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	4 September 2019
Participants	• Anti-Dumping Commission: Justin Wickes, Jasna Halilovic and Sharini McEwen • Glencore Coal Assets Australia: o Angel Fu and Dave Poddar (Clifford Chance) o Andrew Daly, Anthony Pitt, Nick Ogden and Darren Oliver (Glencore) o Robert Gare (Moncourt Group) • Yara AB: Alistair Bridges (Moulis Legal) • Downer EDI Mining-Blasting Services: Daniel Moulis (Moulis Legal)
Time opened	11:00am AEST
Time closed	12:03pm AEST

Purpose

The purpose of this conference was to obtain further information and seek clarifications from the Anti-Dumping Commission (ADC) and a better understanding of the reasons for the finding relating to materiality of injury in REP 473 (Section 9.6, pages 90 – 91). Further, the purpose of this conference was to provide an opportunity to the applicants, being Yara AB (Yara), Downer EDI Mining -Blasting Services Pty Ltd (DBS) and Glencore Coal Assets Australia Pty Ltd (Glencore), to comment on such clarifications and information provided by the ADC, in relation to their relevant grounds of review, in their respective applications for review before the Anti-Dumping Review Panel (ADRP) in relation to Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand.

The conference was held pursuant to s.269ZZHA(3) of the *Customs Act 1901* (Act).

The conference was not a formal hearing of the review and was not an opportunity for parties to argue their case before me. I have only had regard to information provided at this conference as it relates to relevant information (within the meaning of s.269ZZK(6) of the Act). Any conclusions reached at this conference are based on that relevant information. Information that relates to some new argument not previously put in an application or submission or not related to the ADC's clarifications and further information provided in the conference, is not something that the ADRP has regard to, and is therefore not reflected in this conference summary.

Discussion

ADC

1. The ADC was requested to provide a step by step non-confidential narrative of its methodology and analysis of the following finding in REP 473 relating to materiality of injury, with particular reference to Confidential Attachment 17:

> "The Commission found that profit forgone (on an annual basis), relative to the applicants' (i.e. CSBP's, Orica's and QNP's) aggregated profit in the investigation period, is material to the Australian industry as a whole when taking into consideration the relative share of the total production volume during the investigation period the applicants comprised." (See Section 9.6 pf REP 473, page 91)

In this regard the ADC was requested to explain (in a non-confidential format) the relevance of the three worksheets comprising Confidential Attachment 17, entitled respectively:

1) Materiality of Injury (Worksheet 1);
2) Applicants' Profit (Worksheet 2); and
3) Aus Industry Production (Worksheet 3).

The ADC responded to this clarification request during the conference and subsequently provided the ADRP with its response in written form, which is reflected in Attachment 1.

2. With regard to the statement from REP 473 quoted above, the ADC was requested to clarify whether its finding with regard to materiality of injury relates to the investigation period only (as would seem to be indicated in the above-quoted statement) or whether it also includes injury (in the form of profit forgone) in the post investigation period, which seems to be included in Column AC of the spreadsheet in Worksheet 1, in those instances where it has not been noted in Column AD to have occurred in the investigation period.

The ADC responded to this clarification request during the conference and subsequently provided the ADRP with its response in written form, which is reflected in Attachment 1.

3. Cell AC22 of Worksheet 1, seems to reflect the total post investigation period profit forgone as a percentage of Australian industry profit and Cell AC23 seems to reflect the total investigation period profit forgone as a percentage of Australian industry profit. Cell AC21 seems to reflect the sum of the total post investigation period and investigation period profit forgone as a percentage of Australian industry profit.

   a. The ADC was requested to clarify in respect of which of these percentages did the ADC base its finding, as articulated in the above quoted paragraph.

   b. The ADC was asked if there is any reason why the aggregated figures of profit forgone as a percentage of the aggregated Australian industry profit are confidential. If not, the ADC was requested to disclose the aggregated percentage on which the ADC based its finding so that the applicants (and other interested parties) can comment thereon.

   The ADC responded to this clarification request during the conference and subsequently provided the ADRP with its response in written form, which is reflected in Attachment 1.

4. If the ADC's analysis and finding includes injury in the post investigation period, the ADC was requested to clarify, in a narrative non-confidential format, how it calculated the Australian industry's profit, for a period in the future, to obtain the relevant percentages of profit forgone as a percentage of Australian industry profit, as they appear in Column AC of Worksheet 1?

   The ADC responded to this clarification request during the conference and subsequently provided the ADRP with its response in written form, which is reflected in Attachment 1.

Yara

5. Yara was provided with an opportunity to comment on the ADC's above clarifications and any effect on the arguments relating to Ground 4 of Yara's application for review. Yara was advised that if it was unable to provide comments during the conference, the conference would be held open and a written submission could be made to the ADRP within a period (to be specified) after the conference.

Yara selected to make a written submission commenting on the ADC's clarifications, to be provided to the ADRP after the conference,[1] but requested to seek the following further clarifications from the ADC, through the Reviewing Member (RM), during the conference:

1) Yara's Representative (YR) requested clarification of the "post investigation period".

   The ADC Representative (AR) stated that these are contracts that were negotiated during the investigation period to commence following the investigation period, at a future date specified in the contract.

   YR requested further clarification as to what the outer limit of the period was, to which the AR responded that the outer limit is a year, which commenced shortly after the investigation period.

2) YR requested a breakdown between the profit foregone during the investigation period and the post investigation period.

   The AR responded that the ADC would take it on notice and if in a position to disclose that figure, would provide it in the written response.[2] The RM clarified that the applicants would all receive a copy of the ADC's written response to the clarifications soon after the conference and would then be requested to provide their own written comments within a specified period thereafter.

DBS

6. DBS was provided with an opportunity to comment on the ADC's above clarifications and any effect on the arguments relating to Ground 1(a) of DBS's application for review. DBS was advised that if it was unable to provide comments during the conference, the conference would be held open and a written submission could be made to the ADRP within a period (to be specified) after the conference.

[1] Yara subsequently made a written submission which is reflected in Attachment 2.
[2] The ADC subsequently disclosed the breakdown to the applicants in its written response. See the ADC's written response to clarification request 3(b) on page 5 of Attachment 1.

DBS selected to make a written submission commenting on the ADC's clarifications, to be provided to the ADRP after the conference,[3] but requested to seek the following further clarifications (through the RM) during the conference:

1) DBS' representative (DR) enquired why the higher level aggregated data could not be provided at the summary level in that it is aggregated data.

   The RM clarified that the understanding was that the ADC would consider whether providing that information would give any indication of confidential data, and if not would include it in its written submission.[4] The AR confirmed this position adding that REP 473 contains a summary of all the injury findings, which the ADC considered to be sufficiently summarised, and that looking at materiality in the context of profit is just one aspect of the injury findings.

2) DR requested whether the ADC could provide a better understanding of what the "but for" analysis referred to at page 93 of REP 473 means in respect of the post investigation period, in particular whether the "but for" analysis assumes that all other things would be equal in the post investigation period.

   The RM requested clarification as to whether DR was referring to materiality of injury, being the subject of the conference. DR stated that he accepted that it could be outside that, in relation to the way in which the conclusion was reached that there was causation of injury. The RM, pointing out that the conference is limited to the finding in Section 9.6 of REP 473, asked the ADC whether it had anything to add with regard to the "but for" analysis in relation to the specific finding of materiality of injury.

   The AR stated that the ADC's approach is outlined in Section 9.2.2 of REP 473 and that in the context of materiality of injury, it was exactly how it was explained during the conference. The AR pointed out that the ADC looked only at the contracts where the dumping influenced the price and caused price depression, and then asked "but for" that price depression what would have been the profit to the industry. The AR stated further that the profit

[3] DBS subsequently made a written submission which is reflected in Attachment 3.
[4] The ADC subsequently disclosed the breakdown to the applicants in its written response. See the ADC's written response to clarification request 3(b) on page 5 of Attachment 1.

foregone as a result of that price depression is what the ADC quantified for materiality.

Glencore

7. Glencore was provided with an opportunity to comment on the ADC's above clarifications and any effect on the arguments relating to Ground 6 of Glencore's application for Review. Glencore was advised that if it was unable to provide comments during the conference, the conference would be held open and a written submission could be provided to the ADRP within a period (to be specified) after the conference.

   Glencore selected to make a written submission commenting on the ADC's clarifications, to be provided to the ADRP after the conference,[5] but requested to seek the following further clarifications (through the RM) during the conference:

   1) Glencore requested clarification as to whether the [redacted]% of Australian industry profits had been calculated as the aggregated profit foregone during the investigation period and in subsequent years, as a percentage of the Australian industry profitability, in a single 12 month period.

      The AR confirmed that all the figures were annualized. Glencore requested further clarification since it was understood that there was an aggregated profit foregone across multiple years, whatever those contract lengths. Clarification was sought as to whether that was summed up or taken as a particular snapshot of a 12 month period of that aggregated profit foregone. The AR confirmed that it was a 12 month snapshot, for example, if it was a five year contract, the ADC did not take the profit foregone over the life of five years and divide it by a single year's profit. It took the profit foregone on that five year contract on a per year basis, with the denominator being a profit in one year.

   2) Glencore's Representative (GR) pointed out that the ADC's commentary, given the confidentiality restrictions, highlights the difficulty for parties such as Glencore to understand how the ADC has done the calculation having regard to the various contracts, and then applied it across the industry. GR pointed out that the greater

[5] Glencore subsequently made a written submission which is reflected in Attachment 4.

the clarity that could be provided in the ADC's written response, the more helpful it would be to be able to provide meaningful submissions.

The RM asked whether there was anything further that the ADC would be in a position to provide relating to the methodology, without disclosing confidential information.

The AR stated that there may be a misunderstanding that the ADC extrapolated findings in relation to particular contracts across the industry. The AR clarified that in quantifying materiality the ADC only took into consideration the specific contract negotiations that were found to be influenced by dumped goods during the investigation period (which are discussed in detail in Section 9.2 of REP 473). The AR stated that the ADC then considered what the result of that price depression was in terms of a reduction in that particular industry member's profit that it might have otherwise achieved if it did not have to compete against the dumped imports. That was considered to be the only profit foregone that was considered because it related specifically to those contracts. The AR stated further that in trying to examine whether that was material, the ADC took that profit foregone and looked at it as a percentage of the industry's profit on an annual basis, which resulted in the [redacted]%. The AR pointed out that the ADC did not take any findings of price depression or reduction in profit and extrapolate it across any other contracts or sales by the Australian industry.

Conclusion and Way Forward

8. The RM explained that the reason why the conference was held prior to initiation was in order to provide the applicants (and other interested parties) with sufficient opportunity to comment on the additional clarification and information provided by the ADC, within the maximum period provided for in s.269ZZJ of the Act.

9. The RM explained that the first step would be to receive the written comments of the ADC in response to the clarification requests, with some adjustments following the various questions raised by the applicants during the conference. The AR advised that the ADC's written response would be provided to the ADRP by the following day. The RM then suggested that the applicants' written responses be provided within 3 business days from receipt of the ADC's written response. All parties agreed that this was reasonable, bearing in mind that there would be a further opportunity to

provide more detailed comments after initiation of the review, in s.269ZZJ submissions.

10. The RM thanked all parties for their participation and ended the conference.

Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

The Anti-Dumping Commission (the Commission) has prepared the following written responses to the Anti-Dumping Review Panel Member's questions (in blue text) posed during a teleconference held on 4 September 2019.

1. Could the ADC provide a step by step non-confidential narrative of its methodology and analysis of the following finding in REP 473 relating to materiality of injury, with particular reference to Confidential Attachment 17:

> "The Commission found that profit forgone (on an annual basis), relative to the applicants' (i.e. CSBP's, Orica's and QNP's) aggregated profit in the investigation period, is material to the Australian industry as a whole when taking into consideration the relative share of the total production volume during the investigation period the applicants comprised." (See Section 9.6 pf REP 473, page 91)

In this regard the ADC should explain (in a non-confidential format) the relevance of the three worksheets comprising Confidential Attachment 17, entitled respectively:

1) Materiality of Injury (Worksheet 1);
2) Applicants' Profit (Worksheet 2); and
3) Aus Industry Production (Worksheet 3).

Commission's response

In Confidential Attachment 17, the Commission quantified the effect of dumping, which occurred in the investigation period, on the Australian industry's profit in order to determine whether the resulting injury is material to the Australian industry as a whole.

Profit forgone was calculated in relation to only the examples listed and discussed in section 9.2.1 of REP 473, and only where there was evidence that pricing or volumes were affected or influenced by the dumped goods during the investigation period. Further, the Commission did not determine profit forgone for the duration of the contracts specified in each example listed in section 9.2.1 of REP 473. Instead, the Commission determined profit forgone, caused by dumping, on a per annum or annualised basis.

The calculation of profit forgone is outlined in section 9.4 of REP 473 (page 83 refers), which the Commission has reproduced below.

> *The Commission estimated revenue and profit forgone (on a per annum basis) for each individual contract negotiated* [examples listed in section 9.2.1 of REP 473] *as follows:*
>
> - *price effect on revenue (which directly translates to profit forgone) – the 'undumped' price less the re-contracted price (per tonne),*

- *multiplied by the contracted minimum annual volume or the volume sold during the investigation period (in tonnes), depending on the specific example. This isolates the effect of dumping from the subject countries, and this is a more conservative estimate than an estimate based on the price prevailing in accordance with the existing contract at the time of the negotiation;*
- *volume effect on profit (lost volumes) – the price per tonne offered, multiplied by the annual volume (in tonnes) bid for, multiplied by the relevant applicant's margin in the investigation period.*

Having calculated the profit forgone in column Z of worksheet 1 in Confidential Attachment 17, the Commission then divided these figures in each row by the aggregated profit for the applicants in the investigation period. This was undertaken to determine the significance of the profit forgone relative to the applicants' aggregated profit. This calculation was alluded to in section 9.6 in REP 473, as follows:

> *…profit forgone (on an annual basis), relative to the applicants' (i.e. CSBP's, Orica's and QNP's) aggregated profit in the investigation period.*

The profit forgone for each example, determined as a percentage of the applicants' aggregated profit (in column AA), was then adjusted or multiplied by the ratio of the relevant applicants' production volume to the Australian industry's total production volume (i.e. the aggregated production volume of five ammonium nitrate manufacturers) in the investigation period.

This calculation was undertake in column AC for each example, and was undertaken because the Commission did not have information relevant to the profit amount for Dyno Nobel and Yara Pilbara Nitrates. This calculation was alluded to in section 9.6 of REP 473, as follows:

> *…taking into consideration the relative share of the total production volume during the investigation period the applicants comprised.*

The resulting figures in column AC in workbook 1 were then aggregated to determine a total profit forgone as a percentage of the Australian industry's profit on a per annum basis.

Details in relation to the relevance of each worksheet comprising Confidential Attachment 17 are provided below.

1) Materiality of Injury (Worksheet 1);

This worksheet lists all the examples that were discussed in section 9.2.1 of REP 473. For the examples that the Commission was satisfied were affected by dumping, the Commission quantified the profit forgone in relation to these examples (as outlined above), and then calculated this profit forgone as a proportion of the aggregated profit for the three applicants in the investigation period. This was then adjusted by the ratio relevant to the applicants' share of

the total Australian industry's production volume in the investigation period, given that the Commission did not have information relevant to the profit amount for Dyno Nobel and Yara Pilbara Nitrates.

2) Applicants' Profit (Worksheet 2); and

This worksheet contains the three applicants' profit from 2014-15 to 2017-18 (the investigation period). The figure in cell E6 is used as the denominator in the calculations undertaken in column AA in worksheet 1. The sum of the figures in cells E4 and E5 are used as the denominator in the calculation undertaken in cell AA20 in worksheet 1.

3) Aus Industry Production (Worksheet 3).

This worksheet contains the production volumes in the investigation period for each Australian ammonium nitrate manufacturer. Therefore, the information in this worksheet relates to the whole Australian industry's production during the investigation period.

This worksheet is used to determine the relative ratios or percentages to apply to the figures in column AA in worksheet 1 (these ratios are also listed in column AB in worksheet 1). The ratios applied relate to the applicants' share of the total Australian industry's production volume, given that the Commission does not have information pertaining to the profit relevant to Dyno Nobel and Yara Pilbara Nitrates to use in the denominator in the calculations undertaken in column AA.

2. With regard to the statement from REP 473 quoted above, can the ADC clarify whether its finding with regard to materiality of injury relates to the investigation period only (as would seem to be indicated in the above-quoted statement) or whether it also includes injury (in the form of profit forgone) in the post investigation period, which seems to be included in Column AC of the spreadsheet in Worksheet 1, in those instances where it has not been noted in Column AD to have occurred in the investigation period.

Commission's response

It is important to note that the injury experienced, in terms of price depression, *occurred in the investigation period* as the applicants were responding to the pricing of the dumped goods in the investigation period when negotiating contracts for future supply. This price depression, occurring as a result of dumping during the investigation period, was quantified and disclosed in section 9.2.2 of REP 473 (page 79 refers) and the Commission considers it to be significant.

However, in quantifying the materiality of the injury to the Australian industry as a whole, the Commission had regard to profit forgone (an annualised amount).

The Commission determined profit forgone in the investigation period and post investigation period, given that some sales occurred in the investigation period, and other sales commenced post-investigation period in accordance with the

date specified in the negotiated/re-negotiated contract. Regardless, the price at which these sales occur has been affected or influenced by the dumping that occurred in the investigation period. In terms of lost volumes and the quantification of profit forgone in relation to these volumes, the Commission took into consideration the period in which the sales volumes in relation to the relevant applicant's bid would have occurred; however, the negotiations for these volumes were still influenced by dumping which occurred during the investigation period.

The applicants' aggregated profit in the investigation period is used as the denominator in the calculations in column AA of worksheet 1 in Confidential Attachment 17. This is further clarified in the Commission's response to question 3.

3. Cell AC22 of Worksheet 1, seems to reflect the total post investigation period profit forgone as a percentage of Australian industry profit and Cell AC23 seems to reflect the total investigation period profit forgone as a percentage of Australian industry profit. Cell AC21 seems to reflect the sum of the total post investigation period and investigation period profit forgone as a percentage of Australian industry profit.

    a. Can the ADC please clarify in respect of which of these percentages did the ADC base its finding, as articulated in the above quoted paragraph.

Commission's response

The Commission relied upon both calculations for its finding as they are both relevant to the finding of material injury caused by dumping; however, in Confidential Attachment 17, the calculations are presented separately as they relate to the profit effects, based on some sales occurring in the investigation period and other sales post-investigation period. Regardless, the injury to the Australian industry has occurred during the investigation period due to the dumped goods leading to price depression, or loss of sales volumes in certain instances.

Put another way, the injury experienced, in terms of price depression and loss of volumes, *occurred in the investigation period* as the applicants were responding to the pricing of the dumped goods in the investigation period when bidding and negotiating contracts for supply. The price depression, occurring as a result of dumping during the investigation period, was quantified and noted in section 9.2.2 of REP 473 (page 79 refers).

However, in quantifying the materiality of the injury to the Australian industry as a whole, the Commission had regard to profit forgone which is also based on negotiated contracts where the sales commence or occur in accordance with these contracts subsequent to the investigation period. The profit on these sales, and therefore the profit foregone, is realised subsequent to the investigation period also.

b. Is there any reason why the aggregated figures of profit forgone as a percentage of the aggregated Australian industry profit are confidential? If not, can the aggregated percentage on which the ADC based its finding be disclosed so that the applicants (and other interested parties) can comment thereon?

Commission's response

The figures were not published because it is not the Commission's usual practice to publish the materiality of injury in any report prepared for the public record. However, given that the calculations in Confidential Attachment 17 relate to three applicants and the profit forgone is an aggregated amount, the Commission is open to disclosing the profit forgone figures to the ADRP applicants.

The aggregated profit forgone is [redacted] per cent of the Australian industry's profit, calculated on a per annum basis (this comprises [redacted] per cent during the investigation period, and [redacted] per cent post-investigation period for the examples where sales commence post-investigation period). This profit forgone is *solely* attributable to dumping of the goods from the countries subject to the investigation.

Confidential Attachment 17 demonstrates that the injury to the Australian industry, as a whole, is not immaterial, insubstantial or insignificant, noting that there is no legislated threshold to observe in determining whether the injury is material.

4. If the ADC's analysis and finding includes injury in the post investigation period, can the ADC clarify, in a narrative non-confidential format, how it calculated the Australian industry's profit, for a period in the future, to obtain the relevant percentages of profit forgone as a percentage of Australian industry profit, as they appear in Column AC of Worksheet 1?

Commission's response

The relevant profit amount (which is used as the denominator in the calculations) was the three applicants' aggregated profit achieved in the investigation period. The Commission considers that this is the best available information and is the most reliable information. The Commission had not extrapolated an aggregated profit amount post-investigation period.

The Commission considers that using the profit amount achieved in the investigation period is conservative given that the aggregated profit for the three applicants has consistently decreased between 2015-16 and the investigation period (2017-18), and is lower than that achieved in 2014-15. Therefore, if the Commission had extrapolated the profit based on the data presented in tables 11 and 12 in Chapter 8 of REP 473 (page 63 refers), the extrapolated profit would have been lower than that used by the Commission as the denominator in column AA of worksheet 1 in Confidential Attachment 17, and would have led to a higher profit forgone estimate.

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10 September 2019

Ms L Blumberg
Member
Anti-Dumping Review Panel
c/- Anti-Dumping Review Panel Secretariat

Canberra
Australian Capital Territory 2600

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 4 September 2019 held under s.269ZZHA of the Act and to the email from the ADRP Secretariat dated 5 September 2019 which attached the written responses of the Anti Dumping Commission ("Commission") to the questions discussed in that conference.

Thank you for providing the opportunity to both better understand the Commission's position and to provide comments in relation to that position. On Yara's behalf, we note as follows:

1 Our understanding is that the "profit foregone"[1] upon which the finding that the Australian industry had suffered material injury was based relates to circumstances that occurred during the period of investigation ("POI") and in the post-POI period, being:

- POI: 1 April 2017 – 31 March 2018; and
- Post-POI period: 1 April 2018 – 31 March 2019.[2]

[1] We refer to the Third Ground of Yara's ADRP Application for commentary regarding the determination of the "profit foregone".

[2] During the conference, the Commission confirmed that the Post-POI period spanned the 12 months following the end of the POI.

2 We understand the "profit foregone" quantified for each period was:

POI	Post-POI	Total
[redacted]%	[redacted]%	[redacted]%

3 We understand that this amount has been "annualised". The process through which this was achieved has not been explained, however we infer from the Commission's responses that it was done by dividing the "profit foregone" in each period by the aggregated profit of the applicants in the POI.

4 We observe that the "profit foregone" is a percentage of the aggregated POI profit for the applicants. This means that the above quoted percentages do not reflect a total reduction in the profit margin, say from 20% to [redacted]%.[3] Rather they are the percentage of the profit margin itself. For example, if the aggregated profit margin in the POI was 20%, the addition of the "profit foregone" would have the following impact on the margin:

POI	Post-POI	Total
[redacted]%	[redacted]%	[redacted]%
Being 20% plus [redacted]% of 20%	Being 20% plus [redacted]% of 20%	Being 20% plus [redacted]% of 20%

5 We understand that the Post-POI "profit foregone" amount is not based on any verified information regarding actual costs incurred, sales made or profits achieved in the period April 2018 – 31 March 2019. Further, no regard seems to have been had to the fact that in the post-POI period, the applicants would have had an additional12 months to make further profit.

6 We note the references throughout the written submissions to "price depression" that occurred in the investigation period and references to injury occurring "solely" as a result of the subject imports. In this regard, we note the Report's conclusion that:

> *…the Commission found that the majority of the applicants' sales during the investigation period were made in accordance with contracts negotiated several years prior to the investigation period, and, in some instances, before the volume of the goods exported from China, Sweden and Thailand increased substantially. Therefore, the applicants' selling prices and volumes observed during the investigation period mostly reflect the contract terms, including prices and volumes, negotiated and agreed to before the investigation period.*[4]

We understand that when the Commission refers to "price depression" it refers only to the "effects" the subject imports were found to have on the seven contract negotiations in Part 9 of the Report, rather than some generalised and heretofore unrevealed form of price depression. For the reasons stated in the First and Second Grounds in Yara's application to the ADRP, Yara does not accept that these effects could or should have been attributed to Yara's exports.

7 Finally, we note the Commission's comment that "*there is no legislated threshold to observe in determining whether the injury is material*". We observe that does not mean that *any* injury is material. Materiality of injury is a condition precedent to the exercise of the power to impose

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3 In this regard, please refer to Yara's submission of 27 September 2018 (EPR file number 18).

4 Page 70.

anti-dumping measures under s 269TG(1) and (2) of the Act; it is a fundamental concept in anti-dumping law and is of equal importance to a finding that dumping occurred.

Once again, Yara thanks you for this opportunity. Nothing that has been revealed through this process impacts Yara's view – as elaborated in the Fourth Ground of Yara's application – that the injury suffered by the Australian industry, if any, was not material.

Yara reserves the right to make further interested party submissions in relation to its ADRP application following the initiation of the review.

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10 September 2019

Ms L Blumberg
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Anti-Dumping Review Panel
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Australian Capital Territory 2600

By email

Dear Member

Downer EDI Mining-Blasting Services Pty Ltd
Application for review - ammonium nitrate from China, Sweden and Thailand

We refer to the pre-initiation conference held on 4 September 2019 in relation to *"ADRP Review No. 107 - Ammonium Nitrate"*, and to the email from the Anti-Dumping Review Panel ("Review Panel") Secretariat dated 5 September 2019 to which was attached the written responses of the Anti-Dumping Commission ("Commission") to the questions you posed for the purposes of that teleconference.

At your request and invitation, we provide the comments of our client Downer EDI Mining-Blasting Services Pty Ltd ("DBS") to those written responses:

1. With respect to Example 1 in the examples listed in section 9.2.1 of the Commission's Report 473 ("Report 473"), being those contracts said by the Commission to provide *"evidence that pricing or volumes were affected or influenced by the dumped goods during the investigation period"*, DBS notes that the contract referred to in Example 1 was not entered into in the investigation period.

2. With respect to Example 2 in the examples listed in section 9.2.1 of Report 473, DBS notes that when working out the *"contracted price"* referred to in the fifth paragraph concerning Example 2 the Commission did not include the price of the sales to the *"specific site"* referred to in the first paragraph. This is because the *"contracted price"* referred to *"all other sites"*.

3. With respect to Example 3 in the examples listed in section 9.2.1 of Report 473, DBS notes:

   - that there is no reference in that Example to a contract having been entered into;
   - that there is a lack of clarity in that Example as to whether the expression *"particularly from one of the countries the subject of the application"* means that the non-particularised countries were or were not the subject of the application;
   - that there is no reference to evidence of the import parity pricing *"pricing mechanism"*, instead the finding relies on CSBP's *"explanation"* that a particular customer *"referred"* to

that mechanism; and

- that the Commission assumed a future state of affairs (*"the assumption that the sales volumes to this particular customer in the future, once the agreement commences, would be similar to the offtake volumes to this customer during the investigation period"*) which, by reason of the fact that an assumption was required, must not have been based on information recorded in any contract (if there was one).

4. With respect to Example 5 and Example 6, second negotiation, in the examples listed in section 9.2.1 of Report 473, DBS notes that the Australian industry member concerned did not enter into a supply contract, and that therefore there was and could be no profit forgone (profit being a return on cost of sales).

5. With respect to Example 7, DBS notes that these were spot sales in the investigation period, and therefore unable to be included, whether directly or by way of any operative assumption/s, in the post investigation period or beyond.

6. The Commission's written response states that profit foregone was not determined for the duration of the contracts specified in each example listed in section 9.2.1 of Report 473, and that *"[i]nstead, the Commission determined profit forgone, caused by dumping, on a per annum or annualised basis"*. DBS notes that this explanation indicates that profit foregone was determined for the duration of the contracts, at one point in the Commission's calculation, but that it is not indicated, in Report 473 or the Commission's written responses, whether the actual contracted or supplied quantities in either the investigation period or the post-investigation period were the same as the per annum or annualised quantities.

7. DBS notes that with respect to *"the calculation undertake[n] in column AC for each example… the Commission did not have information relevant to the profit amount for Dyno Nobel and Yara Pilbara Nitrates*". This is as baldly stated in the Commission's written responses.

8. DBS notes that the Commission's explanation of its methodology and analysis does not include any consideration of cost in the post investigation period or beyond that period (profit being a return on cost of sales). DBS therefore maintains its contention that the *'[redacted]%"* post-investigation period *"profit foregone"* has no evidentiary basis, for that reason alone.

9. DBS understands from the Commission's written responses that the *'[redacted]%"* and *'[redacted]%"* numbers cited by the Commission are *percentages* of the profit, and not *percentage points* of the profit.

We advise that nothing in the Commission's written response causes our client to withdraw or moderate any of the grounds on which it presented its application for review to the Review Panel.

Our client looks forward to the opportunity to lodge submissions with respect to these matters or other matters once the review has been initiated by the Review Panel.

Yours sincerely

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1. This submission addresses the written response (**Response**) of the Anti-Dumping Commission (**ADC**) in relation to the issues raised during the Anti-Dumping Review Panel's teleconference on 4 September 2019.

2. The Response discloses that the calculations in Confidential Appendix 17 to REP 473 quantify the profit forgone on the relevant contracts in Section 9.2.1 as [redacted]% of the Australian industry's profit on a per annum basis.

3. The ADC asserts that this profit forgone is *solely* attributable to dumping of the goods from the countries subject to the investigation. Though not the focus of the present submission, it should be borne in mind that this assertion is controversial. For the reasons given in Glencore's submission in elaboration of its grounds of review, the manner in which the ADC has identified the profit forgone (based on the difference between the contract price under seven contracts and an "undumped price", viz, the import price adjusted for the dumping margin) is legally and factually flawed. Among other things, as explained in connection with Ground 6, there are compelling reasons for concluding that the contract price under the relevant contracts would have been the same irrespective of the existence of dumped imports. Further, any impact on price in the seven contracts concerned does not equate to injury to the industry as a whole, which is what ss 269TG requires.

4. Assuming, contrary to the foregoing, that it is permissible to identify the profit forgone by comparing the contract price under the relevant contracts to the "undumped price" derived by the ADC, and that this represents the injury resulting from dumping, Glencore makes the following observations about the [redacted]% figure.

5. <u>First</u>, an injury calculated as [redacted]% of the Australian industry's annual profit, if correct, is not material injury. A [redacted]% impact is not significant when compared to the usual ebbs and flows in the Australian industry's profit. Those ebbs and flows can be seen by an analysis of the profits of the three applicants (who between them comprise 78% of total production volume during the investigation period: REP 473, p 28). That analysis, set out in REP 473, p 63, shows that in the three years from 2015 to 2018, there were variations of well over 50% compared to 2014-2015 profits.

6. <u>Secondly</u>, it appears that the [redacted]% may not be correct and that the ADC's calculations have somehow miscarried.

7. The likelihood that there is an error is apparent from the following analysis:

    a. the Australian industry's total profit is likely to be at least $270m on a 12 month basis. This based on assumptions that (a) 1.8m tonnes of AN are produced domestically each year[1]; and (b) AN can easily be produced with a margin of $150/mt margin over fully allocated costs;[2]

[1] This is based on a market size of 1.97m tonnes annually (Consideration Report 473, Section 2.5.1), less 136,000 tonnes recorded by Australian Customs as imported during the investigation period.

[2] This assumption is based on confidential cost modelling undertaken by Glencore. If the ADRP would be assisted by viewing Glencore's modelling, Glencore is open to exploring means to share this modelling with it.

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b. [redacted]% of the $270m profit figure is approximately $[redacted]m;

c. the $[redacted]m figure can be divided by the final dumping duties of approximately $75/mt in order to arrive at the volume of sales likely to be affected by dumping[3] (this is because the final duties are set at a level sufficient to remove the injury). That calculation produces a figure of [redacted] tonnes a year.

d. the figure of [redacted] tonnes a year is, on its face, excessive. That is because:

   i. due to the multi-year supply contracts commonly used for AN supply, it is an extraordinarily high volume of sales to have been negotiated during the investigation period, when compared to the 1.8m tonnes produced domestically each year;

   ii. assuming an average contract length of 4 years, there would be [redacted] tonnes of AN up for renegotiation each year. Again, [redacted] tonnes is an extraordinarily high proportion of this;

   iii. the impacted tonnage relates only to QNP and CSBP (thus excluding NSW and most of Queensland); and includes some examples of "spot sales" and "additional volumes" above contract (see REP 473, Section 9.2.1). These constraints make it even more unlikely that the impacted volume could amount to [redacted] tonnes.

8. These considerations suggest the ADC calculations resulting in the [redacted]% figure have not been correctly undertaken. Without access to the underlying workings, Glencore cannot identify where any error may have crept in. However, it invites the ADRP to consider the following possibilities:

   a. has the ADC properly accounted for the impact of varying prices of ammonia in comparing the contract price and the "undumped" price in the seven relevant contracts identified at Section 9.2.1? AN contracts are typically structured so that headline contract prices are set based upon international ammonia costs and variations in prices of ammonia and/or gas are passed through to the customer using an adjustment formula, which may operate by reference to variations from a nominated base ammonia or gas index. Comparing contract prices by reference to the headline price alone will fail to render a proper comparison, unless account is also taken of the international ammonia price that supports the headline price and differences arising from applying the nominated adjustment formula;

   b. is there double-counting of production volumes within, and post-dating, the investigation period? This possibility emerges in particular in connection with

[3] $75/mt conservatively assumes a US$350/mt FOB cost in Sweden or Thailand to which duties of ~15% could be applied, with a 0.70 USD/AUD exchange rate.

Example 2 on pp 72-73 of REP 473. That example refers to (i) an "arrangement" entered into by CSBP which at a specific site, covering three quarters of the investigation period and (ii) a multi-year supply contract negotiated for the same site, under which supply has now commenced. There is a danger of double-counting if these arrangements cover the same volumes;

c. has the application of a ratio for each example in column AC of Worksheet 1 been properly undertaken? This is a reference to the second step identified on page 2 of the Response, viz, "The profit forgone for each example…was then adjusted or multiplied by the ratio of the relevant applicants' production volume to the Australian industry's total production volume…". Glencore has difficulty understanding why this step is undertaken and finds the explanation of the process adopted hard to follow without access to the underlying figures. Glencore invites the ADRP to consider whether the multiplication of the profit forgone by a particular ratio has unnecessarily enlarged the size of the profit said to have been lost from dumping;

d. has profit from AN production *alone* been accounted for? The profit figures used should exclude other profit centres available to some producers such as Orica, e.g. emulsion manufacture, initiating systems, and services. These profit centres are not related to domestic AN production;

e. has tax been accounted for consistently? For example, it is possible that profitability is reported as Gross Margin, EBIT, EBITDA or NPAT depending on the producer concerned. There may be differences in the way corporate overheads are allocated as well;

f. have one-off losses been backed out of the profit numbers? Examples are Orica's third party purchases of ammonia due to the turnaround of its ammonia plant at Kooragang Island (REP 437, pp 61, 64);

g. have increased costs been backed out of the profit numbers? Examples are Orica's increased natural gas costs referred to at REP 437, p 64. AN contracts typically allow for such costs to be passed through; if that has not occurred, that is an election made by the producer which will unnecessarily inflate its costs;

h. have reduced margins been taken into account in circumstances where a manufacturer has chosen to import instead of produce domestically? An example is Orica's decision to mothball half its production capacity at its Yarwun plant (REP 437, p 26).

9. Glencore requests that these matters be considered by the ADRP in the course of any review.