

ADRP Conference Summary

Review No. 134 – Ammonium Nitrate exported from the Russian Federation

Panel Member	Leora Blumberg
Review type	Review of Minister's decision
Date	14 September 2021
Participants	Andrew Daly – Legal Counsel, Glencore Coal Assets Australia Robert Gare – Principal, Moncourt Group (consultant to Glencore) Alistair Bridges – Senior Associate, Moulis Legal (external counsel) Andrew Rose – Group Procurement Manager, Glencore Coal Assets Australia
Time opened	9:00am AEST
Time closed	9:30am AEST

Background

A conference was held with Orica Australia Pty Ltd (“Orica”) and Dyno Nobel Asia Pacific Pty Ltd (“Dyno Nobel”) on 24 August 2021 (“the August Conference”), the purpose of which was to formally obtain and place on the record the “applicants’ further information” (as referred to in the summary of the conference held on 15 July 2021), in accordance with s.269ZZHA(1) of the *Customs Act 1901* (the Act).

During the August Conference the Anti-Dumping Review Panel (“Review Panel”) also requested Orica and Dyno Nobel, separately, to consider extending the disclosure / non-confidential summaries relating to the public versions of the “further information” (the subject of Paragraph 1 and 4, respectively, of the summary of the August Conference), for procedural fairness purposes. After the August Conference both Orica and Dyno Nobel provided the Review Panel with revised non-confidential versions of the “further information”, attached to the summary of the August Conference as Annexures B and C respectively.

Purpose

To provide an opportunity for Glencore Coal Assets Australia Pty Ltd (“Glencore”) to comment on the applicants’ further information as set out in Annexures B and C to the summary of the August Conference, for procedural fairness purposes.

It was emphasised that the Review Panel had not at this stage formed a view as to whether:

- the applicants’ further information “relates to the relevant information” (within the meaning of s.269ZZK(6) of the Act), pursuant to s.269ZZHA(2)(a) of the Act, and if so;
- whether the Review Panel should exercise its discretion, within the statutory

framework of its functions and powers, and have regard to the applicants' further information, in making its recommendation to the Minister under s.269ZZK of the Act, or in requesting a reinvestigation under s.269ZZL of the Act.

I advised that the holding of the August Conference and this conference is necessary to facilitate the Review Panel's consideration of the above issues and should in no way be construed as any indication of the Review Panel's view in this regard.

Procedural matters

At the start of the conference, I informed the participants:

- That the conference was being recorded and transcribed by Express Virtual Meetings Pty Ltd, and that the recording would capture everything said during the conference.
- That the conference was being recorded and transcribed to assist the Panel in preparing a conference summary. The conference summary will then be published on the Panel's website.
- Any confidential information discussed during the conference would be redacted from the conference summary prior to publication.

Prior to the conference, participants were provided with a copy of the Panel's Privacy Statement. The Privacy Statement outlines who the conference recording and transcript maybe disclosed to. The Privacy Statement is available on the Panel's website [here](#). The participants indicated that they consented to:

- The recording of the conference; and
- The recording being dealt with as set out in the Privacy Statement.

Discussion Item

Glencore was provided with the opportunity to comment on the applicants' further information as set out in Annexures B and C to the summary of the August Conference, in particular, to comment on:

- the substantive content of the applicants' further information; and
- whether the applicants' further information, "relates to the relevant information" (within the meaning of s.269ZZK(6) of the Act), for the purposes of s.269ZZHA(2)(a) of the Act.

Glencore was requested to orally present a brief summary of its comments during the

conference, with the full written version to be submitted following the conference.¹

Glencore representatives made an oral presentation of its comments in summary form and after the conference provided a full written version of its comments, attached as Appendix 1.

Other Issues Arising

A Glencore representative requested clarity on the status of Annexure A to the summary of the August Conference. I advised that:

- the information contained in Annexure A was not formally before the Review Panel and was attached to the summary of the August conference for reference purposes only, having been raised by Orica during that conference;²
- the Review Panel has not taken a decision on whether to exercise its discretion to hold a conference under s.269ZZHA(1) of the Act to “obtain” that further information contained in Annexure A; and
- if the Review Panel decided to hold such a conference, interested parties would be provided with an opportunity to comment on Annexure A.

Leora Blumberg
Panel Member
Anti-Dumping Review Panel
16 September 2021

¹ The conference was held open for this purpose.

² See paragraph 2 of the summary of the August Conference.

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For the public register

14 September 2021

Ms Leora Blumberg
Panel Member
Anti-Dumping Review Panel Secretariat
GPO Box 2013, Canberra, ACT 2601

By email: ADRP@industry.gov.au

Dear Ms Blumberg

We refer to the conference invitation that was forwarded to us on 9 September 2021. We understand that the purpose of that conference is to provide Glencore Coal Assets Australia and Mount Isa mines (collectively, **Glencore**) the opportunity to provide comment regarding the content of Annexures B and C of the file note placed on the public record on 7 September 2021. Specifically, we are advised the comments must relate to:

- the substantive content of the applicants' further information; and
- whether the applicants' further information, "relates to the relevant information" (within the meaning of s.269ZZK(6) of the Act), for the purposes of s.269ZZHA(2)(a) of the Act.

Glencore's comments in that regard are set out below.

A *the substantive content of the applicants' further information; and*

We thank the ADRP for the opportunity to make comments regarding the substantive content of the applicant's information "further information". There is some difficulty in taking full advantage of this opportunity, because:

- the current summaries provided do not contain sufficient detail to allow a reasonable understanding of the substance of the information; and
- neither authors have articulated a cogent reason why they consider this information would change the outcome of the reviewable decision. They have failed to address the substantive test for continuation addressed at s 269ZHE(2) of the Customs Act 1901 (the **Act**).

Put another way, to address the substantive content, we would need to understand the substance of the further information. At this point, we do not. Having noted that, and due to the *ad hoc* and unpredictable nature through which this "further information" is allowed into the ADRP review and subject to interested party scrutiny, we will address the content as best we can.

The further information seems to address either communications the Australian industry has had with identified suppliers of Russian ammonium nitrate following the Minister's decision, or additional information regarding Russian AN producers' capacity. We will address these in turn.

With regard to the "communications", we observe:

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- The Australian industry has a history of importing HDAN from Russia. In 2019, they were the largest importers from Russia.¹ Apart from one other importer that the Commission considers is no longer likely to source AN from Russia, the Australian industry are the only established distribution links between Russia and Australia.²
- Given that context, the communications between Russian suppliers and Orica and Dyno-Nobel do not seem to be alarming or even unusual. We think they are merely evidence of the continuation of a well-established trend. That trend was not interrupted by the measures; the continuance of that trend after the expiry of the measures is no reason to consider the expiry of those measures was incorrect or not preferable.
- Further, if such communications ever led to imports, we do not see how such imports could be “injurious” to the Australian industry, even where they are dumped.
- We do not understand that the “further information” reveals evidence that non-Australian industry members have been approached by Russian suppliers.
- In the case of Annexure B, the communications are evidenced in the form of file notes of “conversations”. Based on the non-confidential summaries, it is not clear who instigated these discussions. It is not clear what the tenor nor intent of these discussions were. But, given the Australian industry are the only entities in Australia with established ongoing distribution links with Russian ammonium producers, the available inference is that discussions between the Australian industry and Russian manufacturers of AN are not uncommon.
- Annexure B also includes a “quotation from a shipping agent concerning supply of Russian AN”. There is very little we can say about that given the level of redaction. It is not clear if the supposed offers received have been made by producers directly or third parties. It is unclear if the potential suppliers even have access to the products they are offering. To be clear, traders can easily claim access to a product to test interest levels, but they may not be able to supply what they are suggesting. Further, we note that FOB sales prices of Russian AN in May 2021 were significantly higher than during the investigation period as was the cost of sea-freight.³
- Regarding Annexure C, this is apparently some form of email to Dyno-Nobel. We have no understanding of its “substantive content”.

In any case, as we have noted in our submission of 18 August 2021, imports of ammonium nitrate from Russia continued while the measures were in place and are likely to do so once they are removed. The goal of the measures was not to prevent imports from Russia, and certainly not to prevent the Australian industry from discussing such imports with Russian producers. We do not believe the further information supports the Australian entities call to allow the continuation of measures and we note the possibility that discussions instigated by Orica or Dyno-Nobel could have led to the circumstances where the further information was obtained.

In terms of the further information regarding capacity:

- We have already noted that the Commission considered KAO Azot’s additional capacity and did not consider it to support the Australian industry’s call for the continuation of measures.

¹ Report No. 565, page 62.

² Report No. 565, page 63.

³ If necessary, the Review Panel could have regard to the Bulk Ammonium Nitrate FOB Baltic index published by Fertecon (IHS Markit), Argus Media, CRU and others to verify this point.

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- The announced Shchekinoazot expansion has a declared launch date of 2024. But, the focus of the reviewable decision is what is likely to result from the expiry of the measures in 2021. Clearly, the commissioning of this project was not a result of the expiry of the measures, and the vague possibility that it may export to Australia at some point after 2024 is no basis to continue the measures in 2021.

So again, we do not understand why this further information is said to support the Applicants' applications. It either touches upon well-trod ground or is otherwise irrelevant to the reviewable decision.

B whether the applicants' further information, "relates to the relevant information" (within the meaning of s.269ZZK(6) of the Act), for the purposes of s.269ZZHA(2)(a) of the Act.

As we have already noted in our submission of 9 August 2021, we hold strong reservations regarding the prospect that any information arising after the expiry date of the measures can be relevant to the reviewable decision. Such information is alien to the Commissioner's recommendation and the Minister's decision, both of which are based on a prospective view of the impact of the expiry of the measures. As we have noted, we do not consider the "further information" to be relevant to the application nor the review, and so it should not have been accepted under s 269ZZK(1).

As to the defined point regarding whether the further information "relates to the relevant information" we must also answer in the negative.

The relevant information is a specific set of discrete information defined at s 269ZZK(6)(d) to be either information the Commissioner had regard to or was required to have regard to under s 269ZHF(3)(a). Further information must relate to that specific, discrete and identifiable information for it to be considered under s 269ZZK(5).

Neither Orica nor Dyno-Nobel have attempted to link the further information to any specified piece of the relevant information. At most they say it "*relates to' all of the information provided to the investigation concerning the capacity of Russian exporters to export to Australia and their interest in doing so.*" That is not relevant information as defined under s 269ZZK(6)(d) and 269ZHF(3)(a) of the Act. It does not refer specifically or even in general to any of the documents that make up the relevant information. It is about a subject considered by the Minister, but that is not what is required by s 269ZZHA(2)(a) of the Act.

The Australian industry argues for a very broad interpretation of s 269ZZHA(2)(a). Such an interpretation sits uneasily with the specific review mandate of the ADRP. Such an interpretation would allow the applicants to seek to solicit selective and targeted information in support of their application, which is divorced from the broader factual context. Such selective information can only be countered via the conference process, as it is not subject to the verifying processes undertaken by the Commission. For example, the news is replete with information regarding the capacity constraints and record high pricing that typifies the shipping industry right now. This will impact the ability to source AN from overseas for quite some time. Yet, we are unable to provide detail of that fact.

The ADRP's role is to review the Minister's decision on the basis of the relevant information. Given this, s 269ZZHA(2)(a) should be read narrowly, to only allow further information where it is clearly and directly about specific items of the relevant information. Orica and Dyno-Nobel have not attempted to show any real linkage between the further information and the relevant information that was before the Commissioner and which formed the basis for the reviewable decision. For that reason, it should not be considered when making a recommendation under s 269ZZK of the Act.

Further, the summaries of the further information do not contain sufficient detail to allow a reasonable understanding of the substance of that information in accordance with s 269ZZY. For that reason, we do not believe the review panel should have regard to it, as per s 269ZZK(5).

Thank you for allowing us to make this submission.

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Yours sincerely

A handwritten signature in black ink, appearing to read 'A Daly', with a large, stylized loop at the end.

Andrew Daly
Glencore Coal Assets Australia Pty Limited