NON-CONFIDENTIAL

Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 20 May 2019 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application for review to the ADRP of a review of a Ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

Further application information
You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 9, 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal
You may withdraw your application at any time, by completing the withdrawal form on the ADRP website.

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[1] By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

Contact

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: **Glencore Coal Assets Australia Pty Ltd ("Glencore")**
Address: **Level 4, 670 Hunter Street, Newcastle, NSW 2302**
Type of entity (trade union, corporation, government etc.): **Corporation**

2. Contact person for applicant

Full name: **Darren Oliver**
Position: **Group Manager - Procurement**
Email address: Darren.oliver@glencore.com.au
Telephone number: 0419 421 382

3. Set out the basis on which the applicant considers it is an interested party:

Glencore is or is likely to be directly concerned with the importation into Australia of the goods the subject of the reviewable decision, and has been or is likely to be directly concerned with the importation of like goods to the goods the subject of the reviewable decision, within the meaning of subsection (c) of the definition of 'interested party' under s 269ZX of the Customs Act 1901, because:

(a) [explanation of confidential arrangements in which Glencore is involved directly and which concern the importation of ammonium nitrate].

4. Is the applicant represented?

Yes ☒ **No** ☐

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☒ Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐ Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐ Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐ Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐ Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐ Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐ Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐ Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision:

Ammonium nitrate, prilled, granular or in other solid form, with or without additives or coatings, in packgaes exceeding 10kg

7. Provide the tariff classifications/statistical codes of the imported goods:

Ammonium nitrate, whether or not in aqueous solution, is classified within tariff subheading 3102.30.00, statistical code 05, in Schedule 3 to the *Customs Tariff Act 1995*

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number: **No.2019/57**
Date ADN was published: **3 June 2019**

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

9. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

- **Ground 1:** By confining its attention to 7 contracts, the ADC failed to consider whether dumped imports caused material injury to the Australian industry as a whole, contrary to the requirements of s 269TG(1) and (2) of the *Customs Act* 1901 (Cth) (**the Act**), as interpreted in *Swan Portland Cement Ltd v Minister for Small Business and Customs* (1991) 28 FCR 135 at 144.

- **Ground 2:** The ADC misconstrued "price" in 269TAE(1)(f) by considering only the price paid in 7 contracts and not considering whether that price represented the price in any market for ammonium nitrate in Australia.

- **Ground 3:** The ADC failed adequately to consider whether, in respect of the 7 contracts it analysed, injury was caused by factors other than dumping, contrary to s 269TAE(2A).

- **Ground 4:** The ADC failed adequately to consider whether, in respect of the 7 contracts it analysed, the injury identified was caused by the volume and prices of goods that are not dumped, contrary to s 269TAE(2A)(a).

- **Ground 5:** The conclusion that the contract price, in the absence of dumping, would have been the import prices adjusted for the dumping margin, was not based on facts but was based merely on allegations, conjecture or remote possibilities, contrary to s 269TAE(2AA).

- **Ground 6:** The correct and preferable decision, having regard to the material before the ADC, was that the Minister could not be satisfied that there was material injury to the Australian industry as a result of dumped imports.

- **Ground 7:** The ADC erred in finding that it cannot "carve out" certain states from the dumping duty notice. In light of the evidence that there was no material injury from

dumped imports in NSW or the Pilbara, the Minister should have exempted exports to those markets from the dumping notice.

Each of the grounds identified above are explained in further detail in the attached submission.

10. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:

1. A decision declining to issue a notice, pursuant to s 269TG(1) and s 269TG(2) of the Act, in respect of ammonium nitrate exported to Australia from the People's Republic of China, Sweden and the United Kingdom (**Decision 1**).

2. In the alternative, should the Minister publish a notice under s 269TG(1) and s 269TG(2) of the Act, a decision that ammonium nitrate exported to New South Wales or the Pilbara region in Western Australia be excluded from any such notice (**Decision 2**).

11. Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

- **Decision 1**: Grounds 1-6 outlined in response to question 9 above support the making of Decision 1 as there is no power for the Minister to publish a notice under s 269TG(1) or 269TG(2) unless the Minister is satisfied that dumping has caused material injury to an Australian industry producing like goods.

- **Decision 2**: Ground 7 outlined in response to question 9 above supports the making of Decision 2 on the basis that, if accepted, it would follow there there is no material injury resulting from the dumped goods exported to either New South Wales or the Pilbara region in Western Australia.

12. Set out the reasons why the proposed decision provided in response to question 10 is materially different from the reviewable decision:

Do not answer question 11 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

- **Decision 1:** The proposed decision is materially different from the reviewable decision because it would lead to no dumping duties being imposed on exports of ammonium nitrate from China, Sweden and Thailand.

- **Decision 2**: The proposed decision is materially different from the reviewable decision because it would exempt exports into two markets from any dumping duties imposed on exports of ammonium nitrate from China, Sweden and Thailand.

13. Please list all attachments provided in support of this application:

1. Submission in support of Glencore's application for review.

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: D. Oliver

Name: DARREN OLIVER

Position: GROUP MANAGER- PROCUREMENT

Organisation: GLENCORE COAL ASSETS AUSTRALIA

Date: 28/6/19

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative:

Full name of representative: **Dave Poddar**
Organisation: **Clifford Chance**
Address: **Level 16** **1 O'Connell Street** **Sydney NSW 2000**
Email address: Dave.poddar@cliffordchance.com
Telephone number: **+61 2 8922 8033**

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature: D. Oliver
(Applicant's authorised officer)

Name: DARREN OLIVER

Position: GROUP MANAGER - PROCUREMENT

Organisation: GLENCORE COAL ASSETS AUSTRALIA

Date: 28 / 6 / 19

GLENCORE

Introduction

1. This submission is made in elaboration of the seven grounds contained in the application submitted by Glencore Coal Assets Australia Pty Ltd (**Glencore**) for review of the decision of the Minister for Industry, Science and Technology (**Minister**) to issue a notice under s 269TG(1) and 269TG(2) of the *Customs Act* 1901 (Cth) (**the Act**) in respect of ammonium nitrate exported from China, Sweden and Thailand following recommendations made by the Anti-Dumping Commission (**ADC**) in *Anti-Dumping Commission Report No. 473* (**Rep 473**).

Overview

2. The application is directed to two findings in Rep 473:

    a. That dumping of ammonium nitrate (**AN**) caused material injury to an Australian industry producing like goods (**Finding 1**);

    b. That it is not possible to carve out certain states or markets from the anti-dumping duty notice (**Finding 2**).

3. **Finding 1** was made despite the fact that, over the injury analysis period:

    (a) dumped imports comprised 2.7-3.1% of the Australian market, compared to the Australian industry's market share of 91.7-94.7% (Rep 473, p 57);

    (b) dumped imports increased their market share by only 0.4%, compared to a 3% increase for the Australian industry over the same period (Rep 473, p 57)

    (c) structural constraints limited imports of AN into the Australian market (BHP Submission 13 December 2018; cf Rep 473 p 86);

    (d) the Australian industry experienced an increase in production and sales volumes (Rep 473, p 59)

    (e) a co-incidence analysis was impossible because the majority of AN was sold and purchased under fixed-term contracts, and because numerous other factors had caused material injury to the Australian industry (Rep 473, p 47). In particular, it was acknowledged that overcapacity and competition between producers kept prices low (Rep 473, pp 87-90);

    (f) the only injury at all found to result from dumped imports was confined to a price impact on 7 contracts negotiated during the investigation period (Rep 473, pp 70-75);

    (g) the bulk of losses of profit and profitability among the applicants were suffered by Orica, which was not party to any of the 7 contract negotiations in question. Of the other two applicants, CSBP *increased* its profit over the period; while QNP saw also increases (albeit not in the investigation period) (Rep 473, p 63).

Private Mail Bag 8, Singleton, NSW 2330
567 Broke Road, Singleton, NSW 2330
T + 61 2 6570 2416 F + 61 2 6570 2520 www.glencore.com

Glencore Coal Assets Australia Pty Limited (ACN 163 821 298)

4. In the face of those unpromising facts, the ADC based its finding of material injury to the Australian Industry caused by dumping on an exceedingly slim foundation. It found that, in the 7 contracts just mentioned, dumped imports had had an impact on price in the form of either price depression or a loss of sales volumes (Rep 473, p 70); and concluded that the injury resulting from these 7 contracts only was material (Rep 473 p 91).

5. This approach is illogical and contrary to law. It has produced a finding of material injury to the Australian industry which is against the evidence and contrary to common sense.

6. **Finding 2** was made despite the fact that facts submitted to the ADC as part of the investigation clearly demonstrate that exports to the NSW and Pilbara markets warranted separate consideration if the ADC proposed to impose duties; and there is no legal reason why in publishing a dumping duty notice the Minister cannot discriminate between exporters according to the destination of the export.

7. These propositions are elaborated in the grounds of review below.

Finding 1: That dumping of ammonium nitrate (AN) caused material injury to an Australian industry producing like goods

Ground 1: By confining its attention to 7 contracts, the ADC failed to consider whether dumped imports caused material injury to the Australian industry as a whole, contrary to the requirements of s 269TG(1) and (2) of the Act, as interpreted in *Swan Portland Cement Ltd v Minister for Small Business and Customs* (1991) 28 FCR 135 at 144.

8. The ADC's reasoning can be reduced to the following steps:

   (1) It identified 5 contract negotiations in which CSBP or QNP matched, or were requested to match, import prices; and 2 contracts where QNP's sale was lost to an importer selling at dumped prices (pp 71-75).

   (2) It assumed that, but for the dumped imports, the negotiated price would have been the import price adjusted for the dumping margin, described as an "undumped price" (pp 78-79, 90).

   (3) It concluded that the profit and revenue foregone, based on this "undumped price", isolates the effect of the dumping (p 90).

   (4) It measured that profit foregone relative to the applicants' aggregated profit in the investigation period, to determine whether it is material to the industry as a whole, taking account of the applicants' total production volume in the investigation period (p 91).

9. This analysis does not address the question of whether the Australian industry as a whole has suffered material injury from dumping. That is the question posed by s 269TG(1) and (2): *Swan Portland Cement Ltd v Minister for Small Business and Customs* (1991) 28 FCR 135 (***Swan***) at 144.

10. Injury is not caused to the Australian industry as a whole merely because 5 contracts were negotiated by reference to the prices of dumped imports, and 2 sales were lost to imports at dumped prices. It was necessary for the ADC to consider whether it was possible to extrapolate from that finding to a finding that dumped imports had an impact on the Australian industry as a

whole. To quote from the Dumping and Subsidy Manual p22, it needed to consider whether those 7 contracts were "sufficiently representative of the industry concerned".

11. That step was not taken. In particular, the ADC nowhere expressly or impliedly considered:

    (a) whether the 7 contracts were representative of the price impact of dumping on the industry as a whole;

    (b) the volumes covered by the 7 contracts in the context of volumes sold by the Australian industry as a whole in the investigation period. In this respect, it is notable that three of the negotiations (Examples 1, 6 and 7) were not for fixed term contracts but for once-off sales of additional volumes or spot sales.

    (c) the circumstance that the 7 contracts related exclusively to QNP and CSBP and did not include any contracts of Orica or Dyno Nobel (who, between them, accounted for 60% of the Australian market: see BHP 15 March 2019 submission).

12. Not only did the ADC fail to extrapolate from these 7 contracts; it is patent it could never have done so. The 7 contracts it relied on were what remained after the ADC had excluded 7 other sets of contracts on the basis that these did not involve any impact of dumping on price (see Examples 7 to 13 at Rep 473, pp 74-78); and after the Australian industry had already been given an opportunity to supply additional information in support of its injury and causation claims (Rep 473, p 70). In other words, there is no reason to believe that, outside these 7 contracts, dumping had any impact on price.

13. The ADC seeks to circumvent this problem by considering only whether the impact of dumping on the 7 contracts alone is material in the context of the Australian industry as a whole (Step 4 above). This is the wrong question. The question is whether material injury has been suffered by the industry as a whole; not whether injury (not demonstrated to have been suffered by the industry as a whole) is material in the context of the profits of the industry as a whole. Were it otherwise, it would be open to the Minister to publish a dumping notice simply because the price in one very large contract has been impacted by dumping, where the profit impact of that contract is material in the context of the industry's profits as a whole.

Ground 2: The ADC misconstrued "price" in 269TAE(1)(f) by considering only the price paid in 7 contracts and not considering whether that price represented the price in any market for ammonium nitrate in Australia.

14. Related to Ground 1, there was a misconstruction of "price" in 269TAE(1)(f).

15. In determining whether material injury had been caused to the Australian industry because of dumped imports, the ADC was entitled under s 269TAE(1)(f) to consider the price effects of dumped imports on the price paid for like goods produced or manufactured in the Australian industry.

16. This is what the ADC purported to do in Report 473. Indeed, its identification of material injury is premised entirely on the price effects of dumped imports in the context of the 7 particular contract negotiations it analysed at pp 70-79. Although volume effects and profit effects are also referred to, these effects are simply a consequence of the price effects identified in the context of those 7 contracts: the volume effects comprise the volumes the subject of the two contracts lost by QNP; and the profit effects comprise the profit foregone on all 7 contracts (Rep 473, p 83).

17. However, in confining its identification of injury to the price impact on these 7 contracts alone, the ADC erred.

18. For the purposes of s 269TAE(1)(f), "price" refers to the price or prices of the goods set, by the forces of supply and demand, in the market or markets that comprise the Australian industry: *Swan* at 145-146.

19. The ADC's report discloses that there are four distinct markets for AN in Australia (Rep 473, p 24). In those circumstances, the price the ADC needed to consider was the price or prices for which AN was being sold by members of the Australian industry in these markets. This is not necessarily the same as the actual price in a selection of contracts. Only if the price in one or more of the relevant markets was impacted by dumped imports could it be said that dumping had had an effect on price within the meaning of s 269TAE(1)(f). The ADC failed to consider this question because it failed entirely to link the prices paid in the 7 contracts which it analysed with the price paid for goods in any one of the four markets in which the Australian industry made sales.

Ground 3: The ADC failed adequately to consider whether, in respect of the 7 contracts it analysed, injury was caused by factors other than dumping, contrary to s 269TAE(2A).

20. The ADC accepted in Rep 473 that there were factors other than dumping that may have caused injury to the Australian industry. Specifically, it acknowledged that excess capacity in the domestic market and competition between manufacturers in the Australian industry may have caused injury in the form of price depression (Rep 437, pp 87-90).

21. However, when it came to the 7 contracts under consideration, the ADC put these other factors to one side on the basis that it had found a causal link between dumping and price depression (Rep 437, pp 89, 90). That was impermissible.

22. The causal link the ADC refers to is simply the fact that, in the 7 negotiations in question, CSBP or QNP matched, or were requested to match, import prices (or, in the two cases of lost sales, the contract was lost to an importer selling at dumped prices). In other words, in these 7 contract negotiations, the dumped prices were used as a benchmark.

23. The mere fact that dumped prices were used as a negotiating benchmark did not absolve the ADC of the obligation, imposed by s 269TAE(2A), to consider whether the prices actually paid in these 7 contracts were the result of factors other than dumping. It remained necessary to analyse whether the other factors (which the ADC acknowledged might have been operative) were sufficient to keep prices at or below the prices of dumped imports.

24. This required a counterfactual consideration of what customers would have paid in the absence of the dumped imports. Such counterfactual analysis was provided by Frontier Economics in a 10 December 2018 report (provided by BHP on 13 December 2018)(**Frontier Report**), which opined that in the absence of dumped imports prices would have fallen anyway because of the fall in demand for AN in Australia in 2017 and the existence of overcapacity. That counterfactual analysis was not even referred to in this part of Rep 473.

25. Even without a counterfactual analysis, a first step would have been to consider whether prices in the 7 contracts were the same as the prices for other contracts negotiated during the investigation period. That matter was not considered at all.

26. It is apparent that the ADC did none of these things because it assumed, from the mere fact that the price of a dumped import is referred to as a negotiating benchmark, that in the absence of dumping the price negotiated would have been the import price adjusted for the dumping margin, described as the "undumped price" (Rep 473, p 78). It further assumed that the profit foregone based on this "undumped price" isolates the effect of dumping (Rep 473, p 90). The basis for these assumptions is nowhere explained. The entire approach is flawed because it assumes what it needs to prove.

27. These flaws are underscored by the requirements of the Dumping and Subsidy Manual. The Manual states that where a coincidence analysis is not possible, an alternate method such as a "but for" analysis can be used, but in accordance with WTO jurisprudence it "will require a 'compelling explanation' as to why causation exists notwithstanding the absence of any co-incidence" (p 131). Further, the Manual provides:

> "Parties submitting information to demonstrate injury based on 'but for' grounds must provide, and explain, the evidence on which this claim rests. For example, how they estimated the effects of the dumping by using suitable accounting methods and counterfactual analysis. It is not sufficient to simply assert such an effect as this will not meet the evidentiary requirement."

28. The ADC has transgressed these important requirements by assuming, without explanation, that customers would have paid a different price in the absence of the dumped imports.

Ground 4: The ADC failed adequately to consider whether, in respect of the 7 contracts it analysed, the injury identified was caused by the volume and prices of goods that are not dumped, contrary to s 269TAE(2A)(a)

29. Not all imports into Australia during the investigation period were from the countries the subject of Investigation 473. As well as China, Sweden and Thailand, imports came from other countries such as Indonesia and Russia (Rep 473, p 24). The market share of these other imports was between 3 and 5.6% over the injury analysis period (Rep 473, p 57).

30. In accordance with s 269TAE(2A)(a), the ADC was required to consider whether the injury it identified was caused by the volume and prices of goods that are not dumped.

31. It is apparent from the ADC's analysis of three particular contract negotiations that it failed to do this. Rather, the negotiating benchmark used in these examples was not dumped imports but imports generally. Thus:

    a. In discussing Example 4, it is said "The Commission verified the price of imports used by QNP to form its price offers. The lowest priced imports during the period were from the subject countries" (Rep 473, p 74). It is clear from this extract that some undumped imports were also used as a point of comparison. There is no consideration of the correlation which these dumped imports bore to the price ultimately offered.

    b. In discussing Example 6, the ADC says "QNP was successful in supplying at a price derived with reference to import parity pricing" (Rep 473, p 74). It is not clear whether import parity pricing refers to parity with all imports (which would be its natural meaning) or is confined to dumped imports.

c. In discussing Example 7, the ADC says "The Commission observes that the prices of the balance of the spot volumes are similar to the IPP that QNP has derived by using the average of imports to the relevant ports plus importation costs to derive a landed price" (Rep 473, p 75). This wording suggests that the benchmark used was an average of all imports, not dumped imports only.

32. In each of these cases, the ADC failed to consider whether the contract price would have been the same in any event because of the benchmark set by undumped imports.

Ground 5: The conclusion that the contract price, in the absence of dumping, would have been the import prices adjusted for the dumping margin, was not based on facts but was based merely on allegations, conjecture or remote possibilities, contrary to s 269TAE(2AA).

33. As already explained, the ADC concluded that in the absence of dumping the price negotiated in each of the 7 contracts under consideration would have been the import price adjusted for the dumping margin (Rep 473, p 78). This is what the ADC calls the "undumped" price. There is no basis given for this conclusion.

34. Even if, contrary to what is put above, the use of dumped prices as a benchmark supports a conclusion that the prices paid in these contracts were impacted by the existence of dumped imports, it does not follow that the parties would otherwise have settled on the "undumped" price – as opposed to, say, the non-injurious price, or indeed some other price. The supposition that, but for the existence of dumped imports, customers would have paid the "undumped" price is nothing more than conjecture. That is contrary to s 269TAE(2AA).

Ground 6: The evidence before the Minister did not support a finding that there was material injury to the Australian industry as a result of dumped imports.

35. The Minister could not have been satisfied, on the material before her, that the Australian industry suffered material injury as a result of dumped imports of AN.

36. The determination whether material injury has been caused is not an exercise of counting heads; it is a "practical exercise": *Swan* at 144. As a matter of common sense and practical experience, the following matters are pertinent.

37. First, the only evidence of *any* injury caused to the Australian industry from dumped imports was the injury said to arise in the 7 contract negotiations analysed at Rep 473, pp 70-79.

38. Even in the context of those 7 negotiations, the Minister could not be satisfied that the contract price was affected by the price of dumped imports.

39. The ADC points out that the prices negotiated in the 7 contracts in question were on average 24% lower than the contract prices existing at the time of the negotiations (Rep 473, p 79). There are sound reasons for concluding these lower prices would have been offered or demanded in any event. That is for the following reasons:

(a) prices would have been expected to fall in the absence of dumped imports. This is supported by Frontier Economics' counterfactual analysis, which refers to the fall in demand for ammonium nitrate in Australia throughout 2017 and overcapacity in ammonium nitrate production as reasons why prices would have fallen in any event will (Frontier Report p 13).

It is also supported by the ADC's acknowledgment of the role of overcapacity and competition between Australian producers in keeping prices down (Rep 473, pp 87-90). There was ample evidence to support that view, including in Glencore's submission of 17 March 2019, paras 3.10-3.15; BHP's submission of 10 August 2018, para 3.2; and Moncourt's submissions of 17 August 2018, pp 5-9, 14.

It cannot be concluded from the mere fact of reference to import prices in negotiations that the lower prices followed from the existence of dumped imports; these other factors suggest that even if dumped imports could not be used as a reference point, lower prices would still result.

(b) It is inherently unlikely that, despite their apparent use as a reference point, dumped imports could have had any credible impact on price. That is because there were structural impediments to importing large amounts of ammonium nitrate into Australia. These impediments were summarised in Rep 473, p 86, and elaborated in the Frontier Economics Report at pp 19-20 and the Glencore 10 December 2018 submission, para 3.17b. They include: the limited number of ports that can accept AN; limitations on the discharge quantity per shipment; the requirement for a licence to import it; difficulties with transporting and storing it (as it is a hazardous substance); the requirement to have facilities in close proximity to mine sites; difficulties in maintaining quality and consistency (as the product degrades with temperature and humidity); and security of supply (impacted by lead times for importation). In fact, imports of AN had comprised only about 5% of the Australian market since April 2015 (Rep 473, p 57).

This does not involve disbelieving any of the documentation provided to the ADC, which apparently suggested that dumped imports were used as a negotiating benchmark. It simply suggests that, had such a benchmark not been available, some other negotiating tool would have been used to arrive at a similar price.

40. Secondly, once it is recalled that these 7 contracts are not the entirety of the Australian industry, and that in the balance of the market or markets in which the Australian industry competes the ADC was unable to make any finding that dumped imports had an impact on price, there is no basis for extrapolating that dumped imports have had any price effect (or related volume or profit effect) on the Australian industry as a whole.

41. Thirdly, there was positive evidence that dumped imports did *not* have a price impact. That included the following:

(a) in its 17 March 2019 submission, para 3.3, Glencore identified examples of recent negotiations with Australian AN producers which resulted in pricing well below import prices as a result of competition between Australian producers.

(b) There are 7 instances where the ADC positively found price depression or loss of sales volumes could *not* be said to have been caused by dumping (Examples 7 to 13 at Rep 473, pp 75-78).

(c) The ADC's own findings included an analysis of AN imported by Orica and Dyno Nobel from China during the investigation period. The ADC found that these exportations did *not* influence CSBP or QNP's price negotiations or volumes in even the 7 contracts which the ADP found were impacted by dumping (Rep 473, p 86).

42. Fourthly, the other circumstances of the industry, identified in paragraph 3 above, stood in the way of any finding that the Australian Industry had suffered material injury as a result of dumping.

43. Of these, two factors deserve particular mention:

    (a) The relative market share held by the dumped imports. These comprised between 2.7 and 3.1% of the market during the injury analysis period. It is inherently unlikely that imports to that extent could influence prices in a market, particularly given the structural impediments mentioned above.

    (b) The proportionate rate of increase of dumped imports, compared to the increase of sales by the Australian industry. Article 3.2 of the WTO Anti-Dumping Agreement provides that "the investigation authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing member". Here, not only is the increase of dumped imports not significant (only 0.4%); it is not as large in relative terms as the increase in sales by the Australian industry (3%).

44. Fifthly, any injury that was suffered by the Australian industry as a whole was not material.

45. The Ministerial Direction on Material Injury dated 1 June 2012 provides that, in order to be material, "[t]he injury must also be greater than likely to occur in the normal flow of business".

46. In the absence of access to Confidential Attachment 17, it is not possible to make meaningful submissions on this question. However, it is notable that the Frontier Economics report contains a detailed evaluation of the normal flow of business in the AN industry (pp 20-23). It notes that this is characterised by:

    (a) regular swings in profits from changes in contract arrangements when existing contracts come up for renewal (due to the existence of only a few large suppliers and large buyers)

    (b) large contract price variations including, in 2017, a difference of more than 40% between upper and lower price bounds; and

    (c) Variations in key input prices which, in 2017, included variability of 50%, which can be expected to result in material variations in profits (all other things being equal).

47. Any injury in fact found to have been suffered by the Australian industry would need exceed the bounds of the ebbs and flows just outlined in order to qualify as material within the meaning of the Ministerial Direction.

Finding 2: That it is not possible to carve out certain states or markets from the anti-dumping duty notice.

Ground 7: The ADC erred in finding that it cannot "carve out" certain states from the dumping duty notice. In light of the evidence that there was no material injury from dumped imports in NSW or the Pilbara, the Minister should have exempted exports to those markets from the dumping notice.

48. The ADC identified in Rep 473, p 24, four distinct AN markets in Australia, namely, NSW (Hunter Valley), Queensland (Bowen Basin), and two markets in WA (Kalgoorlie and the Pilbara).

49. Glencore explained in its 17 March 2019 submission that:

(a) AN destined for one regional market does not typically enter other regional markets;

(b) none of the 7 contracts comprising the alleged material injury related to the NSW market;

(c) dumped imports made up less than 1% of the NSW market.

50. Glencore's submission concluded that the NSW market warranted separate consideration if the ADC proposed to impose duties. It made a similar point with regard to the Pilbara, where it was impossible to identify any imports at all that were not made by the Australian industry.

51. The ADC addressed this submission by asserting that it is not possible to "carve out" certain states from the dumping notice (Rep 473, p 91). This assertion is wrong in law.

52. As Lockhart J explained in *Swan* at 146:

> "The 'price' in s 269TAE(1)(e) can easily be read (and often will be read) as 'prices'. Of course this may lead the Minister to determine that one market within the industry is being injured while others are not being injured, due to different pricing structures…[O]nce it is accepted that there may be different levels of injury determined under s 269TAE(1)(e), then ***it is logical that different levels of dumping duty may have to be imposed on a foreign exporter depending on the market in which the goods are dumped***… *There is no reason in s 8 [of the Anti-Dumping Act] why the Minister has to impose one level of dumping duty.* ***The Minister has the power to impose different levels of dumping duty in particular cases depending on the injury or injuries involved.***" (emphasis added)

53. Those comments were made in a context where the market for cement clinker in Western Australia was different to the market elsewhere in the industry.

54. Lockhart J's construction is consistent with s 33(3A) of the Acts Interpretation Act 1901 (Cth), which provides:

> "Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) with respect to particular matters (however the matters are described), the power shall be construed as including a power to make, grant or issue such an instrument with respect to some only of those matters or with respect to a particular class or particular classes of those matters and to make different provision with respect to different matters or different classes of matters."

55. It should be borne in mind that dumping duty notices discriminate all the time between exporters of the same goods, for example, by imposing different duties on different exporters or on exporters from different countries. There is no reason why the Minister cannot discriminate according to the destination of the export.

56. It follows that there was power to publish a dumping notice which did not apply, or imposed different duties, in respect of AN exported to NSW or the Pilbara. Given the material referred to in the Glencore submission, the power should have been exercised so as to excise from the dumping notice any exports into those two markets.

Customs Act 1901 – Part XVB

Ammonium nitrate - 473

Exported from the the People's Republic of China, Sweden and the Kingdom of Thailand

Findings in Relation to a Dumping Investigation

Public notice under subsections 269TG(1) and (2) of the *Customs Act 1901*

Anti-Dumping Notice (ADN) No. 2019/57

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of ammonium nitrate exported to Australia from the People's Republic of China (China), Sweden and the Kingdom of Thailand (Thailand).

The goods the subject of the investigation (the goods) are:

> *Ammonium nitrate, prilled, granular or in other solid form, with or without additives or coatings, in packages exceeding 10kg.*

Ammonium nitrate, whether or not in aqueous solution, is classified within tariff subheading 3102.30.00, statistical code 05, in Schedule 3 to the *Customs Tariff Act 1995*.

This tariff classification and statistical code may include goods that are both subject and not subject to this investigation. The listing of this tariff classification and statistical code is for convenience or reference only and does not form part of the goods description.

The Commissioner reported his findings and recommendations to me in *Anti-Dumping Commission Report No. 473* (REP 473), in which he outlines the investigation carried out and recommends the publication of a dumping duty notice in respect of the goods. The report is available at www.adcommission.gov.au.

Particulars of the dumping margins established and an explanation of the methods used to compare export prices and normal values to establish each dumping are set out in the following table:

Country	Exporter	Dumping Margin	Method to establish dumping margin
China	Uncooperative and all other exporters	39.3%	Weighted average export prices were compared with weighted average corresponding normal values over the investigation period in terms of subsection 269TACB(2)(a) of the *Customs Act 1901*.
Sweden	Yara AB	51.1%	
	Uncooperative and all other exporters	61.3%	
Thailand	Uncooperative and all other exporters	32.7%	

I, KAREN ANDREWS, the Minister for Science, Industry and Technology (the Minister), have considered, and accepted, the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 473.

I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those goods and because of that, material injury to the Australian industry producing like goods might have been caused if the security had not been taken. Therefore under subsection 269TG(1) and section 45 of the *Customs Act 1901* (the Act), I DECLARE that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

(i) the goods; and
(ii) like goods

that were exported to Australia six months prior to the publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been caused or is being caused. Therefore, under subsection 269TG(2) of the Act, I DECLARE that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from China, Sweden and Thailand.

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports on prices in the Australian market and the consequent impact on the Australian industry including price depression, reduced profits and profitability, and loss of sales volumes.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

In this case, the non-injurious price is less than the normal value and the lesser duty rule applies. The form of measures and effective rates of duty are set out in the following table:

Country	Exporter	Fixed component of duty	Form of measures
China	Uncooperative and all other exporters	0.3%	Combination of fixed and variable duty
Sweden	Yara AB	14.4%	
	Uncooperative and all other exporters	14.4%	
Thailand	Uncooperative and all other exporters	13.5%	

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export prices, non-injurious prices, and normal values of the goods (as ascertained in the confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how measures securities are applied to 'goods on the water' is available in ACDN No. 2012/34, available at www.adcommission.gov.au.

REP 473 and other documents included in the public record may be examined at the Anti-Dumping Commission office by contacting the case manager on the details provided below. Alternatively, the public record is available at www.adcommission.gov.au.

Enquiries about this notice may be directed to the case manager on telephone number +61 3 8539 2424, fax number +61 3 8539 2499 or email investigations2@adcommission.gov.au.

Dated this 29th day of May 2019

KAREN ANDREWS
Minister for Industry, Science and Technology