (CFR) reported by Fertecon.

years, but [manufacturer's] prices would not reflect this. Such effects are not injury. If the Commission decides it is valid form of injury, we submit it must not be attributed to dumping in this investigation.

5. The impact of other factors cannot be discounted

As we appreciate it, the Applicants have been dealing with matters of far greater significance than the small volume of imports that are targeted in their application. This is not to say that we consider the Australian industry to have been materially injured, because the financial data publicly available suggests their businesses are all significantly profitable. However, there are external factors that have no doubt weighed on their performance.

We raise these issues because we think it would be wrong to attribute the impact of these external factors to the imports that occurred during the investigation period.

For example, Orica estimated that trade tensions between China and Australia would reduce sales volumes of ammonium nitrate by 60,000 tonnes in the half year ending 31 March 2021, with the situation continuing after that date.[28]

> *Trade tension between Australia and China is ongoing and is impacting demand in Orica's higher margin Australian thermal coal market. In the first half of FY21, demand for Orica's products and services from affected mines is expected to be approximately 60 thousand tonnes of ammonium nitrate lower than the prior corresponding period (pcp).*[29]

Another issue for the Commission to consider is whether competition between the members of the Australian industry has caused any injury to the Applicants. Injury caused by factors other than dumping, such as *"competition between […] Australian producers of like goods"* must not be attributed to the subject imports, pursuant to Section 269TAE(2A)(d) of the Act.

In previous investigations, the Commission has found that the members of the Australian industry do compete with each other:

- *the three ammonium nitrate manufacturers (Orica Australia, Dyno Nobel and QNP) in Queensland compete for contracts to supply explosives manufacturers and associated blasting services providers, including mining principals. As mentioned above, Orica Australia and Dyno Nobel also compete with other market participants to provide mining blast services; and*
- *CSBP was the sole ammonium nitrate manufacturer in WA until 2017, when Yara Pilbara Nitrates commenced production in the Pilbara region. Subsequent to Investigation 473, the Commission understands that Yara Pilbara Nitrates commenced producing and selling commercially material quantities of ammonium nitrate during 2020.*[30]

The competition between the members of the Australian industry remains relevant to the investigation. The relative market shares of total imports and the Australian industry have stayed approximately the same over the last five years (please refer to Figure 1). Now, with high ocean freight costs and raw material costs, imports are less competitive in the Australian market. The main source of competition, in our view, is between the members of the Australian industry themselves. Given the small volume of imports discussed above in Section 3.2, we believe that the Applicants' pricing is far more influenced by it biggest competitors, namely the other members of the Australian industry.

The effects of legitimate competition between the members of the Australian industry, which is ultimately good for customers, should not be falsely attributed to dumping.

[28] Orica's financial year is the year ending 30 September.
[29] Orica press release, 26 February, 2021. <https://www.orica.com/news-media/2021/market-update-on-factors-impacting-first-half-fy21>
[30] EPR 565, Doc 050, Final Report 565, page 28.

6. No threat of material injury from dumping

The Applicants are likely at full capacity and there is no imminent and foreseeable threat of material injury caused by dumping. Furthermore, the Applicants are generally performing well financially and do not require protection in the form of dumping duties.

Orica stated publicly that they are sold out of ammonium nitrate in Australia:

> *I don't think we can step in if someone needs several hundred tonnes of AN in a hurry. We won't be able to do that.*[31]

It is difficult to predict the future of the Australian market for ammonium nitrate, based on snapshots of negotiations leading up to and during the period of investigation.

Our view is that the Applicants' ability to adjust prices under long-term contracts is a factor reducing the relevance of dumped imports from the subject countries during tender negotiations. From a threat perspective, it is a contractual certainty and clearly foreseeable that prices will be adjusted in accordance with the relevant indices. In relation to the effect of imports from the subject countries in a tender negotiation year, our view is that the total volume of subject imports is too small to make any material impact on the Applicants' performance. Looking into the future, any impact is more remote, given the lack of global capacity in light of current events in Europe and high ocean freight costs.

We observe that from January to May 2022, less than 8,000 tonnes of goods in total has been imported from the subject countries. Such small volumes do not even represent 1% of Australian demand and cannot be positioned as a threat to the Applicants with any credibility. Furthermore, such small volumes call into question the claimed loss of 215,000 tonnes of sales at Section 5.3.1 of the Consideration Report. At that rate, it will take more than 10 years for that quantity of ammonium nitrate to be imported, which is clearly absurd.

We ask that the Commission's findings on the issue of threat be based on facts, not speculation, as outlined in Section 3.3 of this submission.

7. Final remarks

Whitehaven operates four mines, three open-cut and one large underground mine, in the Gunnedah Coal Basin of NSW. Our operating assets are complemented by two high-quality, near-term development assets, being Vickery, near Gunnedah, and Winchester South, in Queensland's Bowen Basin. Over our almost 20-year history, including 12 years as a publicly listed entity on the Australian Securities Exchange, we have developed a growing reputation for excellence in project delivery, safe operation, and targeted investment in the local economy and community.

Being able to source explosives that incorporate competitively priced ammonium nitrate is critical to our business. With the greatest of respect, every trade barrier the Anti-Dumping Commission imposes to the import of ammonium nitrate further entrenches the market power the members of the Australian industry exercise in their own geographic markets. There is no dispute that the Australian industry is profitable and no suggestion they have lost market share or sales volumes, any material injury they allege they have suffered is in the nature of speculation. Accordingly, we hope that the Commission will consider our submissions to terminate this investigation.

If anything further is required from us, we would be happy to oblige.

Yours sincerely

Dean Lawrence
General Manager Procurement

[31] Mining Magazine, 12 May 2022, <https://www.miningmagazine.com/financial-results/news/1432109/orica-posts-loss-quitting-russia>.