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.

[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:	**Yara AB ("Yara AB")**
Address:	**Box 4505** **203 20 Malmö** **Besökadress** **Östra Varvsgatan 4** **211 75 Malmö** **Sweden**
Type of entity (trade union, corporation, government etc.):	**Yara is a company.**

2. Contact person for applicant

Full name:	**Alistair Bridges**
Position:	**Senior Associate**
Email address:	**alistair.bridges@moulislegal.com**
Telephone number:	**+61 3 8549 2276**

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

Pursuant to Section 269ZZC of the Customs Act 1901 ("the Act") a person who is an interested party in relation to a reviewable decision may apply for a review of that decision.

The reviewable decision in this case relates to an application made to the Commissioner under Section 269TB requesting that the Minister publish a dumping duty notice.

Under Section 269T of the Act an "interested party" for the purpose of that kind of a reviewable decision is defined as including, amongst others, any person who is or is likely to be directly concerned with the importation or exportation into Australia of the goods the subject of the application; any person who has been or is likely to be directly concerned with the importation or exportation into Australia of like goods; and any person who is or is likely to be directly concerned with the production or manufacture of the goods the subject of the application or of like goods that have been, or are likely to be, exported to Australia.

Yara is a manufacturer of the goods to which the decision relates, namely ammonium nitrate which was exported to Australia from Sweden during the investigation period. Yara is thus an "interested party" for the purposes of the Act and this application.

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:

The goods the subject of the reviewable decision, as described in Final Report 473 are:

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

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

The goods are classified to the tariff subheading:

- **3102.30.00, statistical code 05**

of Schedule 3 to the Customs Tariff Act 1995.

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number:	**Anti Dumping Notice 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

Please refer to Attachment 1 – ADN 2019/57.

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.

See Attachment 2, which is provided in both confidential an non-confidential format.

- 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:

See Attachment 2.

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:

See Attachment 2.

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

See Attachment 2.

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

See Attachment 2.

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

The attachments provided in support of this application are:

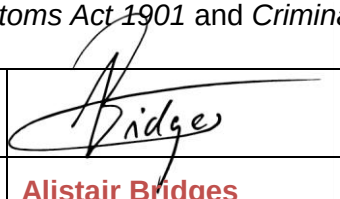
- **Attachment 1 – ADN 2019/57;**
- **Attachment 2 – grounds for review – confidential;**
- **Attachment 2 – grounds for review – non confidential; and**
- **Attachment 3 – letter of authority.**

PART D: DECLARATION

The applicant's authorised representative 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:	
Name:	**Alistair Bridges**
Position:	**Senior Associate**
Organisation:	**Moulis Legal**
Date:	**3 July 2019**

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:	**Alistair Bridges**
Organisation:	**Moulis Legal**
Address:	**Level 39** **385 Bourke Street** **Melbourne** **VIC 3000 Australia**
Email address:	**alistair.bridges@moulislegal.com**
Telephone number:	**(03) 8459 2276**

Representative's authority to act

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

Please refer to Attachment 3 – letter of authority.

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:

(Applicant's authorised officer)

Name:

Position:

Organisation:

Date: / /

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

NON-CONFIDENTIAL

In the Anti-Dumping Review Panel

03 July 2019

Application for review

Ammonium nitrate from Sweden

Yara AB

A Introduction

By way of notice published 25 June 2018,[1] the Anti-Dumping Commission ("the Commission") initiated an anti-dumping investigation regarding the export of ammonium nitrate from China, Sweden and Thailand ("Investigation 473").

Investigation 473 was initiated based on an application lodged by Orica Australia Pty Ltd ("Orica"), CSBP Limited ("CSBP") and QNP Limited ("QNP"), which alleged exports from China, Sweden and Thailand were exported at dumped prices, and as a consequence of these exports the Australian industry suffered material injury.

By way of notice published 3 June 2019 the decision of the Minister for Industry, Science and Technology ("the Minister") was imposed.[2] In making its decision the Minister,

> *…considered, and accepted the recommendations of the Commissioner, the reasons for the recommendation, the material findings of fact on which the recommendation are based and the evidence relied on to support those findings in REP 473.*[3]

The recommendations of the Commission are contained in the final report for Investigation 473 ("Report 473)".[4]

The decision of the Minister was made 29 May 2019. The decision of the Minister was published 3 June 2019 on the website of the Commission.

Yara AB ("Yara") is a Swedish manufacturer and exporter of ammonium nitrate.

The Minister imposed anti-dumping duties on Yara, amongst others. Anti-dumping duties were imposed on Yara at a rate of 39.3%. The effective duty rate was imposed on Yara at a rate of 14.4%.

As outlined in this application, Yara seeks review by the Anti-Dumping Review Panel ("ADRP") under Section 269ZZA(1)(a) and 269ZZC of the *Customs Act 1901* ("the Act") of the decision of the Minister for Investigation 473.

We now address the requirements of both, the form of application that has been approved by the Senior Panel Member of the ADRP under Section 269ZY of the Act, and of Section 269ZZE(2) of the Act in relation to our client's grounds of review being those requirements not already addressed within the text of the approved form itself, which we have also completed and lodged with the ADRP.

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1 Anti-Dumping Notice No. 2018/103.

2 Anti-Dumping Notice No. 2019/57.

3 Anti-Dumping Notice No. 2019/57 at page 2.

4 See Doc 065.

B First Ground – Yara's exports have not caused injury to the Australian industry

9 Grounds

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

In order for prospective anti-dumping measures to be imposed, the Minister must be satisfied both that dumping has occurred and that, because of that, injury to an Australian industry producing like goods has been or is being caused, or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered.[5]

The injury finding is of equal – if not greater – importance to the decision to impose measures as is the finding of dumping. Dumping that does not *cause injury*, *threaten injury* or *materially hinder* the establishment of an Australian industry producing like goods cannot be met by anti-dumping measures. It is the injury finding that justifies the government's intervention in the market via imposition of the measures and the resultant costs imposed on the broader economy.

In this regard, Report 473, which was adopted by the Minister as the basis for her decision to impose measures, determined:[6]

> *The Commissioner is satisfied that material injury to the Australian industry in the form of price depression, decreased profit and profitability, and loss of sales volumes (lost contracts) has been or is being caused by dumped goods exported to Australia from the subject countries during the investigation period.*[7]

This was a specific finding based on an analysis of thirteen contract negotiations (six of which were disregarded as irrelevant to the question of injury). The "causation" theory is best summarised in the following extract:

> *To establish a causal link between injury to the Australian industry and the dumped goods, the Commission assessed the information provided by the applicants to support their claims that prices and the increasing volumes of the goods imported from the subject countries during the investigation period have impacted contract prices and volumes that were negotiated. This injury may be either in the form of price depression or loss of sales volumes (loss of contract).*[8]

Yara submits that the causation assessment is not correct in fact, and that the determination that exports from Yara have caused material injury is neither correct nor preferable on the basis of the information before the Minister when the reviewable decision was made.

Section 269TAE of the Act provides guidance on items the Commission should have regard to in undertaking its causation analysis, including:

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5 Section 269TG(2) of the Act.

6 Anti-Dumping Notice No. 2019/57 at page 2.

7 See Doc 065 at page 9.

8 Report 473, page 48

> *(1) In determining, for the purposes of section 269TG or 269TJ, whether material injury to an Australian industry has been or is being caused or is threatened or would or might have been caused, or whether the establishment of an Australian industry has been materially hindered, because of any circumstances in relation to the exportation of goods to Australia from the country of export, the Minister may, without limiting the generality of that section but subject to subsections (2A) to (2C), have regard to:*
>
> *…*
>
> *(f) the effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the price paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and*
>
> *(g) any effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the relevant economic factors in relation to the Australian industry;*

While Section 269TAE(1) is drafted somewhat broadly, and does not limit the considerations the Minister may have regard to when making an injury determination for the purpose of Section 269TG, it does provide some discipline for that exercise. The Minister's "satisfaction" under Section 269TG must be based on a determination under Section 269TAE(1). The Minister, must be satisfied that material injury is being *caused* by any circumstance in relation to the exportation of the goods. We would observe that "causation" naturally speaks of "effect", so the considerations in Section 269TAE(1)(f) and (g) would be of fundamental importance to any causation finding. This interpretation aligns with Australia's obligations under the Anti-Dumping Agreement, which places the "*effect of the dumped imports on prices in the domestic market for like products*" as one of the primary considerations in an injury determination.[9]

It is also worth emphasising that, under Australian law, an injury determination must be based on facts and not merely on allegations, conjecture or remote possibility.[10] This is a substantive requirement for any injury determination.

An assessment of the "economic conditions" of the Australian industry during the period of investigation and the impact of the subject exports during that same period was unable to establish that dumping had caused injury. This was because:

> *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 from 1 April 2014 to 31 March 2018 mostly reflect the contract terms, including prices and volumes, negotiated and agreed to before the investigation period.*[11]

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99 Article 3.1.

10 Section 269TAE(2AA) of the Act.

11 Doc 065 at page 69.

As a result, the injury finding does not relate to the general economic conditions as observed and partially verified by the Commission. Instead, the injury finding narrowly focuses on 13 contract negotiations that occurred during or after the period of investigation. Of these only seven were found to be relevant to some degree to the injury determination:

Report 473 example	Australian industry member applicable
Example 1	CSBP
Example 2	CSBP
Example 3	CSBP
Example 4	QNP
Example 5	QNP
Example 6	QNP (partial consideration)
Example 7	QNP (partial consideration)

These seven examples form the entirety of Report 473's injury finding, and therefore the entirety of the decision to impose measures against Yara's exportation of ammonium nitrate. However, when they are considered carefully, we submit that there is no factual basis to support any conclusion that Yara's exports have materially influenced the outcome of the contract negotiations.

We will address each of the seven relevant negotiations in turn. However, at the outset, we note that all of Yara's exports during the period of investigation were made to one customer only. Yara had a supply agreement with that customer which pre-dated the period of investigation, and under which the majority of the exports were made. Yara does not believe its customer was one of the customers in any of the seven negotiations through which injury was said to have been caused. Additionally, Yara participated in only one tender during the period of investigation – at prices that were significantly different to those to its pre-existing customer – and was quickly advised that those prices were too high.[12] All of which is to say, the supposed effect of Yara's exports on the Australian industry's prices do not arise directly from Yara's exports.

Turning to the relevant examples we will see how far removed they are.

Example 1 – CSBP

> *CSBP detailed a negotiation that commenced in early 2018 for potential supply of additional volumes of ammonium nitrate to an existing customer. The negotiation concluded in mid-2018.*
>
> *…*
>
> *CSBP indicated that this customer already imported the goods from one of the countries the subject of the investigation and therefore did not have any issues sourcing its ammonium nitrate through an import supply chain. Given this, CSBP's price offer to this customer was determined by having regard to the alternative supply option available to this customer (particularly given that this customer allegedly imports the*

12 Letter to Commission date 5 December 2018, See Doc 025 at page 5.

> *goods from one of the subject countries) and also prices of ammonium nitrate imported into WA (mostly from China and Thailand) for the 12 months ending December 2017.*[13]

The "effect" in this example is CSBP's own internal pricing considerations. In determining a price offer to that customer CSBP had regard to pricing information from some of the subject countries. That is it. We query whether this is sufficient, on its own, to attribute the outcome of the negotiation to circumstances relating to the exportation of the goods from the subject countries.

Yara itself did not export any product to Western Australia. This is quite important, because CSBP is based in the West Australian market and has stated that it does not routinely compete in the eastern states.[14] This suggests that the customer in this example was based in Western Australia. Yara is not the alternative supply option available to the customer in this example, nor would Yara's exports be readily included in the "*prices of ammonium nitrate imported into WA*".

Based on the express terms of Report 473, Yara's exports had no effect, injurious or otherwise, on this negotiation.

Example 2 – CSBP

> *CSBP claimed that during the investigation period, it supplied ammonium nitrate to a particular customer at a specific site in WA in accordance with an import parity supply arrangement at the insistence of the customer.*
>
> *CSBP claimed that, during the investigation period, it matched a price determined at import parity, which represented the customer's 'next best' alternative supply option. CSBP provided documentation which demonstrated that the customer requested that CSBP match a price at import parity during a particular period which encompassed three quarters of the investigation period.*
>
> *The Commission observes that the price that CSBP was requested to match was based upon a FOB price of ammonium nitrate exported from one of the countries the subject of the investigation, plus relevant shipping, importation and other costs to derive an ex-works equivalent price that CSBP matched.*[15]

The terminology used in the above extract is a little confused – ultimately it appears as though CSBP matched a particular import price from one particular country subject to this investigation. This appears to be in line with some arrangement CSBP has with the customer – although it is not clear how long such an arrangement has prevailed, whether it is contractual and, if so, whether that contract confers any benefits on CSBP other than the price for the ammonium nitrate. It can also be implied from the above that this arrangement related to only a "specific site" in WA, and so it is possible that CSBP supplies the customer more broadly based on prices determined in a different manner.

Again, we would note that at no point has Yara supplied the Western Australian market, and at no point has Yara engaged in negotiations with potential customers to supply the Western Australian market. So exports of ammonium nitrate from Sweden would not represent the "next

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13 Doc 065 at page 71.

14 Doc 042 – CSBP Verification Visit Report, page 10.

15 See Doc 065 at page 72.

best" alternative supply source for the customer. Yara's exports have not effected CSBP's prices.

Exports by Yara have not had any effect on the price paid or the economic conditions relevant to this example.

Example 3 – CSBP

> *CSBP claimed that, just prior to December 2017, it commenced re-negotiating an existing supply agreement with a customer for supply to South West WA, which was negotiated many years before the investigation period. These negotiations have been finalised, with supply to commence in accordance with the re-negotiated contract at a date specified in the contract.*
>
> *CSBP alleged that, as a result of these negotiations, the existing agreement with this customer was amended, and the price was reviewed in line with import parity pricing (i.e. the comparative cost of imports into WA at an ex-works equivalent price), particularly from one of the countries the subject of the application.*[16]

CSBP's price offer in these circumstances was based its commercial decision to use its own import parity pricing mechanism, based on *"the comparative cost of imports into WA at an ex-works equivalent price"*. At no point has Yara supplied the Western Australian market. Accordingly its prices cannot be included into a comparative cost of imports into Western Australia.

Exports by Yara have not had any effect on the price paid or the economic conditions relevant to this example.

Example 4 – QNP

> *In this example, a customer with an existing long-term contract with QNP requested a price review.*
>
> *The negotiation commenced and concluded during the investigation period. QNP provided documentation to the Commission which demonstrated how it had derived its price to this customer. It is apparent from the documentation that was provided that QNP based its price offer to this customer on import parity pricing. The price offer was revised several times during the course of the negotiation. 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.*[17]

The supposed "effect" of the exports that is said to cause injury in this instance is that QNP (a member of the Australian industry) derived a price offer to a customer having had some regard to import prices. In isolation, we would suggest that this is not enough to say that exports have had any direct effect on the price ultimately agreed to between QNP and its customer. It appears as though QNP did this of its own volition, internally. There is certainly no suggestion that the subject exports from Sweden – or indeed any other country subject to the investigation

16 See Doc 065 at page 73.

17 See Doc 065 at page 74.

– were being used by any party as a potential alternate supply source should QNP fail to meet its customer's demands with regard to price.

Beyond that, we do not know if QNP sought a price premium above the import prices it considered, nor if there were other considerations material to the price offer. We do not know if the volume of the contract was such that it made commercial sense for QNP to pursue a low unit price in the expectation that it could take advantage of economies of scale and thus receive higher net revenue. Indeed, QNP was not verified by the Commission, so such information may not even be before the Commission.[18]

Nevertheless, that price offer was then revised "several times" during the course of negotiation to come out at the price that was agreed to between the parties. Again, there is no information about the course of these negotiations, but presumably these revisions were caused by factors other than import prices. As a result, the ultimate price was different from the initial offer.

Import prices were referred to at one point, by QNP itself, for its own internal purposes. The parties then negotiated based on their individual commercial interests and agreed to a contract that was presumably mutually beneficial. This is a normal commercial process. The impact of the subject exports on this process does not appear to be significant nor determinative.

Example 5 – QNP

> *QNP provided information in relation to its bid to supply a customer with ammonium nitrate over a 12 month period.*
>
> *This customer approached QNP in the investigation period, and QNP provided an offer to this customer, which was subsequently rejected.*
>
> *QNP claims that the potential customer advised that it is able to source ammonium nitrate at a lower price from overseas. No evidence was provided to support this claim. The Commission notes, however, that this customer is an importer of the goods from one of the subject countries. An examination of verified data from the importer shows that, following QNP's unsuccessful offer, this customer ordered the goods from one of the countries the subject of this investigation.*
>
> *The Commission found that the price at which the customer sourced the goods from the subject country undercut QNP's price offer.*[19]

The effect identified in relation to Example 5 is mere speculation. QNP did not provide evidence to support its claim, and the Commission has not received confirmation from the importer about the circumstances of its purchase. We do not know why the offer was rejected – but the potential reasons are not limited to price differences. For example, it could be the case that the customer was not impressed by QNP's customer service, or that QNP could not deliver the ammonium nitrate in the required timeframe. We do not know why the offer was rejected, nor does Report 437.

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18 In contrast, the Commission verified both Orica and CSBP, with the relevant verification report available at Doc 040 and Doc 042 respectively.

19 See Doc 065 at page 74.

Report 473 assumes the reason for the customers purchasing decision, without evidence from QNP and without confirmation of the customer. Irrespective, this negotiation was for supply of the goods over a 12 month period, with the exported goods said to have replaced QNP's supply. Yara has not entered into any agreements for a12 month period, and accordingly is not the alternative source of supply referred to.

Exports by Yara have not had any effect on the price paid or the economic conditions relevant to this example.

Example 6 – QNP

> *QNP is the incumbent supplier to this customer in accordance with a fixed-term contract. During the investigation period, and subsequent to the investigation period, QNP negotiated with this customer for supply above the contracted volumes on three separate occasions, as follows.*
>
> *...*
>
> - *Second negotiation (supply in second quarter, 2018): QNP was unsuccessful in supplying additional volumes to this customer. The Commission has obtained information from QNP and the importer that has been successful in its bid to supply this particular customer. The Commission found that this importer has supplied this customer with dumped goods from one of the countries the subject of this investigation at a lower price than what QNP's bid was to this customer. The Commission observes that these volumes were directly displaced by dumped imports.*[20]
>
> …

It should be noted that the first and third negotiations referred to by QNP were not included in the injury assessment and are therefore not referred to here. The example refers to the additional supply for a customer of which QNP is already the incumbent supplier in second quarter 2018. QNP did not lose pre-existing sales, it merely did not win new short-term supply of additional sales. We would suggest that this, in and of itself, is not injurious.

This example is not of any application to Yara. Exports by Yara have not had any effect on the price paid or the economic conditions relevant to this example.

Example 7 – QNP

> *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. The Commission accepts that these QNP's spot prices were influenced by dumped goods. The Commission has included these sales in its assessment of injury to the Australian industry.*[21]

QNP makes a commercial decision on its spot sales to determine its price on the basis of import parity pricing. The unique circumstances of exportation would not be matched by Yara in any other supply agreement, and based on the applicant's claim of transparency in the market,

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20 See Doc 065 at page 74.

21 See Doc 065 at page 75.

it should have excluded Yara's exports made pursuant to the supply agreement from its pricing offer considerations.

The supposed "factual" effects Report 473 links to the exports on the Australian industry vary in degree. They can be as innocuous as a member of the Australian industry having regard to import pricing information when formulating a price offer that will be made to a customer, to the more express such as the adoption of a pricing mechanism based on imports from the next closest source, to the completely speculative. We struggle with the concept that some of these "effects" would require the imposition of measures to counter – for instance, what a producer does with data it procures regarding exports from Sweden would seem to be a matter that does not call for tariff protection in and of itself. Nonetheless, as demonstrated, these seven negotiations do not relate to Yara, either directly or indirectly. It is not correct for any supposed price or volume injury to be attributed to exports by Yara from Sweden in these circumstances.

10 Correct or preferable decision

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:

The correct or preferable decision is that exports by Yara from Sweden have not factually *caused* material injury to the Australian industry.

Accordingly, the reviewable decision should be revoked.

11 Grounds in support of decision

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

The grounds raised in question 9 support the making of the proposed correct or preferable decision by demonstrating the incorrect assessment presented in Report 473 and providing the correct interpretation of the information submitted by the Australian industry.

12 Material difference between the decisions

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

The proposed decision is materially different to the reviewable decision, as the proposed decision requires the termination of the investigation as it relates to exports by Yara on the basis that Yara's exports have not caused the Australian industry material injury.

C Second Ground – the effect of Yara's exports should not be cumulated with exports from China and Thailand

9 Grounds

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

The determination of the Commission in Investigation 473 is that:

> *the injury caused to the Australian industry by dumped goods exported to Australia from China, Sweden and Thailand is material.*[22]

To reach this conclusion the Commission chose to cumulate the effects of goods exported by Yara, with the effects of goods exported from China and Thailand, stating:

> *The Commissioner recommends the Minister* ***be satisfied that:***
>
> - *in accordance with subsection 269TAE(2C), the cumulative effect of exportations of ammonium nitrate from China, Sweden and Thailand can be considered because:*
> - *each of those exportations is the subject of this investigation; and*
> - *the investigation of those exportations resulted from one application under section 269TB; and*
> - *the dumping margin worked out under section 269TACB for the exporter for each of the exportations is at least 2 per cent of the export price or weighted average of export prices used to establish that dumping margin; and*
> - *the volume of goods the subject of the application that have been, or may be, exported to Australia over a reasonable examination period from the countries of export and dumped is not taken to be negligible for the purposes of subsection 269TDA(3) because of subsection 269TDA(4); and*
> - *it is appropriate to consider the cumulative effect of those exportations, having regard to the conditions of competition between those goods, and the conditions of competition between these goods and like goods that domestically produced.*[23]

Yara submits that the decision to cumulate the effects of exports from Sweden by Yara with those of China and Thailand for the purposes of the material injury determination under Section 269TAE(1) of the Act is not the correct or preferable decision.

a Australian law requires assessment of the conditions of competition

With respect to accumulation, Section 269TAE(2C)(e) of the Act states:

> *In determining, for the purposes referred to in subsection (1) or (2), the effect of the exportations of goods to Australia from different countries of export, the Minister should consider the cumulative effect of those exportations only if the Minister is satisfied that:*

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22 See Doc 065 at page 70.

23 See Doc 065 at page 108.

….

(e) it is appropriate to consider the cumulative effect of those exportations, having regard to:

i. the conditions of competition between those goods; and

ii. the conditions of competition between those goods and like goods that are domestically produced.

Notably, the law does not assume that a cumulative consideration of the effect of the exportation of the goods from different countries is something that will arise as a matter of course. It is an option that is open to the Minister if certain conditions precedent are met. That said, even where those conditions are met, the Minister may still opt not to consider the cumulative effect of exportations from different countries of export.

In the First Ground above, we have provided an overview of the alleged factual effects of the exports on the Australian industry – being the supposed effects of the seven negotiations. In each instance, the effect, be it a price effect or a volume effect, can be linked to exportations from specific countries or importations generally.

If, as we have suggested, the "alternative supply option" in Example 1 is not Yara, it would not be a preferable outcome that the identified "effect" be attributed to exports from Sweden, rather than purely to exports from the "alternative supply option". The latter is factually accurate, the former is not.

Report 473 isolates the effect of the exports to the seven negotiations discussed in above. Primarily, that effect, at least as it pertain to prices, is the use of price data from one or multiple sources in contract negotiations. The source of this price data is apparently identified in most instances, albeit in some instances it may relate to "imports generally". Similarly, "volume" effects relate to instances where QNP failed to usurp import supply from certain importers – the source of the imports is readily identifiable.

Given it is possible to identify on the evidence before the Commission the "effect" that each countries' export had on the Australian industry, we would submit that there is no need to consider the "cumulative" effect of the exports. Indeed, we would submit that the preferable decision is not to do so.

In addition to that, we also submit that it was not the correct decision to cumulate the effect of the goods from Sweden, Thailand and China. Under Australian law, the cumulative effect of the exports should only be considered where certain requirements are met. Importantly, it must be *appropriate* to consider the cumulative effect having regard to the conditions of competition between the exportations from the subject countries and the conditions of competition between the exports and the like goods that are domestically produced. Indeed, when the appropriate conditions of competition are adequately considered, we would suggest that doing it is plain that accumulation of the effects of the exports from each of the subject countries is inappropriate.

b Background - Yara's conditions of competition

Yara has explained the unique circumstances surrounding its exportation of the goods during the investigation period at a number of instances throughout the investigation.[24] As per Yara's submission dated 27 September 2018:

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24 Doc 018 and Doc 028 as well as discussions throughout the onsite verification process.

[CONFIDENTIAL INFORMATION DELETED – commercially sensitive circumstances regarding Yara's exports to Australia]

As also explained in that submission:

[CONFIDENTIAL INFORMATION DELETED – commercially sensitive circumstances regarding Yara's exports to Australia]

Based on this, Yara submitted that it was not appropriate to consider the cumulative effects of the exports. The reasons for this position were summarised in Yara's 5 December 2018 submission as follows:

> *Yara's exports were:*
>
> - *To one customer, pursuant to a supply agreement that was signed prior to the POI.*
> - *For the benefit of the Australian industry producing like goods.*
> - *Will be replaced by sales from the Australian industry producing like goods in the future.*
> - *To Yara's knowledge, do not directly compete with imports from China of Thailand, nor with the production of the Australian industry.*[25]

In considering the information presented by Yara the Report 473 stated:

> *… the Commission considers that the particular circumstances of the goods exported to Australia from Sweden, as outlined by Yara, do not support Yara's assertion that the goods exported from Sweden do not compete with goods exported from China and Thailand, and like goods produced by the Australian industry. The Commission considers that the goods exported from Sweden compete with goods exported from China and Thailand, and like goods that are domestically produced given that these goods are sold to the same or similar customers and are interchangeable in end-use applications.*[26]

In specifically rejecting Yara's submission regarding accumulation, Report 473 makes a number of points that this application will address in turn.

> *…while the majority of the goods exported from Sweden by Yara have been imported by only one customer in Australia during the investigation period in accordance with a supply agreement, the importer of these goods exported from Sweden does compete with other entities (including the Australian industry) in the Australian market for supply contracts and has also on-sold the goods to other entities within the market (including the Australian industry and importers of the goods from some of the other subject countries), contrary to the importer's claims that these imports were only for supply to a specific customer's mine sites...*[27]

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25 See Doc 028 at page 8.

26 See Doc 065 at page 51.

27 See Doc 065 at page 50.

Yara's customer is a "blasting service provider".[28] This means that it does not typically sell ammonium nitrate in the Australian market.[29] Rather it enters into contracts for explosive services, whereby the ammonium nitrate it imports is used as a raw material for the explosives required to deliver the contracted services. Such service agreements – referred to in Report 473 as "bundled contracts" – have not been found to have been effected by exports of the goods from any country.[30] Indeed, Orica is the largest blasting service provider in the Australian market and Orica was not a party to any of the seven "injurious" negotiations upon which the decision to impose measures was based.

To our understanding, neither CSBP nor QNP offer any blasting services. Rather, they sell ammonium nitrate to blasting service providers and other entities. So, there is no substantial competition between Yara's importer and CSBP nor QNP. Further to this, Yara did not export any products to the Western Australian market which is dominated by CSBP, so as we have already suggested, Examples 1 through 3 of the contract negotiations cannot be linked to Yara's exports, or the sale of Yara's product once it is imported.

Competition between Yara's customers and the Australian industry in the context of the injury that was found to have been suffered by the Australian industry does not support the view that the effect of exports from different countries should be considered cumulatively. Indeed, we would suggest that a cumulative consideration of the impact of exports from different countries would be inappropriate in these circumstances, because it would result in the incorrect attribution of injury to Yara's exports.

> *…the Commission has information that Yara has competed, at dumped prices, directly with certain Australian industry members for a significant contract during the investigation period…*[31]

This is mere speculation. The comment Yara has "competed" is a roundabout way of suggesting that Yara bid for a contract. Yara has not been awarded this supply contract. Yara has not made exports under this supply contract. The Commission has not conducted an investigation such that it can actually state prices offered were "at dumped prices". Indeed, as mentioned in Yara's submission dated 5 December 2018, the feedback from the customer was that Yara's price offer was simply not competitive with those offered by member of the Australian industry.[32]

As we have said, the circumstances surrounding the supply agreement under which the bulk of Yara's exports were made in the period of investigation are unique to that agreement. The pricing principles underpinning that agreement would not be made under any other circumstances. To believe otherwise would be to reject the detailed information and evidence provided by Yara throughout the investigation.

> *…the "unique" supply arrangement Yara refers to is not exclusive, and the importer of the goods exported from Sweden could have sourced the ammonium nitrate from certain Australian industry members which it also has supply arrangements with. Further, Yara has*

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28 We do not understand why Report 473 states that it is only the "majority" of exports from Sweden that go to Yara's sole customer. Unless there is another Swedish exporter, this would seem to be loose language. Yara had only one customer during the period of investigation.

29 See Doc 058 at page 52.

30 See Doc 065 at page 87.

31 See Doc 065 at page 50.

32 Letter to Commission date 5 December 2018, See Doc 025 at page 5.

> *willingly chosen to export the goods from Sweden at significantly dumped prices to match pricing in accordance with this supply arrangement...*[33]

First, as Yara explained, its exports were made as a consequence of the [CONFIDENTIAL INFORMATION DELETED – particular circumstances]. Its sales were made for the benefit of [CONFIDENTIAL INFORMATION DELETED – entities].[34] The notion that the importer *"could have sourced"* the goods from other Australian industry members is a demonstration of the internal competition between members of the Australian industry. It is not relevant to the conditions of competition assessment at hand. Notably, the Commission has not stated the importer could have sourced its goods from China or Thailand.

Secondly, the Commission mistreats commercial reality in its claim that *"Yara has willingly chosen to export the goods from Sweden at significantly dumped prices to match pricing in accordance with this supply arrangement"*. Yara was required to meet its contractual obligations or be liable for breach of those obligations. Yara was also cognisant of the requirements of the [CONFIDENTIAL INFORMATION DELETED – entities]. Notwithstanding these points, this does not negate differences in the conditions of competition between Yara and exports from China and Thailand.

> *…the applicants have presented evidence to the Commission that they do take into consideration import prices, including the relatively low import prices of the goods exported from Sweden, and that these prices have had an effect on the Australian industry's prices; therefore, even though the goods exported from Sweden appear to be the result of one entity's decision to enter into such agreement to benefit one member of the Australian industry (as argued by Yara), this has contributed to the injury experienced by the industry as a whole.*[35]

This is oddly circular. The "evidence" referred to here is the seven negotiations that were said to have caused the Australian industry injury. The discussion surrounding the conditions of competition relates to whether it is appropriate to consider the effect of the exportations from all countries – being specifically in this case the effect on those seven negotiations – cumulatively. Again, when regard is had to the analysis of those seven negotiations, it is clear that there are instances where the identified effect can be linked back to exports from a specific country or exporter.

Ultimately, Report 473 appears to take the position that as long is some degree of competition between the exports from the subject countries, as well as between those exports and the sale of goods of the same kind produced by the Australian industry, then it will be appropriate to cumulate the effect of the exports from the subject country. On the plain text of the Act, that is clearly not the case. The conditions of competition are the jumping off point for considering whether it is appropriate to cumulatively assess the effect of exports.

Yara would again reiterate the following:

- Yara did not export any product to the Western Australian market.
- Yara certainly did not compete to supply any entity in the West Australian market.

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33 See Doc 065 at page 50

34 Please refer to the email of 19 November 2018 between Moulis Legal and the Commission for further explanation of these pricing principles and relevant evidence regarding their purpose.

35 See Doc 065 at page 50.

- It is apparent that CSBP did not consider data regarding Yara's prices when negotiating prices in examples 1, 2 and 3.

- With regard to QNP, we note that example 5 and example 6 second negotiation relate to scenarios where QNP's offer was rejected for some reason, and the customer sought supply from export sources. These could not have been Yara, because Yara only had one customer in Australia and its relationship with that customer existed prior to the period of investigation.

- With regard to example 4, 6 second negotiation and 7, Yara did not compete for supply of these contracts.

- The prices which Yara exported its product to Australia were derived due to specific circumstances and were not on offer to the market generally.

In light of this, it is inappropriate to cumulate the effect of the exports from each of the subject countries, because doing so

- attributes injury that has been found to have occurred in the West Australian market to Yara's exports, in factual circumstances in which Yara could not have caused that injury;[36]

- attributes loss of contracts to specific exports to Yara's exports in circumstances where Yara did not tender for or win any additional contracts; and

- is unnecessary, because the information before the Commission allows it to ascertain the impact of different countries' exports on each of the seven examples that form the basis of the injury finding.

Section 269TAE(2C)(e) refers to the "effect of the exportations". As we have suggested above, ascertaining the effect of the exportation on the price paid for ammonium nitrate produced by the Australian industry and on the relevant economic factors of the Australian industry is fundamental to a determination under section 269TAE(1). If the exports have not had an effect on the Australian industry, then clearly they cannot be considered to have caused the Australian industry injury, material or otherwise.

10 Correct or preferable decision

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:

The correct decision was that the relevant conditions of competition did not make it appropriate to consider the cumulative effect of the exports from the subject countries under Section 269TAE(2C). The preferable decision is that the cumulative effect of the subject exports should not have been considered under Section 269TAE(2C) because the *effect* of those exports were separately identifiable and quantifiable on the methodologies adopted in Report 473 and, so considering the cumulative effect led to a substantially different outcome.

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[36] Report 473 considers that the divide between the east and west market is significant when it comes to determining the USP. It is equally significant when determining the impact of the goods from Sweden.

Accordingly, the material injury assessment should be conducted for Yara in isolation from the other subject exports. On that basis, and as discussed in relation to Yara's first ground, it would be likely that the correct decision that would flow from this is that Yara's exports have not caused, and are not causing the Australian industry material injury.

11 Grounds in support of decision

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

The grounds raised in question 9 support the making of the proposed correct or preferable decision by demonstrating the incorrect conditions of competition assessment presented in Report 473 and illustrating the correct interpretation of the relevant conditions of competition between exports by Yara.

12 Material difference between the decisions

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

The proposed decision is materially different to the reviewable decision, as the proposed decision requires the assessment of the material injury caused by Yara in isolation from any injury caused by other subject exports.

Yara submits that as a result of the proposed decision, noting that Yara's exports were to the benefit of the Australian industry and have been attributed by Report 473 with effecting the Australian industry in ways they factually could not,[37] no material injury can be said to have been caused by Yara's exports. The proposed decision would therefore result in the termination of the investigation as it applies to exports by Yara from Sweden.

D Third Ground – the price effects and volume effects have not been correctly determined

9 Grounds

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

In Yara's first ground, we submitted that Yara's exports could not have factually caused the "effects" Report 473 attributes to them. In Yara's third ground, we submit that the calculation of the impact of those effects, generally, is neither correct nor preferable.

[37] See Doc 065 at page 50.

Report 473 does not find any direct relationship between the Australian industry's economic performance in the period of investigation and the dumped exports. This is apt, because those economic indicators illustrate a circumstance of:

- increased sales volumes over the injury analysis period;
- increased market share over the injury analysis period – representing 94% of the market when the Australian industry's own imports are not considered;[38] and
- increased prices evident for the 2017-18 investigation period.[39]

Yara also understands that the Australian industry was also highly profitable during the injury analysis period.[40]

Not being able to establish what is more traditionally recognised as injury, the Report goes on to consider the "effect" of the subject exports on seven contract negotiations. In doing so, Report 473 determines that injury was suffered by the Australian industry, stating:

> *The Commissioner is satisfied that material injury to the Australian industry in the form of price depression, decreased profit and profitability, and loss of sales volumes (lost contracts) has been or is being caused by dumped goods exported to Australia from the subject countries during the investigation period.*[41]

The basis for its finding of price depression, decreased profit and profitability, and loss of sales volumes (lost contracts), and the impact of this injury is explored through Report 473. The ultimate finding of injury in Report 473 is limited to and quantified by the seven contract negotiations discussed throughout this application. With regard to these seven negotiations, Report 473 calculates a form of injury arising as a result of "price effects" and "volume effects" attributed to the subject exports.

With respect to price effects the Report states:

> *The Commission found that the negotiated prices (or prices that were matched) were, on average, approximately 24.3 per cent lower than the contract prices existing at the time of the negotiation. To quantify the effect of dumping only, the Commission compared the negotiated prices adjusted for dumping (the 'undumped' price) to the negotiated prices. The Commission found that, on average, the prices adjusted for dumping are approximately 17.8 per cent higher than the negotiated prices.*
>
> *Based on the assessment above, the Commission considers that, while there appear to be factors other than dumping that have also caused the reductions in prices, dumping has still caused a significant reduction in prices.*[42]

With respect to volume effects it finds:

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38 See Doc 065 at page 58.

39 See Doc 065 at page 63.

40 See Doc 018 at page 4.

41 See Doc 065 at page 9.

42 See Doc 065 at page 79.

> *The Commission found that for two of the contracts negotiated during and following the investigation period (example 5 and 6 in section 9.2.1), the Australian industry experienced injury in the form of reduced sales volumes due to price competition with dumped imports. The Commission found that dumped imports directly displaced these volumes causing injury to the Australian industry during the investigation period and subsequent to the investigation period.*[43]

On the basis of these two "effects" the Report then determines that the Australian industry has suffered a "profit effect". This profit effect has been quantified in the following manner:

> *The Commission estimated revenue and profit forgone (on a per annum basis) for each individual contract negotiated 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.*
>
> *The Commission considers that the reduced prices achieved as a result of contract negotiations conducted during the investigation period and subsequent to the investigation period will result in lower profit and profitability*[44]

Finally, the "materiality" of the injury is defined in terms of this "profit foregone". This id discussed further in Yara's fourth ground of review.

Australian law requires that an injury determination be *based on facts and not merely on allegations, conjecture or remote possibilities.*[45] We note that this is a requirement specific to Australian law. While the Anti-Dumping Agreement refers to such a requirement, it does so only in relation to a finding that material injury is "threatened"; Australian law is not so limited.

Report 473 does not meet this requirement. No injury, in a palpable or material sense, is identified; there is no indication that any of the seven sales agreements negotiated by the Australian industry are unprofitable or otherwise not to the benefit of the individual industry member. Rather the injury found to have occurred is hypothetical in nature, and premised on the theory that the Australian industry could have performed even better than it factually did. The gap between the factual outcome of the negotiation and the hypothetical outcome is where the "injury" is said to occur. As a result, the entire injury finding is built on allegation, conjecture and remote possibility, rather than fact. This is clear when the "price effect" methodology and the "volume effect" methodology are considered.

The calculation of the price effect is based on an assumption at to the outcome of the relevant negotiation absent the effect of the subject goods. This hypothetical is referred to as the "undumped price", which appears to be the actual price agreed to between the parties in the negotiations, plus the dumping margin. What that dumping margin is depends on the circumstance of the negotiation: where

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43 See Doc 065 at page 83.

44 See Doc 065 at page 83.

45 Section 269TAE(2AA) of the Act.

an import parity method was used in the agreement it seems to be the case that some form of weighted average was adopted, whereas when a specific countries prices were matched the margin is used for the specific country.

Such a conclusion ignores the fact that there is substantial competition in the Australian ammonium nitrate market, including as between the members of the Australian industry – which supplied 94% of the market in the period of investigation – as well as with imports from counties not subject to the investigation which represented 3% of the Australian market over the same period.

We note that it is not uncommon in the Australian ammonium nitrate market for "imports" to refer to sales from the West Australian producer/s into the eastern markets and *vice versa*, and not only to imports from overseas. We also note that the Moncourt Group submission dated 17 August 2018 reveals that some 35,593 MT - similar in volume to the subject imports - of AN was imported into the Gladstone port from an Australian source (likely CSBP).[46] It is likely that this would have competed with QNP's sales given the close geographical proximity to QNP's Moura plant.[47] Yet this has this not been considered when considering the prices that QNP could have achieved in the same geographical market absent the exports from the subject countries.

The price effect conclusion also ignores the fact that the Australian industry member involved in the negotiation is only one party to that negotiation. The customer will have its own commercial imperatives which may not allow them to accept the "undumped price". Negotiation for significant supply agreements are protracted processes and will be based on issues wider than the price, including volume, delivery terms, terms of the contract.

The price effect determination assumes automatically, and without greater consideration of the broader market context, that the "undumped price" would have been an achievable outcome. There is not even a consideration as to whether the undumped prices is close to prices being achieved in the market during that period, or during the injury analysis period generally. It is, but for some reference to imports in the pricing methodology, blind to every aspect of the actual negotiation and the goals of the negotiators and the circumstance of the market. As such, the resultant injury identified cannot be said to be more than a "remote possibility".

The "volume effect" analysis is similarly skewed. It considers that QNP – being the Australian industry member involved in the negotiation of contracts 5 and 6 - suffered *reduced sales volumes* by virtue of the fact it was not successful in winning supply for these volumes.

Notably, the customer in example 5 is referred to as a "potential" customer. While QNP was the "incumbent supplier" to the customer in example 6, the volumes being negotiated are described as being "additional". From this, we take it that the outcome of these negotiations did not impact QNP's actual sales volumes adversely, but rather, is considered to be injurious because QNP did not win additional sales volume.

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46 Doc No 011.

47 Although in stating this we note that the concept of "import parity pricing" adopted for this investigation does not even seem to require the allegedly injurious imports to be anywhere near the country – fear is enough, apparently, to connect them to future injury.

This assumes that QNP would have won the additional sales volumes if dumping did not occur. There is no consideration that there may have been other suppliers who were contacted (including other members of the Australian industry) that would also compete with QNP to tender these volumes.

We would further note that QNP has access to imports, and likely imported some of the goods during the period of investigation. Example 11 all but confirms this, stating that during one of the scheduled shutdowns QNP offered to supply ammonium nitrate through alternative local and import sources.[48] Given QNP has not been verified, to what degree can the Report be certain that any of the examples relating to QNP would have been supplied by its own produced ammonium nitrate? If the sales were not of Australian produced AN, then any impact is not an impact on the Australian industry producing like goods. We note that QNP had significant shutdowns in the first half of FY18 and of FY19. These would have impacted supply under examples 4, 5 and 6.[49] Further QNP would no doubt honour major existing contracts first, from Australian supply. New offers or spot sales would much more likely involve imported ammonium nitrate.

Ultimately we submit that any injury based on these methodologies cannot be said to rise to the level of fact – rather it is more of the character of remote possibilities and allegations. Further than that we would say that it is conjectural in nature. The common definition of the term "conjecture" is

an opinion formed on the basis of incomplete information…[50]

Having focussed on these negotiations, Report 473 has failed to fully inform itself of the facts of the negotiation. As already noted, a negotiation involves two parties: the supplier and the customer. Report 473 is not informed in the slightest by the customer's view of the negotiation. Any conclusions drawn from this are therefore conjectural in nature.

Many of these customers are not "interested parties" per the definition of that term in Section 269T of the Act. Their awareness of this investigation generally, and this investigation's use of their private negotiations specifically, may be limited. This is a difficulty, because actual interested parties, such as Yara, did not participate in the relevant negotiations are ham-strung in making submissions about them. Nonetheless, if it is the applicants' position that these negotiations were injurious, then the applicant bears the onus of substantiating that factually. If the applicants cannot do so, the Commission has every ability to try to substantiate those claims themselves. If this cannot be done, and the requirements of s 269TAE(2AA) cannot be met, then a positive injury determination cannot be made for the purpose of Section 269TAE(1) and so the Minister cannot have the requisite satisfaction for Sections 269TG(1) and (2).

Report 473 is of the view that using these negotiations to assess injury and causation is appropriate because a *gap in remedy* would arise if they could not. We recall, however, that the remedy is not for dumping specifically, but rather for injury caused by dumping. Section 269TAE(2AA) is clear, any injury determination must be based upon facts, rather than on allegations, conjecture or remote possibility. If it is the Commission's view that measures can be imposed on the basis of the effect of dumped goods on contract negotiations, the Commission still needs to ensure that the "effect" found meets the

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48 See Doc 044 – SEF, page 73.

49 Wesfarmer's Half Year Report to December 2018 (accessible here https://www.wesfarmers.com.au/docs/default-source/asx-announcements/2019-half-year-report-(incorporating-appendix-4d).pdf?sfvrsn=0) states as follows:

"Production from QNP was affected by a planned major shutdown during the half but earnings for the business remained broadly in line with the prior period."

50 As per the *Australian Concise Oxford Dictionary*, Fifth edition.

requirements of Section 269TAE(2AA). If there is not sufficient facts – and it is within the Commission's power to apprise itself of the facts – then the injury conclusion is based on allegation, conjecture and remote possibility. In such circumstance, the Commission cannot make a recommendation that the Minister be satisfied that dumping has caused, or is causing, material injury.

10 Correct or preferable decision

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:

The correct or preferable decision is that, on the evidence before the Commission, the Minister could not be satisfied that material injury has been, or is being, caused to the Australian industry producing like goods.

Accordingly, the reviewable decision should be revoked.

11 Grounds in support of decision

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

The grounds raised in question 9 support the making of the proposed correct or preferable decision by demonstrating the incorrect materiality assessment presented in Report 473 and demonstrating the injury suffered is not material.

12 Material difference between the decisions

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

The proposed decision is materially different to the reviewable decision, as the proposed decision requires the termination of the investigation as it relates to exports by Yara on the basis of that injury suffered by the Australian industry is not material.

E Fourth Ground – the injury is not material

The extent of Report 473's "materiality" assessment is provided at Section 9.6 of Report 473 (titled "Materiality of injury"). In Section 9.6 the form of injury is summarised with limited comment on how *material* that injury actually is. It states:

> *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.*

It then refers to the Commission's assessment of materiality at Confidential Attachment 17. No basis has been provided at Section 9.6 to consider the assessment in Confidential Attachment 17 considers issues wider than the text above.

We would note as follows:

(1) the "injury" is said to be the profit foregone as a result of the price and volume effects discussed above. As noted, that injury is hypothetical nature, and based on untested conjecture as to the possibility of the outcome of seven negotiations to which either QNP or CSBP were parties. There is no suggestion that the actual outcome of these negotiations were unprofitable to the relevant Australian industry member. It is therefore, not material to any of the parties involved in those negotiations.

(2) the profit foregone is said to have been assessed on an annual basis, which suggests that some portion of the "material" injury derives from assumptions regarding the Australian industry's performance in the future. This is clearly a remote possibility as, (a), such injury has not been suffered by the Australian industry at this time; and (b) the quantification of such injury – which is said to be material – likely has no relationship to how the Australian industry will actually perform in the future.

(3) the materiality of the injury – in the sense of profit foregone - has not been properly assessed on the basis of the Australian industry producing like goods. It is measured against the aggregated profit of CSBP, Orica and QNP during the period of investigation. It fails to take into consideration the profit of Dyno-Nobel, which is one of the bigger producers in the Australian market and therefore represents a significant portion of the Australian industry producing like goods.

(4) the question of the "relative share" of QNP, CSBP and Orica's total production volume during the period of investigation is irrelevant to the question of materiality. None of the seven negotiations which have been said to injure the Australian industry related to Orica. Orica is the largest producer of ammonium nitrate in Australia. None of those seven negotiations relate to Dyno-Nobel either. We understand that collectively, these two entities represent over half the Australian industry producing like goods.

In reality, we are talking about seven contracts in the context of a market that conservatively is constituted of well over 2.5 million tonnes. Over 97% of this market is supplied by the Australian industry, whether through their own production, or through imports they acquire either directly or through traders when they suffer supply shortfalls. More than half of the Australian market is supplied by Orica and Dyno-Nobel, both of whom have not been impacted by the outcome of these negotiations. There is no suggestion that these contract negotiations were unprofitable, no suggestion that the Australian industry is unprofitable generally and no suggestion that the Australian industry has lost any pre-existing sales volumes to the subject exports. In these circumstances, we do not consider it is the correct and/ or preferable decision that the Australian industry has suffered material injury by virtue of imports that constituted 3.1% of the market in the period of investigation.[51]

We would like to address this ground further, however, the Report is opaque as to how the "materiality" of injury has been assessed. There is, for example, no reason why the "profit foregone" relative to the aggregated profits of CSBP, QNP and Orica could not be revealed to interested parties. Such figures are incapable of being linked back to the performance of each of the applicants and so could not be considered to be commercially sensitive. This issue was raised by Yara in direct response to the lack of

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51 See Doc 065 at Page 57.

reasoning in the Statement of Essential Facts. In its email dated 7 March,[52] amongst other items, Yara queried:

> *On review of the SEF we have identified some matters that we need the Commission to clarify to allow Yara to accurately respond to the findings and proposed recommendations in the SEF. Grateful if you could provide me with details regarding the following, at the soonest possible opportunity:*
>
> - *The SEF does not provide a clear description about how the injury found to have been suffered by to the Australian industry as a result of the export of the subject goods was quantified and determined to be "material". Can you provide a step by step explanation of this process?*

The Commission has not responded on this issue, either to Yara directly or in the Report 473.

Yara respectfully requests the ADRP direct the Commission to release its assessment of this issue in a legible manner, to allow interested parties to review and provide submissions in relation to this significant issue. Interested parties have limited opportunity to make submission to the ADRP, so we request that such disclosure be made as soon after initiation of the review as possible, to allow ample time for consideration of Report 473's full methodology and conclusions.

The Commission's assessment, and its summary of the forms of injury indicates a presupposition that injury automatically equals material injury. This is not correct. There is a difference between injury and *material* injury which is fundamental and well-established. This difference is recognised under both Australian law and the Anti-Dumping Agreement.

10 Correct or preferable decision

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:

The correct or preferable decision is that, on the evidence before the Commission, the Minister could not be satisfied that material injury has been, or is being, caused to the Australian industry producing like goods.

Accordingly, the reviewable decision should be revoked.

11 Grounds in support of decision

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

The grounds raised in question 9 support the making of the proposed correct or preferable decision by demonstrating the incorrect materiality assessment presented in Report 473 and demonstrating the injury suffered is not material.

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52 This email at the Commission's request was also provided as a public record submission. See Doc 048.

12 Material difference between the decisions

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

The proposed decision is materially different to the reviewable decision, as the proposed decision requires the termination of the investigation as it relates to exports by Yara on the basis of that injury suffered by the Australian industry is not material.

F Fifth Ground – the injury is not greater than that likely to occur in the normal ebb and flow of business

The Ministerial Direction on Material Injury directs that:

> *material injury is injury which is not immaterial, insubstantial or insignificant;*[53]

The Ministerial Direction of Material Injury is Australian law that must be followed in the Commission's decision making. Yara submits that the injury, as identified in Report 473, is not material in the correct sense of the word, and Report 473 has not provided any appropriate basis to consider the injury is material.

The injury assessment circumstances can be summarised as follows:

- Only seven negotiation examples were considered appropriate for use in the injury assessment.
- No injury was suffered, in any form, by Orica as a consequence of the subject exports. Orica remains the biggest of the Australian industry members.
- CSBP operates in the Western Australian market, which is distinct from the market dynamics of the east coast.
- QNP has not been verified at any point in the investigation.

In its assessment the Commission has quantified the level of injury, but it has not assessed whether that level of injury is material in the context of the whole ammonium nitrate market.

Yara submits that the level of injury identified is immaterial, insubstantial and insignificant.

The Ministerial Direction on Material Injury further directs that:

> *the injury must be greater than that likely to occur in the normal ebb and flow of business*[54]

More specifically:

> *Consistent with Australia's international trade obligations under the World Trade Organization's Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures, I would expect it to be shown that the industry is suffering injury, and that the injury caused by dumping*

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53 Ministerial Direction on Material Injury at page 1.

54 Ministerial Direction on Material Injury at page 1.

> *or subsidisation is material in degree. The injury must also be greater than that likely to occur in the normal ebb and flow of business.*[55]

This was raised during the investigation. As noted in Report 473:

> *Yara submits that injury would need to be greater than that likely to occur in the normal ebb and flow of business and greater than the profit trend established over the injury analysis period.156 In order to establish the profit in the normal ebb and flow of business, in its submission, Yara duplicated the index of profit variations from the application, which shows a 12.5 per cent reduction in the applicants' aggregated profit from 2014 to 2017.*[56]

In response, the Commission stated:

> *The Commission reiterates that the 'profit foregone', as estimated by the Commission in its assessment of material injury, isolates the injury caused by dumping in the examples outlined in section 9.2.1 of this chapter. As the assessment isolates the injury caused by dumping, the Commission is satisfied that the injury to the Australian industry is greater than that likely to occur in the normal ebb and flow of business.*[57]

This response does not address the "normal ebb and flow of business" requirement in the Ministerial Direction. In fact, it misunderstands the concept entirely. To reiterate the Commission's consideration:

> *As the assessment isolates the injury caused by dumping, the Commission is satisfied that the injury to the Australian industry is greater than that likely to occur in the normal ebb and flow of business.*[58]

The "ebb and flow" consideration is not about other factors that may have caused injury, as the Commission appears to believe.[59] It is the understanding that within the course of ordinary business a company will have positive and negative factors. These negative factors that occur within the course of ordinary business are not unexpected. This is a baseline as to whether injury is considered material according the Ministerial Direction.

If the level of injury is not greater than likely to occur in the normal ebb and flow of business, then it does not meet the Ministerial Direction's legally binding requirement. Yara explained to the Commission that this level of injury is not outside the ordinary ebb and flow of business. Yara restates its position that the level of injury determined is not material.

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55 Ministerial Direction on Material Injury at page 2.

56 See Doc 065 at page 92.

57 See Doc 065 at page 92.

58 See Doc 065 at page 92.

59 In any regard, we disagree that the assessment isolates injury caused by other factors, as per the third ground.

10 Correct or preferable decision

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:

The correct or preferable decision is that injury suffered by the Australian industry is not material when regard is had to the normal ebb and flow of business, as must be done in accordance with the Ministerial Direction. If any injury suffered is not considered to be material measures cannot be imposed by the Minister.

Accordingly, the reviewable decision should be revoked.

11 Grounds in support of decision

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

The grounds raised in question 9 support the making of the proposed correct or preferable decision by demonstrating the incorrect materiality assessment presented in Report 473 and demonstrating the injury suffered is not material.

12 Material difference between the decisions

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

The proposed decision is materially different to the reviewable decision, as the proposed decision requires the termination of the investigation as it relates to exports by Yara on the basis of that injury suffered by the Australian industry is not material.

Conclusion

The decisions to which this application refers are reviewable decisions under Section 269ZZA of the Act. Where references are made to the Commission and its recommendations, it is those recommendation which were accepted by the Minister and form part of the reviewable decision that our client seeks to have reviewed.

Yara is an interested party in relation to the reviewable decisions.

Yara's application is in the review form and has otherwise been lodged as required by the Act.

We submit that the application is a sufficient statement setting out its reasons for believing that the reviewable decisions are not the correct or preferable decisions, and that there are reasonable grounds for that belief for the purposes of acceptance of its application for review.

This application contains confidential and commercially sensitive information. An additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information is included as an Attachment to the application.

The correct and preferable decisions that should result from the grounds that are raised in the application are dealt with and detailed above.

Lodged for and on behalf of Yara AB by:

Alistair Bridges
Senior Associate