



18 October 2019

BHP Billiton Iron Ore Pty Ltd
ABN 46 008 700 981
125 St Georges Terrace
Perth WA 6000 Australia
PO Box 7642
Cloisters Square
Perth WA 6850
T +61 8 6321 0000
Bhp.com

Anti-Dumping Review Panel Secretariat
GPO Box 2013
Canberra City ACT 2601

By email to ADRP@industry.gov.au

Dear Panel Members,

RE: Review of the Minister's decision to publish a dumping duty notice in respect to Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand

BHP, as one of Australia's largest exporters of goods, welcomes the review of the Minister's decision to publish a dumping duty notice in respect to Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand.

Ammonium Nitrate is an important input to BHP's iron ore, metallurgical coal and other minerals production processes and BHP spends in the order of AUD400m annually on Ammonium Nitrate products in Australia, all of which is currently sourced from domestic producers.

BHP submits that the Minister's decision to publish a dumping notice and apply the tariff, is derived from an incorrect conclusion by the ADC that the Ammonium Nitrate products exported to Australia from China, Sweden and Thailand caused material injury to the domestic Ammonium Nitrate production industry.

In support of our submission we refer the review panel to, and reiterate the points set out in our submission made to the ADC dated 10 August 2018, a copy of which is attached. As we have pointed out in the past:

- These exports to Australia represented a very small proportion (around 3%) of total Ammonium Nitrate sales, and were not sufficient to displace a meaningful volume of domestic production (ref section 1 of BHP's 10 August 2018 submission to the ADC);
- The domestic industry actually grew in terms of both output and market share during the injury analysis period (ref section 1 of BHP's 10 August 2018 submission to the ADC);
- Domestic production capacity is well utilised and producers reported sound profitability (ref section 2 of BHP's 10 August 2018 submission to the ADC) in and around the injury analysis period; and
- The commercial behavior of Ammonium Nitrate producers and resellers has been primarily driven by domestic competition and capacity factors including investments in new domestic production capacity, for example Orica's significant investment in the new Burrup plant, rather than the availability of imports. BHP's experience as an Ammonium Nitrate buyer is that competition between domestic producers is the overwhelmingly dominant factor affecting prices in the domestic industry.

For these reasons BHP continues to submit that the conclusion that Ammonium Nitrate exported to Australia from China, Sweden and Thailand caused material injury to the domestic Ammonium Nitrate industry is incorrect.

We have also had the benefit of reviewing the submissions by Glencore Coal Assets Australia Pty Ltd, Yara AB and Downer EDI Mining - Blasting Services Pty Ltd to the review panel and agree with the detailed submissions of these parties that there is no basis to conclude that the imports in question caused injury to the Australian industry.

BHP considers that the imposition of the dumping duty is anti-competitive and unfairly disadvantages and penalises Australian users of Ammonium Nitrate. Therefore we would respectfully submit that the Minister's decision to impose the dumping duty should be revoked.

We would be pleased to provide further explanation to the review panel in relation to BHP's submission.

Faithfully,



Renée Ostwald
BHP Billiton Iron Ore Pty Ltd
Manager
Procurement (Drill, Blast and Geology)
Renee.Ostwald@bhp.com
M +61 437 695 496



10 August 2018

To:

The Director, Investigations 2
GPO Box 2013
Canberra ACT 2013
Australia
investigations2@adcommission.gov.au

BHP Billiton Iron Ore Pty Ltd
ABN 46 008 700 981
125 St Georges Terrace
Perth WA 6000 Australia
P O Box 7642
Cloisters Square
Perth WA 6850 Australia
T +61 8 6321 0000
F +61 8 6322 9978
bhpbilliton.com

By email

Dear Director

Investigation No. 473 – Ammonium Nitrate exported from China, Sweden and Thailand

BHP welcomes the opportunity to provide a submission to the Anti-dumping Commission (**ADC**) in relation to its investigation into Ammonium Nitrate (**AN**) exported to Australia from the People's Republic of China (**PRC**), Sweden and The Kingdom of Thailand (**Thailand**) (the **Imported AN**).

Summary

BHP submits that there is insufficient evidence to support the conclusion that the Imported AN is causing, or is threatening to cause, material injury to the Australian industry producing AN (the **Australian AN Industry**). The Australian AN Industry has experienced significant growth since 2014 and now complains of small year-on-year shifts in sales volumes and prices, and lower profitability due to increased costs. A close examination of the Australian market for AN over the identified "injury analysis period" commencing on 1 April 2014 (the **Injury Period**) shows that there is no actual or threatened "material injury" of a nature and extent which would permit or justify the imposition of anti-dumping duties. Imposing anti-dumping duties here would compensate the Applicants for the effects of competitive market dynamics and would be contrary to Australia's international obligations.

BHP strongly opposes the imposition of anti-dumping duties in cases where there is no justifiable economic need to do so. BHP, as one of the largest exporters of goods from Australia, benefits from and supports the principles of free trade. Australia's anti-dumping laws should not be used by domestic industries as a form of de facto tariff protection or to defend their domestic profit margins against international competition. Protectionist tariffs have long been contrary to Australia's trade policy. They are contrary to Australia's international obligations under the General Agreement on Tariffs and Trade and are damaging to the overall economy and prosperity. Accordingly, BHP considers that there is no sound legal or policy reason to impose anti-dumping duties in circumstances where the relevant Australian industry is healthy (albeit competitive) and profitable and controls over 90% of the domestic market.

In support of this submission BHP emphasises that the:

1. volume of Imported AN is small and the Applicants themselves purchase a significant percentage of these imports;
2. data referred to in the Consideration Report does not provide a reasonable or cogent basis for deciding that there are reasonable grounds that the Australian AN Industry has suffered material injury from dumped goods;

3. Imported AN does not appear to be the cause of price suppression or depression in the Australian AN market; and
4. Australian AN Industry is strong, profitable and has experienced growth in sales volumes and market share since 2014.

As a consequence, there is no reasonable basis upon which it could be determined that dumping duties should be imposed on the Imported AN.

Each of these points are further developed below.

1. The level of importation of AN into Australia is small and declining

- (a) As noted in the ADC's consideration report, the Imported AN comprises approximately 2.8% of the total Australian AN market.
- (b) Further, as identified by Downer EDI Mining-Blasting Services Pty Ltd in their submission to the ADC, the Applicants purchase a significant portion of the Imported AN. When this purchasing is accounted for, BHP understands that the remaining percentage of Imported AN is less than 1% of the Australian market.
- (c) Overall the volume of importation of AN into Australia is, and has consistently been, low. The low volume of Imported AN means that the scope for the Imported AN to cause "material injury" to the Australian AN Industry is exceptionally limited if not negligible.
- (d) As the ADC notes in its Dumping and Subsidy Manual, published in April 2017, when considering whether or not dumping is threatening material injury it will have regard to those factors set out in the Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994 (**ADA**) and the Agreement on Subsidies and Countervailing Measures (**SCM**). Relevantly, section 15.7 (ii) of the SCM and 3.7(i) of the ADA provide that one of the factors to be considered is whether there is:

*a significant rate of increase of dumped imports into the domestic market indicating the likelihood of **substantially increased importation***¹

- (e) However, the importation of AN into Australia is small and is trending downwards, as set out in the following table².

Market Share (Total 100%)	2014	2015	2016	2017	Since 2014	Total (p.a.)
Australian production – Applicants (A)	74.8%	80.1%	77.0%	77.6%	↑	100%
Australian production – Non-Applicants (B)	13.4%	13.5%	16.3%	16.8%	↑	
Imports from China, Sweden and Thailand (C)	4.4%	1.1%	1.6%	2.8%	↓	
Other Imports (D)	7.5%	5.3%	5.1%	2.9%	↓	
Total Australian production (A+B)	88.1%	93.6%	93.3%	94.3%	↑	100%
Total Imports (C+D)	11.9%	6.4%	6.7%	5.7%	↓	
Total Market Share (A+B+C+D)	100%	100%	100%	100%	-	100%

- (f) There is no evidence to suggest any risk of "substantially increased importation". To the contrary, since 2014 the market share of imports has fallen. While the overall mix

¹ Emphasis added.

² Table compiled by BHP based on 'Indexed Table of Sales Quantities' at p14 of the Application, Table B-1.5 'Import Volumes of Ammonium Nitrate in to Australia' at p.33 of the Application, and estimated Australian market size of 1.97 MT at p.14 of the Consideration Report.

between origin of importers has changed, and will likely continue to change, depending on market forces, the total level of importation is likely to remain small and stable.

- (g) In essence, the volumes of Imported AN, now and in the foreseeable future, are simply too small to cause a material impact on prices or any other form of injury to the Australian AN Industry.

2. No evidence of injury to the Australian AN Industry

The material submitted by the Applicants, and publically available information, does not provide a reasonable basis for determining that the Australian AN Industry has suffered injury as a result of Imported AN, let alone “material injury”.

2.1 Production levels are high and the businesses are profitable

- (a) In this regard the 2017 Annual Reports of Incitec Pivot Limited, Wesfarmers and Orica are instructive.

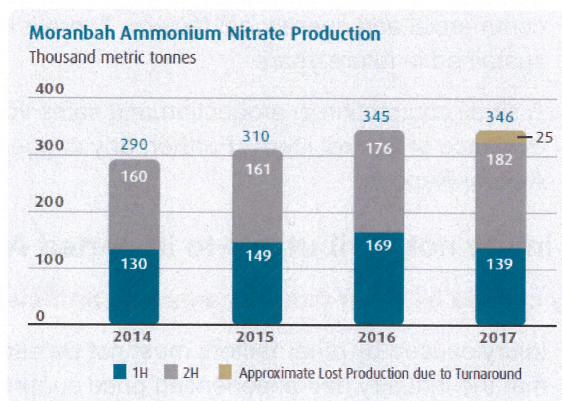
Incitec Pivot Limited Annual Report

- (i) The Directors’ Report of the Incitec Pivot Limited 2017 Annual Report notes:

In Australia, Dyno Nobel manufactures ammonium nitrate at its Moranbah ammonium nitrate plant, which is located in the Bowen Basin, the world’s premier metallurgical coal region. It also sources third party ammonium nitrate from time to time.

*Moranbah was commissioned in 2012 and **produced a record 345k metric tonnes of ammonium nitrate in 2016. As set out below, the plant continued to produce at record levels in 2017**, manufacturing 321k metric tonnes of ammonium nitrate notwithstanding a scheduled four-yearly major turnaround.*³

- (ii) It also includes this graph, showing AN production



- (iii) Of note is that new AN production capacity only came online in 2012, and that the facility has been producing at record levels since it came online. Furthermore, a reduction in production in 2017 is clearly attributable to a business turnaround project.

Wesfarmers 2017 Annual Report

- (iv) The following references in Wesfarmer’s 2017 Annual Report also indicate strong performance and high production levels:

Earnings growth in Chemicals, Energy and Fertilisers was driven by strong performance in the ammonium nitrate and Kleenheat businesses, as well

³ Incitec Pivot Limited Annual Report 2017, 14 (emphasis added) (available from: <http://investors.incitecpivot.com.au/phoenix.zhtml?c=170340&p=irol-reportsannual>).

as the turnaround in Australian Vinyls following the cessation of polyvinyl chloride (PVC) manufacturing in the prior year.⁴

...

*Ammonium nitrate and sodium cyanide plants operated **at full expanded production capacity.***⁵

Orica 2017 Annual Report

(v) Page 8 of Orica's Annual Report notes:

*Ammonium nitrate (AN) volumes for 2017 were 3.65 million tonnes, **up 3%** on the pcp. Sales into coal markets across Australia and North America **improved** due to **normalisation of mining practices and market growth**. Demand from the gold sector remained stable and in line with commodity pricing. Activity in the Quarry and Construction (Q&C) market, particularly in North America, was up due to increased activity on infrastructure projects.*⁶

- (b) None of the Annual Reports indicate any material issues or concerns in respect of the Imported AN. Conversely they paint a picture of strong performance and favourable market conditions.

2.2 Production and sales volumes in the Consideration Report

- (a) The Consideration Report does not contain any evidence of material injury in the form of lost production and sales during the injury examination period. Figure 2 of the Consideration Report shows that during the injury examination period production volumes have been relatively stable since 2014 with a small increase in 2016 followed by a small contraction in 2017. Figure 3 of the Consideration Report shows that during the injury examination period, the Applicants' domestic sales volumes increased overall, again with a small decline in 2017.
- (b) BHP considers that the change in production and sales volumes in 2017 is well within the bounds of ordinary year-to-year variability, which can be affected by a multitude of commercial and operational factors. There is nothing to suggest that the fall will be sustained in future years.
- (c) A small contraction in production and sales volumes between 2016 and 2017 cannot be evidence of market injury. Further, any suggestion that it is, is inconsistent with the Annual Reports.

3. Any injury not attributable to Imported AN

3.1 Injury caused by other factors cannot be artificially attributed to dumping

- (a) Injury caused by other factors must not be attributed to dumping. If the ADC were to find that the industry had experienced price suppression or depression for example, s 269TAE(2A) of the *Customs Act 1901* (Cth) prevents this injury being attributable to the Imported AN when it is caused by other factors such as:
- (i) contractions in demand or changes in patterns of consumption;
 - (ii) restrictive trade practices of, and competition between, foreign and Australian producers of like goods;
 - (iii) the export performance and productivity of the Australian AN Industry; and
 - (iv) the volume and prices of imported like goods that are not dumped.

⁴ CSPB Non-confidential Attachment A-2.9 – Wesfarmers Annual Report 2017, 45 (emphasis added).

⁵ Ibid, 47 (emphasis added).

⁶ ORICA Non-confidential Attachment A-2.9 – Annual Report 2017, 8 (emphasis added).

- (b) BHP submits that when the ADC undertakes this analysis, together with the low volume of Imported AN, there will be no basis for attributing any alleged injury to the Australian AN Industry to Imported AN. This is expanded on below.

3.2 Global and domestic oversupply of AN influencing competition in the Australian market

- (a) Several Australian AN suppliers (including the Applicants) have acknowledged that domestic and global oversupply of AN is causing downward pressures on prices. BHP understands that the installed AN production capacity in Australia amounts to approximately 2.3MT of AN⁷ whereas annual Australian consumption is approximately 1.97MT⁸. There is a clear over capacity issue in the domestic AN industry and basic economic principles dictate that an excess of supply over demand will cause downward pressure on prices. The impact of this oversupply must not be attributed to the Imported AN.

- (b) This dynamic, and its impact, is expressly acknowledged by Wesfarmers in its 2017 Annual Report:

*WesCEF's earnings remain subject to international commodity prices, exchange rates and seasonal outcomes. Earnings for the Chemicals business will be affected by an **anticipated oversupply in the Western Australian explosive grade ammonium nitrate market**, although good work has been undertaken to secure new contracts for ammonium nitrate and emulsion.*⁹

- (c) Similarly, Orica's 2017 Annual Report states:

*The negative contract pricing impact of \$54 million was slightly below expectations and aligned with current market conditions. **Oversupply in domestic and global ammonium nitrate and cyanide markets has kept prices subdued** compared to historical levels, however prices have stabilised over the past six months. The **key contributor of pricing impacts during the year was the continued renewal and alignment of existing contracts to current market prices**. Orica remains focused on maintaining a balanced outlook between retaining market share and securing plant loading.*¹⁰

and

*Global economic growth outlook is uncertain and may result in lower demand for commodities and subsequent reduced sales volumes. Our key inputs, particularly gas, are also linked to international traded commodities and are subject to the movements of the market that have the potential to increase our cost of production. **Over supply of ammonium nitrate through increased capacity may also create a supply/demand imbalance which will result in margin erosion, lost customers and downward price pressure**. Adverse foreign exchange rates can impact the cost of inputs and products and impact sales denominated directly or indirectly in foreign currencies.*

*To manage these risks, operationally we have put in place measures to curtail production and renegotiate supply contracts to provide certainty in pricing and volumes.*¹¹

- (d) Finally, Incitec Pivot Limited's 2017 Annual report states:

New ammonium nitrate capacity has recently been or is soon to be introduced in both the Asia Pacific and Americas geographic regions. In both

⁷ Application for the publication of dumping and/or countervailing duty notices, Ammonium Nitrate Exported from the People's Republic of China, Sweden and Thailand, March 2018, 27.

⁸ Anti-Dumping Commission Consideration Report No. 473, 14.

⁹ Above n4, 21 (emphasis added).

¹⁰ Above n6, 9 (emphasis added).

¹¹ Ibid, 19 (emphasis added).

*instances, the markets are predominantly domestically supplied, and **the new capacity may create a supply/demand imbalance.***¹²

- (e) These Annual Reports also highlight a number of other factors impacting prices and potentially profitability, such as: foreign exchange movements, global commodity prices and gas prices. There is no mention of an adverse impact from the Imported AN. Any alleged 'injury' caused by these other factors must not be attributed to the Imported AN.


4. Conclusion

BHP's view is that there is no sound basis for the continuation of the investigation or the imposition of dumping duties. The market effects complained of are not material and are simply the result of the normal ebb and flow of healthy competition and factors that are not attributable to Imported AN. In this respect it is worth recalling the comments of Lockhart J in *Swan Portland Cement Ltd v Minister for Small Business & Customs* (1991) 28 FCR 135. In that case his Honour noted:

*The determination whether material injury to an Australian industry producing like goods has been, or is being caused, or is threatened, is not an exercise of counting heads of markets, production or distribution centres or things of this kind. It is essentially a practical exercise designed to achieve the objective of determining whether, when viewed as a whole, the relevant Australian industry is suffering material injury from the dumping of goods.*¹³

The April 2012 Ministerial Direction on Material Injury emphasises that findings of "material injury" must be made in a way that is consistent with Australia's international obligations. This requires that the ADC be satisfied on the basis of cogent evidence and analysis that the Australian AN Industry has suffered or is at risk of suffering material injury as result of the Imported AN. This cannot be the case here where the Australian AN Industry is plainly profitable and healthy, albeit facing the normal ebb and flow of healthy competition and commerce, and the volume of Imported AN is negligible with no expectation of significant growth.

Yours sincerely



BHP

¹² Above n3, 18 (emphasis added).

¹³ *Swan Portland Cement Ltd v Minister for Small Business & Customs* (1991) 28 FCR 135, 144.