Australian Government
Anti-Dumping Review Panel

ADRP Conference Summary

2019/107 - Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand.

Panel Member	Leora Blumberg
Review type	Review of Minister's decision
Date	11 May 2020
Participants	Glencore Coal Assets Australia: • Darren Oliver (Glencore Coal) • Dave Poddar (Clifford Chance) • Mark Grime (Clifford Chance) • Robert Gare (Moncourt Group) Downer EDI Mining-Blasting Services • Daniel Moulis (Moulis Legal) Yara AB • Alistair Bridges (Moulis Legal) • Mark Riding (Yara AB) Orica Australia (Orica) • Malcolm Hart • Maria De Luca John O'Connor representing Queensland Nitrates, CSBP Limited and Orica
Time opened	11:00am AEST
Time closed	11:30am AEST

Background

In a conference held under s.269ZZHA of the *Customs Act 1901* ("the Act") on 5 May 2020, the Anti-Dumping Review Panel ("Review Panel") sought clarification from the Anti-Dumping Commission ("ADC") and a better understanding of the reasons for the finding relating to "the reassessment of the materiality of injury with regard to profit foregone", in the report of the Reinvestigation of Certain Findings in REP 473 ("Reinvestigation Report"). The public summary of the conference held on 5 May 2020 was circulated to all participants as well as a copy of the public version of the Reinvestigation Report, to assist parties in preparing for this conference.

Purpose

To put such clarifications and information provided by the ADC during the conference of 5 May 2020, to the Review Panel applicants, being Yara AB ("Yara"), Downer EDI Mining - Blasting Services Pty Ltd ("DBS") and Glencore Coal Assets Australia Pty Ltd ("Glencore") as well as to the industry applicants in ADC Investigation No. 473, being CSBP Limited

("CSBP"), Orica Australia ("Orica") and Queensland Nitrates ("QNP"), and to provide all parties with an opportunity to comment thereon.

The conference was held pursuant to section 269ZZHA of the Act.

The conference was not a formal hearing of the review and was not an opportunity for the parties to argue their case before the Review Panel.

I have only had regard to comments and information provided at this conference as it relates to the ADC's clarifications of its reassessment of the materiality of injury with regard to profit foregone in the Reinvestigation Report, as provided in the conference of 5 May 2020. Any conclusions reached at this conference are based on those comments and information provided in regard to the ADC's clarifications. Information that relates to some new argument not previously set out in REP 473 or the Reinvestigation Report is not something that the ADRP has regard to and is therefore not reflected in this conference summary.

Discussion

During the conference each party was provided with an opportunity to comment orally on the ADC's above-mentioned clarifications in respect of its findings in the Reinvestigation Report relating to of the materiality of injury with regard to profits foregone. Parties were requested to provide a written version of their comments to the Review Panel within a specified period after the conference and the conference was held open for this purpose. [1]

1. Glencore
   See Glencore's written response, attached as Attachment A

2. DBS
   See DBS's written response, attached as Attachment B.

3. Yara
   See Yara's written response, attached as Attachment C.

4. CSBP
   See CSBP's written response, attached as Attachment D

[1] All parties provided written versions of their comments within the specified period.

5. QNP

   See QNP's written response, attached as Attachment E.

6. Orica

   See Orica's written response, attached as Attachment F.

GLENCORE

Attachment A

NON-CONFIDENTIAL
For the Public Register

13 May 2020

Ms Leora Blumberg
Panel Member
Anti-Dumping Review Panel Secretariat
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By email: ADRP@industry.gov.au

1. These submissions are confined to responding to the clarifications and information provided by the Anti-Dumping Commission (**ADC**) during the 5 May 2020 conference with the Review Panel.

2. Glencore maintains the position set forth in its previous submissions made to the Review Panel, being its submissions dated 29 June 2019, 10 September 2019 and 16 October 2019. Those submissions are not repeated here.

3. In its answer to Question 1(i), the ADC states that it considered separately the profit foregone percentages of 2.2% (for the investigation period) and 3.6% (for the post investigation period), "noting that these amounts were directly attributable [to] the dumping found". The conclusions that profits were foregone to this extent, and that these profits foregone are directly attributable to dumping, are disputed – largely for the reasons summarised in its submissions dated 10 September 2019. That aside, the circumstance that the ADC considered separately the 2.2% and the 3.6% figures underlines the impossibility of reaching a finding of material injury. Profit variations in this order are well within the usual ebbs and flows of the Australian industry's profits, as identified in Glencore's 29 June 2019 submissions, paragraph 46 and Glencore's 10 September 2019 submissions, paragraph 5.

4. In its answer to Question 1(ii), the ADC states that Table 2 in the Reinvestigation Report shows, inter alia, what the profit and profitability would have been in the absence of the dumping that occurred in the investigation period. The figures in the rows entitled "Profit in the absence of dumping" and "Profitability in the absence of dumping" are based on the same disputed assertions mentioned in the previous paragraph.

5. In answer to Question 1(iii), the ADC states that the 3.6% profit foregone figure for the post investigation period is material, notwithstanding the increase in profits the Australian industry experienced in this period, because (it says) the increase is explained by increased sales volumes to customers in the Pilbara in circumstances where the Burrup plant located there was experiencing production issues. That

explanation does not provide a basis for regarding the asserted injury as material. Indeed, whatever be the explanation, the increase in profits experienced by the Australian industry in the post-investigation period is inconsistent with a conclusion that it has suffered material injury in this period.

6. In its answer to Question 1(iv), the ADC, when asked to explain its finding that the profit foregone (described as "millions of dollars") is material, refers to the requirement in the Ministerial Direction on Material Injury 2012 that the ADC consider material injury that is not immaterial, insubstantial or insignificant. This does not advance the analysis. It remains the case that the ADC has identified no reference point for comparison. The observations made in Glencore's 10 September 2019 submissions, paragraph 5, are repeated.

7. In its answer to Question 2, the ADC states: "Given that the profit foregone in respect of the seven examples outlined in section 9.2.1 of Rep 473 was determined using a 'but for' analysis and therefore was solely attributable to dumping, this profit foregone is outside of the normal ebb and flow of business". This reasoning is circular. Leaving aside the (disputed) conclusion that the profit foregone in the seven examples was solely attributable to dumping, it remains necessary to test the materiality of the suggested profit foregone *by reference to* the normal ebb and flow of business. Again, this point is identified in Glencore's 29 June 2019 submissions, paragraph 46 and Glencore's 10 September 2019 submissions, paragraph 5. This exercise has not been done.

8. In answer to Question 3, the ADC asserts that the profit foregone of 2.2% in the investigation period, in dollar terms, is not immaterial, insubstantial or insignificant; and that it is not within the normal ebb and flow of business because it was solely attributable to dumping. Those assertions are flawed for the reasons given in paragraphs 6 and 7 above.

Yours sincerely,

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13 May 2020

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By email

Dear Member

ADRP review - ammonium nitrate from China, Sweden and Thailand Conference submission of Downer EDI Mining-Blasting Services

As you know, we are the lawyers for Downer EDI Mining-Blasting Services Pty Ltd ("DBS"). This is the further information submission of DBS within the scope of the conference held in this review on 11 May 2020 under Section 269ZZHA of the *Customs Act 1901*, as invited by the Anti-Dumping Review Panel ("the Review Panel").

We thank the Review Panel for this opportunity to provide information in the context of the said conference for the purposes of this review.

The points we made on behalf of our client at the oral submission stage of the conference are, we think, clear and simple. We wish to reiterate them as follows, largely in terms of our oral submissions as made during the teleconference.

A Necessary coalescence of dumping and injury

Whether or not to impose dumping measures involves a coalescence of dumping and of injury caused thereby. This coalescence must occur in a defined investigation period. Unless that is done the two things cannot be found to have been present or to have occurred at the same time. That necessary "positive evidence" would not be present.[1] Nor would there have been an "objective examination" of the situation under consideration.[2] Further the due process requirements of the WTO Anti-Dumping Agreement and under Australian law would not be met, because interested parties will not be given the

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* art 3.1 ("*WTO Anti-Dumping Agreement*").

[2] Ibid.

evidence or the opportunity to make submissions about the situation after the investigation period.

In this case the Commission has extended out the investigation period to what is called a "post IP" period which, by definition, is not the investigation period.

The case put against our client and the other importers by the domestic industry is that price *offers* were made by them in the investigation period, and that those offers allegedly caused the domestic industry to negotiate for contracts at a lower price than it would have preferred to. The domestic industry goes on to say that the difference between the price it offered and the price it wanted in future years, or at least the post POI, *as well as* in the investigation period, is lost profit that is materially injurious.

As we have maintained, this is an incorrect manner of proceeding.

A but-for analysis of the type the Commission maintains it applied in this case "shifts out" of the Commission's consideration the need to consider the overall condition of the Australian industry in the future period concerned. It denies the need to consider other factors and causes the instruction provided to the Commission by the Minister to have regard to the ebb and flow of business to be ignored, because no analysis is undertaken of these matters at that future time.

We note that the "but for" language used in the Commission's Final Report is absent from the Reinvestigation Report.[3] The Reinvestigation Report refers to the "new information" obtained for the "post IP" period as being:

> *…confidential financial information of applicant industry members… [s]pecifically… production and sales volumes, revenue, costs, prices and net profits.*[4]

About this information the Reinvestigation Report also states:

> *Therefore, and consistent with how the Commission deals with confidential information in a Division 2 investigation, the Commission set out a summary of the new information in the preliminary reinvestigation report allowing interested parties to gain a reasonable understanding of the information without breaching the confidentiality or adversely affecting the industry members' business or commercial interests.*[5]

Firstly, we note that none of that information relates to other economic and market factors relevant to a consideration of whether dumping has caused material injury.

Secondly, the "consistency" referred to, in the context of disclosure of confidential information, is not an argument that can support any claim that natural justice had been provided to interested parties with respect to that information. It is a bootstraps argument to say that because the Commission has always given limited or poor disclosure of essential facts in a "Division 2" proceeding, it is therefore an appropriate level of disclosure.[6]

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3 EPR 473, Doc 065, at pages 48, 58, 70-2, 88, 90, 93 ("Final Report").

4 EPR 473, Doc 071, at page 8 ("Reinvestigation Report").

5 Ibid.

6 Ibid; *Customs Act 1901* Part XVB Division 2.

Thirdly, and most significantly, the Commission's conclusion makes clear that the new information it obtained in the reinvestigation was only for the purposes of verifying the financial condition of the Australian industry applicants, solely in terms of profitability, and not what *caused* that condition to be as it was:

> *As noted in section 2.2.1 of this report, the Commission has used the updated information to determine the Australian industry applicants' net profit for the post-investigation period in order to calculate the profit forgone as a percentage of the Australian industry applicants' profit. The Commission also used this information to determine the change in profitability in the post-investigation period.*[7]

This is still a "but for" analysis, unaccompanied by any dumped exports or finding of same. All that has been employed is a mathematical calculation based on some assumptions and not others.

B The Reinvestigation Report findings do not rely on threat

In the Final Report, this was stated:

> *The Commission's findings relate to dumping that has caused and is causing material injury to the Australian industry, and is not based on threat of material injury.*[8]

No "threat" case was run by the Australian industry and we do not see the language of threat in any of the re-evaluation undertaken by the Commission.

Imposing dumping measures based on "threat" requires a consideration of all likely conditions of the industry in the future, such as costs, competition between domestic members and other imports, whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic process and would likely increase demand for further imports.

This is simply an extension of what must be done in a non-threat case in order to impose measures. That kind of consideration was not done by the Commission in its "post IP" construction.

We therefore maintain that a holistic examination of the Australia industry condition and all of the factors that might impact on that condition was not undertaken in the post POI period and any conclusions based on the examination that did take place are unsound.

Thus, a finding of a 3.2% profit reduction in this post IP caused by dumping is not and could not be based on positive evidence, and the examination of that period was not objective, because if fastened on only one thing without taking into account a whole host of other things.

We submit that the 3.6 per cent number relating to profit foregone is an illusion. It is not a fact for the purposes of determining whether inferred injury was caused in the investigation period, and in the post IP is not accompanied by the host of other considerations that are required to work out whether an Australia industry has suffered material injury or material injury caused by dumping.

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7 Reinvestigation Report, at page 9.

8 Final Report, at page 82.

C Immateriality of injury

We now engage with the "materiality" issue that the Review Panel has squarely raised in the discussion paper.

On behalf of our client we submit:

- That a loss of 2.2% or 3.6% profit, being millions of dollar in an industry whose profit is measured in the hundreds of millions, is not material.
- That there must be "context" for any finding of materiality, which is just another way of saying that there needs to be positive evidence, and an objective examination, of the facts.
- That the Commission admits that it did not consider the 2.2% loss of profit in the IP in context. It did not consider the ebb and flow of business, and the fluctuations in profitability that did occur in the past, or that might occur in the future for that matter, which are within the bounds of profit variability of any industry.

Turning first to the consideration of the ebb and flow of business, the "admission" to which we refer comes in the form of reasoning that maintains that profit forgone because of dumping is not in the normal ebb and flow of business - reasoning that "reads out" the Ministerial direction requirement to consider the ebb and flow of business.[9] This appears to be predicated on a view that dumping is not "normal", or to put it in the terms another Australian industry has recently chosen to do, in its defence against cartel proceedings instituted by the ACCC, that dumping is "illegal".[10] That is hopeful of Australian industry but ultimately is wrong and fanciful.

And in any case, it is not whether dumping is or should be accepted as being in the ebb and flow of business. The Ministerial requirement is, plainly, that the injury must be greater than that likely to occur. In the normal ebb and flow of business.

In that context we ask whether a 2.2% or 3.6% reduction in profitability - not being an outright loss but just a diminution of same, with no consideration of revenue or costs - greater than would be likely to occur "in the ebb and flow of [this] business"? We submit that it is not.

The industry members and the industry overall demonstrated greater swings in their profitability in previous years where dumping is not alleged to have occurred.

Lastly, and tellingly, we note that the Review Panel required the Commission to reinvestigate its assessment of materiality taking into account Yara's and DBS's argument that profit forgone had been reflected as a % of the aggregated profit, which made the figure appear to be more significant, and not as percentage points of aggregated profitability.

The Review Panel required that this be done, in its reinvestigation request letter, and that the

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9 *Ministerial Direction on Material Injury 2012*, Australian Customs Dumping Notice No. 2012/24.

10 See Defence filed by BlueScope Steel Limited in Federal Court of Australia proceedings *Australian Competition and Consumer Commission v BlueScope Steel Australia Limited and Anor* No VID 932 of 2019, in which the First Respondent states that it *"pursued its legal rights to bring anti-dumping actions where it considered that steel products were being illegally dumped in Australia"* and that *"BlueScope would pursue its right to bring anti-dumping actions where steel products were being illegally dumped in Australia"* [our underlining].

Commission should then reassess the profit forgone in the IP for materiality.

The Commission did this and came back to the Review Panel in the Reinvestigation Report by saying the following:

> *It is the Commission's view that this alternative methodology represents the profit foregone as a percentage point change relative to revenue and therefore trivialises the total loss of profit, which is in the millions of dollars.*[11]

These percentage point assessments of lost profitability were 0.6 in the investigation period (and 1.1 in the post IP period). In the conference we indicated that we would wish to comment on the Commission's criticism that that calculation represents the profit forgone as a % point change relative to revenue and is somehow therefore an unhelpful metric.

What continues to be hidden in the argument that the Commission puts forward is the magnitude of the profit in the first place. What we know is that the Australian industry was profitable in the investigation period – we think considerably so – and that the profit allegedly foregone was 2.2%. That is, 2.2% of its entire profitability was foregone. That is a small diminution in profitability. The value of the percentage point change assessment of injury is that it contextualises that 2.2% diminution for the purposes of considering materiality, if one also knows the magnitude of the revenue and the magnitude of the profitability. Those two magnitudes continue to be opaque so far as the interested parties in this matter are concerned, however we expect the Review Panel to be appraised of that information and to take it into account.

Ultimately, the Commission's criticism of the percentage point depiction of the injury is hollow support for its argument that "millions of dollars" is necessarily injurious. A contextual approach to determining materiality requires consideration of the 2.2% number, and the 0.6 percentile point number, and the magnitude of the Australian industry's revenue and profits, and the way in which those revenues and profits change in the normal ebb and flow of business and competition.

Saying that the 0.6 percentile point change trivialises the injury is an admission that the injury, considered in terms of a diminution of profit, was not material. In the Commission's own words, it was trivial. Ironically, given everything else the Commission says in the Reinvestigation Report, the Review Panel has the ability to rely on the Commission's own say-so. The alternative methodology the Review Panel required the Commission to consider is a valid, contextual methodology of assessing materiality in a profit context. It was recommended to the Commission by the Review Panel. Together with the confidential revenue and profit information the Review Panel has access to, and mindful of the finding that Orica was not itself caused injury by dumping in the investigation period, that metric is very useful. An assessment made on that basis would properly take account of the ebb and flow of business, based on a "real world" appreciation of the variability of profit that any industry experiences because of all of the factors of economic competition in that industry's industrial and market setting.

We submit that the injury said to have been caused to the domestic industry was immaterial; that the Commission failed to take into account the ebb and flow of business, adequately or at all, and that ultimately the Commission has acknowledged that the injury was immaterial based on a way of depicting that injury as was recommended to the Commission by the Review Panel.

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[11] Reinvestigation Report, at page 17.

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Our client and ourselves remain available to provide further information to the Review Panel should that be required for clarification of any of the above submissions, through the mechanisms available to the Review Panel for that purpose.

Yours sincerely

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13 May 2020

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By email

Dear Member

Ammonium nitrate exported from China, Sweden and Thailand
Yara AB comments regarding "materiality" of injury

As you know, we act on behalf of Yara AB ("Yara") in relation to its application to the Anti-Dumping Review Panel ("ADRP") made in accordance with s 269ZZE of the *Customs Act 1901* ("the Act").

We refer to the conference of 11 May 2020 held under s.269ZZHA of the Act, following on from your conference with the Anti-Dumping Commission ("the Commission") on 5 May 2020. We note that your conference with the Commission was to seek clarification regarding points discussed in *Anti-Dumping Commission Report to the Anti-Dumping Review Panel - Reinvestigation of Certain Findings in Investigation 473* ("Reinvestigation Report") dealing with the materiality of injury and whether that injury was greater than that likely to occur in the normal ebb and flow of business.

We will discuss each of these issues in turn below:

"Materiality" of injury

As a starting point, we would note that Yara does not agree that its exports caused injury to the Australian industry. The "profit foregone" is based on assumptions the Commission has made about alternate-reality negotiation outcomes in relation to which Yara was not a party and had no input. There is no evidence that supports the proposition that, had Yara not exported to Australia, the Australian industry would have achieved these supposedly foregone profits. Customers will try to negotiate prices down, that is the nature of negotiation.

In any regard, in the Reinvestigation Report and in the 5 May conference, it seems clear that the Commission has found the "absolute" profit foregone is material simply because it is *"in the millions of*

dollars".[1] There is no explanation as to why this would be *material* in the context of the relevant Australian industry producing like goods, being the Australian industry producing ammonium nitrate.

Ultimately, we do not have access to the figures the Commission or the Member does and so cannot comment on the actual figures identified by the Commission. However, we note as follows:

- The Commission refers to the profit foregone as being in the millions, not the tens of millions nor the hundreds of millions. This is significant, because what is material to one industry may not be material to another industry. Millions of dollars can be very significant to smaller business, but to businesses whose profits are already in the hundreds of millions of dollars there is a very real question as to whether the failure to achieve an extra few millions of dollars would be material. We say it very clearly is not, in the circumstances of this case.

- The Australian ammonium nitrate industry is a very high-revenue industry. By way of example, the total gross invoice value of Yara's exports during the period of investigation was [CONFIDENTIAL INFORMATION DELETED - value].[2] We understand Yara's export volume – some [CONFIDENTIAL INFORMATION DELETED - volume] – during the period of investigation was around [CONFIDENTIAL INFORMATION DELETED – small number] of the volume of the ammonium nitrate in the Australian market. We further believe that the Australian industry contributes around 97% of the volume in that market, and is highly profitable in doing so. Again, there has been no analysis as to why a perceived loss that is *"in the millions of dollars"* would be material to such an industry.

- When the profit "profit foregone" is reported as a percentage point change in profitability, the amounts are 0.6 percentage points in the period of investigation and 1.1 percentage points in the post period of investigation period. The Commission considers this "trivialises" the profit foregone.[3] As stated by the representative of DBS at the conference, this statement, intended by the Commission to be a criticism of the ADRP's request that the Commission consider the alleged injury in that context, is actually an admission of the immateriality of that injury. The reason we suggested this approach is that it contextualises what are otherwise abstract figures. The reason the amounts appear smaller – trivial to use the Commission's language – is because they are reported in the context of the Australian industry applicant's performance, rather than in isolation from that performance. It is therefore a better indicator of the materiality of the injury to the Australian industry.[4]

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1 Reinvestigation Report, page 18, reiterated at page 3 of the Commission's written response to discussion points from the 5 May 2020 teleconference.

2 As per column Q of Attachment 13 to Yara's Exporter Questionnaire.

3 Reinvestigation Report, page 17.

4 At page 16, the Reinvestigation Report takes the view that Yara suggested this methodology "anticipating it may result in a lower figure". We note that it was the ADRP that requested the reinvestigation adopt this methodology, and that the Commission appears seems to have failed to undertake that reinvestigation in an open-minded manner, preferring to cast aspersions about Yara's motives. We would also note that Yara has repeatedly, in the investigation and during this review, raised concerns about the transparency of the "materiality" findings the Commission has presented, and that further transparency has only been achieved through the intervention of the ADRP itself. In reality, we are talking about the same data, and we are deeply concerned that the Commission's preferences as to how that data should be reported appear to be dictated by whether that reporting supports the conclusion that injury was material.

- Of course, an assessment of the materiality of injury needs to be based on an assessment of the Australian industry producing like goods as a whole.[5] The above figures relate to three out of five producers in the Australian industry. The two unrepresented producers were responsible for 22% of the ammonium nitrate in produced in Australia during the period of investigation,[6] There has been no analysis or examination as to whether the profit foregone is material to the entire industry producing like goods as a whole, which is unambiguously what is required by law. Given the profit foregone, when understood in the context of the Australian industry applicants' performance, is trivial, logic dictates it would be even less significant in the context of the entire Australian industry producing like goods.

- Finally, notwithstanding the profit foregone, Table 2 in the Reinvestigation Report shows in abstract terms that the Australian industry applicant's profit increased by 22.8% in the post-POI compared to the POI. Again, given this significant increase in performance. How is a hypothetical loss that is *"in the millions"* material given this turnaround?

We submit that the Commission's recommendation regarding the materiality of injury is wrong and should not be adopted in your report to the Minister, as it is not based on an objective analysis of evidence before the Commission. The Minister simply cannot be satisfied that the Australian industry has suffered material injury on this basis. Further, we submit that the correct and preferable decision is that the injury found to have been suffered by the Australian industry was not material, when it is properly understood in the context of the Australian industry producing like goods.

Normal ebb and flow of business

We note that the Commission's reasoning for not applying the "ebb and flow" test is summarised as follows:

> *Given that the profit forgone in respect of the seven examples outlined in section 9.2.1 of REP 473 was determined using a 'but for' analysis and therefore was solely attributable to dumping, this profit forgone is outside of the normal ebb and flow of business.*[7]

Essentially, the Commission is of the view that because it can attribute the injury to dumping, it was outside the normal ebb and flow of business, and so the "ebb and flow" test was not required to be applied.

We note this is the same reasoning adopted in Report 473 as well as in the Commission's submission to this review.[8] Given this reasoning predated the reinvestigation request, we query whether the Commission can be said to have undertaken a reinvestigation in accordance with your requirements, as they are obligated to do under s 269ZZL(2) of the *Customs Act 1901*.

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5 *Re Swan Portland Cement Limited and Cockburn Cement Limited v the Minister of Small Business and Customs and the Anti-Dumping Authority* [1991] FCA 49; 28 FCR 135 (26 February 1991), at para 39.

6 *Report 473 Ammonium Nitrate – China, Sweden and Thailand* ("Report 473"), page 23.

7 Page 3 of the Commission's written response to discussion points from the 5 May 2020 teleconference

8 Page 98 of Report 473 and para 100 of the Commission's submission to this review, dated 21 October 2019.

In any regard, the Commission's reasoning for not applying the normal ebb and flow test is legally impermissible, for the following reasons:

The text of the Ministerial Direction requires as follows:

> *…I would expect it be shown that the industry is suffering injury, and that injury caused by the dumping is material in degree. The injury must also be greater than that likely to occur in the normal ebb and flow of business.*

The text of the direction indicates that "ebb and flow" test is not whether the injury has been suffered in the normal ebb and flow of business. Rather, the injury found must be *greater* than that likely to occur in the normal ebb and flow of business. It is not about the source of the injury, but the magnitude. This requirement is pragmatic, reflecting the reality that all competition is injurious to some degree and that this is a normal part of a functioning competitive market.

Secondly, Section 269TEA(2A) of the Act expressly prevents injury caused by other factors from being attributed to the dumped goods. If the normal ebb and flow test could not be applied to injury found to be caused by dumping, then it would have no function whatsoever.

In Yara's interested party submission, we illustrated what we considered to be the "normal ebb and flow" of the Australian applicants, based on information on the public record. Based on the information in Table 2 of the Reinvestigation Report we can illustrate as follows:

	1 April 2015 to 31 March 2016	**1 April 2016 to 31 March 2017**	**1 April 2017 to 31 March 2018**	**1 April 2018 to 31 March 2019**
Profit change compared to previous year	2.0%	-2.0%	-10.1%	22.8%
Profit change in the absence of dumping	2.0%	-2.0%	- 8.2%	24.5%

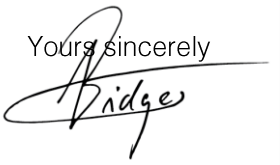
The normal ebb and flow of business is typified by rapid variations in profit level. The "profit foregone" is well within these established trends. The injury is not greater than that likely to occur in the normal ebb and flow of a business operating in the Australian ammonium nitrate industry.

Accordingly, Yara submits the Commission was wrong in asserting it did not have to apply the normal ebb and flow test. When that test is applied, the injury is not greater than that likely to occur in the normal ebb and flow of business. Accordingly, it is not material.

The correct and preferable decision is that dumping did not cause material injury to the Australian industry.

Thank you for providing the opportunity to both better understand the Commission's position and to provide comments in relation to that position.

Yours sincerely



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Attachment D

12 May 2020

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NON-CONFIDENTIAL

Dear Member

ADRP Review No. 107 – Ammonium nitrate exported from China, Sweden and Thailand – Submission of CSBP Limited

I would like to again thank-you for the opportunity to comment on the Anti-Dumping Commission's ("the Commission") response to certain questions from you as detailed in the ADRP Conference Summary of 5 May 2020.

As indicated prior to the 11 May 2020 conference, CSBP Limited believes that the Commission has run a robust process, and agrees with the responses by the Commission that the injury to the Australian industry is not immaterial, insubstantial or insignificant. The quantified injury for the seven examples can only be considered to be the minimum amount of injury experienced by the Australian industry from the dumped exports of ammonium nitrate from China, Sweden and Thailand – as the total injury to all industry members was not fully examined.

CSBP Limited requests that you affirm the Minister's decision in Investigation 473 as the correct and preferred decision.

If you have any questions concerning this submission, please do not hesitate to contact me on (08) 9411 8593 or CSBP's representative Mr John O'Connor on (07) 3342 1921.

Yours sincerely

Gerard Chan
Commercial Manager – Ammonium Nitrate

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12 May 2020

Ms L Blumberg
Member
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c/- Anti-Dumping Review Panel Secretariat
10 Binara Street
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Email: ADRP@industry.gov.au

PUBLIC FILE

Dear Member

ADRP Review No. 107 – Ammonium nitrate exported to Australia from China, Sweden and Thailand – Queensland Nitrates Pty Ltd

Queensland Nitrates Pty Limited (QNP) welcomes the opportunity to comment on the Anti-Dumping Commission's (ADC) written response to discussion points from the ADRP Telephone Conference of 5 May 2020.

QNP considers that the ADC response confirms that the profit forgone by the industry was material in nature. Consistent with the *Ministerial Direction on Material Injury 2012* the injury experienced by the industry can only be considered injury that is "not immaterial, insubstantial or insignificant".

QNP requests that you affirm the Minister's decision as the correct and preferred decision.

Please do not hesitate to contact me if you have any questions on (07) 4997 5100.

Yours faithfully

David Armstrong
General Manager

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13 May 2020

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Dear Member, **FOR PUBLIC FILE**

ADRP Review No. 107 – Ammonium nitrate exported from China, Sweden and Thailand – Submission of Orica Australia Pty Ltd

Orica sets out below its written submission, following the telephone conference of 11 May 2020 conducted by you involving the applicants to the review and representatives of the Australian industry.

I. Summary

Orica Australia Pty Ltd ("Orica") affirms its support of the Minister's findings in Investigation No. 473 (**Minister's Decision**) , which was reinforced by the Anti-Dumping Commission (**Commission**) in its subsequent explanation set out in the ADRP Conference Summary dated 5 May 2020, on the basis that it is the correct and preferable decision.

Orica also considers that the Commission in its Reinvestigation Report was correct to affirm the findings the subject of the reinvestigation.

For reasons developed below, Orica submits that the findings of the Commission significantly understate the injury sustained by the industry during the investigation and post-investigation periods, as they fail to take account of relevant and material evidence of injury sustained by Orica during the investigation period.

Orica requests therefore that the ADRP affirm the Minister's Decision.

II. Anti-Dumping Commission Reinvestigation

Orica supports the Commission's findings in Reinvestigation 473. Specifically, Orica concurs with the Commission's "*reassessment of the materiality of injury with regard to profit forgone*" as further explained in Annexure 1 to the Discussion Items for Conference of 11 May 2020.

III. Additional comments

Orica maintains that the Commission's injury analysis understates the full extent of injury sustained by the Australian manufacturing ammonium nitrate industry. In its submission to the ADRP dated 21 October 2019,

Orica explained that it had experienced injury [*commercially sensitive reference to injury experienced by Orica*] during the investigation and post-investigation periods.

The Commission in Report 473 identified that the contract with the customer contained a feature that was being negotiated that allowed for the variation of the contract price in certain circumstances (based, in part, upon import prices) ("**relevant provision**"). However, it took the view that the injury experienced should not be taken into account, on the basis that the contract between Orica and [*customer*] (which contained the relevant provision demonstrating material injury) had not yet been executed and was therefore treated as outstanding at the time of finalization of its report (at [9.2.1] Example 8).

The Commission in its Reinvestigation Report at 2.2.2.1 stated that it did not "have any information to establish whether this price-variation provision has been included in the finalised contract". This is incorrect. Orica informed the Commission at a meeting on 14 January 2020 that the contract, containing the relevant provision [*commercially sensitive contract timing and effect*] (and confirmed this in its submission to the Commission dated 20 March 2020. Thus the final executed agreement with [*a key Orica customer*] has the effect of reducing Orica's contracted price for ammonium nitrate, to the extent that [*commercially sensitive pricing details*].

Lest the Review Panel be prevented from taking into account the finalised contract by this omission (cf s 269ZZK(4), (4A) (6)(a)), a further conference should be convened so that information concerning the finalised contract can be formally given to the Review Panel and can then be considered (cf s 269ZZHA(1), (2)(a)).

This example cited by Orica was directly on point and relevant to the assessment of injury as it involved a customer – [*customer name*] – seeking price reductions - from Orica, that were driven by lower-priced imports from subject countries (i.e. China and Sweden).

This price impact of Orica responding to the import prices of the dumped imports was an immediate $xxxM reduction in profit in the first [*period*] of the contract with [*a key Orica customer*] that coincided with the post-investigation period. The contract has a remaining xxx years to run following the post-investigation period. The injury will continue to be experienced unless measures are put in place to ensure the industry remains competitive.

It is important to note that, while the contract was executed only on [*date*], it has a longer history, with negotiations having begun well before the investigation and the customer having sought the inclusion of the relevant provision in [*date within investigation period*]. The negotiation thus occupied the last quarter of the investigation period and all of the post investigation period and the contract's terms are a direct consequence of the lower prices of dumped products reaching the Australian market during the investigation period. Orica thus sustained considerable injury as a result of dumped products from China, Sweden and Thailand that occurred during the investigation period, in relation to [*customer*], and which resulted in injury to Orica, of approximately $xxxM during the final [*No.*] months of the post-investigation period on account of a [*commercially sensitive pricing details*] from [*date*] under the new contract.

Further, the injury continues to be suffered by Orica and it is anticipated that it will accumulate over the remainder of the xxx years of the contract with [*customer*]. [C*ommercially sensitive pricing relativities*] , it is clear that any continuation or resumption of dumping – which is likely to occur if measures are removed – would result directly in further price injury to Orica. Importantly, and for the ADRP's consideration and review, the Commission has excluded this impact from its assessment, which Orica maintain would provide a fair and accurate assessment of the injury

In the ammonium nitrate industry, it is important to recognize and factor into account, the delay in impact arising from the nature of the way contracts are negotiated, which can include lengthy tender processes. Dumped imports hawked around the domestic market have distorted (and will continue to distort) pricing with customers during tender negotiations and pervade market pricing. As the Commission acknowledges, once the pricing and supplier is selected by the customer, the impact of the injurious imports are sustained over the duration of the supply contract, typically 3 years (but can be up to 5 years or more) and are not confined to the notional "investigation period" set by the ADC. An additional example provided to the Commission as part of the industry application involved injury sustained by Orica during and post the investigation period resulting from dumping of ammonium nitrate from China just prior to the investigation period, with an EBIT impact of

$xxxM pa. Orica submits that a holistic view should be taken to ensure that injury is reflective of the injury actually sustained.

The $xxxM profit impact of the renegotiated contract [*customer*] represents incremental injury to that already identified by the Commission in the seven contracts where a causal link to the dumping was established. This injury was quantified by the Commission in the "millions of dollars" during the investigation and post-investigation period. Orica is concerned that the true and correct impact of the dumped exports has not been fully assessed in the Commission's analysis.

[*commercially sensitive details concerning plant shutdown*].

This shutdown and the injury sustained from the reduction in employment to Orica is not included in the Commission's Report or Re-investigation Report, as the impact occurred immediately prior to the investigation period (dictated only by the Commission's practice of selecting a twelve-month period over which it examines dumping). However, the injury was sustained, was not immaterial, insubstantial or insignificant and Orica submits is relevant to portray the true assessment of injury.

Orica respectfully requests that the ADRP member acknowledge that the Commission's analysis understates the true impact of the material injury sustained by the Australian industry.

IV. Materiality of injury

It is recalled from the *Ministerial Direction on Material Injury 2012* that the identification of material injury "*will depend upon the circumstances of each case and will differ from industry to industry from time to time*". Further, material injury is injury that is "*not immaterial, insubstantial or insignificant*".

The Commission confirmed that the injury experienced by the industry in terms of the "*absolute amount of the profit forgone*" was in the "*millions of dollars*" and could not be considered "*immaterial, insubstantial or insignificant"*. The Commission's finding is consistent with the *Ministerial Direction on Material Injury 2012* requirement on materiality of injury taking full account of the relevant particulars of the subject industry.

Orica continues to reference that the Commission's findings – which demonstrate injury across the seven contracts was material – understate the true extent of injury to the Australian industry from the dumped imports. The material injury validated by the Commission is not fully reflective of the total, aggregate injury sustained by all three industry applicants across the injury analysis period (including the commercial and human costs referenced above).

V. Recommendation

Orica Australia Pty Ltd ("Orica") affirms its support of the Minister's Decision, as reinforced by the Commission as set out in the ADRP Conference Summary dated 5 May 2020, on the basis that it is the correct and preferred decision.

It is Orica's position that the Commission's findings that establish materiality of injury from the dumped imports from China, Sweden and Thailand do not take full account of all injury sustained by the industry participants. Orica has further quantified the impact of the injurious dumping in a lengthy, drawn out contract negotiation with [*customer]* culminating in a further $xxxM reduction in profit in the post-investigation period, and ongoing injury for a further xxx years which has not been taken into account.

Orica therefore requests the Commission to reaffirm the Minister's Decision as the correct and preferable decision.

If you have any questions, please do not hesitate to contact me on (03) 9665 7309.

Yours faithfully,

Malcolm Hart

Senior AN Market Manager - APA