



Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved¹ form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 June 2021 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party² may lodge an application to the ADRP for 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 (s 269ZZG(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.

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.

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*.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: This application for the review of the Minister for Industry, Science and technology's decision in respect of Report 565 is made by:

Orica Australia Pty Ltd
1 Nicholson Street
MELBOURNE Victoria 3002

Type of entity (trade union, corporation, government etc.):

Orica Australia Pty Ltd is a company.

2. Contact person for applicant

Full name: Malcolm Hart

Position: Senior AN Product Manager – AP, Orica Australia

Email address: malcolm.hart@orica.com

Telephone number: +61 3 9665 7309

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

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

The decision in this instance is a decision of the Minister under section 269ZHG of the Act not to continue anti-dumping measures.

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

Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed**.

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

The goods the subject of this application 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:

Ammonium nitrate (“the goods”) is classified to subheading 3102.30.00 statistical code 05 in Schedule 3 to the Customs Tariff Act 1995. The rate of duty for ammonium nitrate is “free” from all sources.

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number: Anti-Dumping Notice No. 2021/053.

Date ADN was published: 23 May 2021.

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

PART C: GROUNDS FOR THE APPLICATION

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

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

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

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

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

Refer Attachment 2. Attachment 2 is provided in both a confidential and non-confidential form.

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:

Refer Attachment 2.

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

Refer Attachment 2.

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

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

Refer Attachment 2.

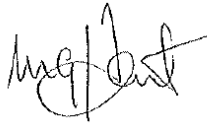
13. Please list all attachments provided in support of this application:

Attachment 1 – ADN 2021/053.
Attachment 2 – Grounds for review (in confidential and non-confidential form).
Attachment 3 – Letter of Authority (Confidential).

PART D: DECLARATION

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

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



Signature:

Name: Malcolm Hart

Position: Senior AN product Manager - APA

Organisation: Orica Australia Pty Ltd

Date: 22 June 2021

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: John O'Connor
Organisation: John O'Connor and Associates Pty Ltd
Address: P.O. Box 329, Coorparoo QLD 4151.
Email address: jmoconnor@optusnet.com.au
Telephone number: (07) 33421921

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.

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:



ANTI-DUMPING NOTICE NO. 2021/053

Ammonium Nitrate

Exported to Australia from the Russian Federation

Findings of Continuation Inquiry into Anti-Dumping Measures No. 565

Notice under section 269ZHG(1)¹

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed an inquiry concerning the continuation of the anti-dumping measures, in the form of an anti-dumping notice, applying to ammonium nitrate (the goods) exported to Australia from the Russian Federation (Russia).

Recommendations resulting from the inquiry completed by the Commissioner, reasons for the recommendations and material findings of fact and law in relation to the inquiry are contained in *Anti-Dumping Commission Report No. 565* (REP 565).

I, CHRISTIAN PORTER, the Minister for Industry, Science and Technology, have considered REP 565 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of fact and law, therein.

Under section 269ZHG(1)(a) of the *Customs Act 1901* (Cth) (the Act), I **declare** that I have decided not to secure the continuation of the anti-dumping measures currently applying to the goods exported to Australia from Russia. These measures will expire on 24 May 2021.

REP 565 has been placed on the public record which may be examined on the Anti-Dumping Commission website.² Enquiries about this notice may be directed to the Anti-Dumping Commission at: clientsupport@adcommission.gov.au

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel³, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Dated this 20th day of May 2021

CHRISTIAN PORTER
Minister for Industry, Science and Technology

¹ All legislative references are to the *Customs Act 1901* (Cth) (the Act), unless otherwise stated.

² The public record is available at www.adcommission.gov.au

³ The Anti-Dumping Review Panel website may be accessed via <http://www.industry.gov.au/about-us/our-structure/anti-dumping-review-panel>

A. Background

On 28 May 2020, the Anti-Dumping Commissioner ("the Commissioner") published a notice on the Anti-Dumping Commission ("the Commission")'s website inviting applications from relevant persons for the continuation of anti-dumping measures on ammonium nitrate ("AN") exported from the Russian Federation ("Russia") that were due to expire on 24 May 2021.

By application dated 27 July 2020, members of the Australian industry which manufacture AN, including CSBP Limited ("CSBP"), Orica Australia Pty Ltd ("Orica") and Queensland Nitrates Pty Ltd ("QNP"), made an application for the continuation of the measures to the Commissioner.

On 20 August 2020, the Commissioner published a notice on the Commission's website commencing an investigation into the continuation of the anti-dumping measures on AN exported from Russia¹.

On 23 May 2021 the Minister for Industry, Science and Technology ("the Minister") published Anti-Dumping Notice No. 2021/053 on the Commission's website, notifying that he had accepted the recommendations of the Commissioner as contained in *Anti-Dumping Commission Report No. 565* ("Report 565") "*not to secure the continuation of anti-dumping measures*" that were due to expire on 24 May 2021.

The anti-dumping measures subsequently expired on 24 May 2021.

As detailed in this application, Orica Australia Pty Ltd ("Orica") seeks a review by the Anti-Dumping Review Panel ("ADRP") under section 269ZZA(1)(d) and 269ZZC of the *Customs Act 1901* ("the Act") of the decision of the Minister to allow the anti-dumping measures on AN exported from Russia to expire on 24 May 2021.

Set out below are the requirements specified in section 269ZZE(2) of the Act in relation to the applicant industry's grounds of review of the Minister's decision.

¹ Anti-Dumping Notice No. 2020/093.

B First Ground – calculation of the dumping margin

9. Grounds for review

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

(a) Legislation

Section 269ZHF(2) requires that the Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied, amongst other things, that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, dumping.

That assessment is premised on the view that the existence of dumping during the inquiry period may be an indicator of whether dumping may occur in the future.

(b) Dumping and Subsidy Manual

Orica notes the guidance as to the “*likelihood of continuing or recurring dumping*” that is provided in the Dumping and Subsidy Manual (“the Manual”). The Commission relied upon the Manual.² In accordance with the Manual, the Commission will have regard to the following (non-exhaustive) list of indicators, including³:

- *pattern of exports since the measures were imposed;*
- *volumes and values of imported goods;*
- *effectiveness of the measures;*
- *whether exports are likely to continue or resume;*
- *whether dumping will resume;*
- *exporters’ historic margins;*
- *exporters’ historic volume and value of exports;*
- *duty absorption by the exporters (or other means of circumventing measures);*
- *exporters’ volumes and values to third countries;*
- *normal values in the exporting country;*
- *export trends after the measures were imposed;*
- *changes in distribution channels;*
- *demand in exporters’ home markets;*
- *evidence of sales below costs;*
- *high dumping margins;*
- *exporters’ dependence on export markets;*
- *world capacity;*
- *other possible sources of supply by importers;*
- *exporters’ domestic profit on sales of like goods;*
- *availability of other markets.*

It is plain, therefore, that the determination of the “dumping” of AN and the size of the dumping margin for the goods exported to Australia are important considerations in the Commissioner’s recommendation to the Minister.

Further, the guidance list is wholly reliant on the cooperation of the exporters of the subject goods in an investigation. In this case, the Government of Russia (GOR) challenged the relevance and need for the information requested by the Commission in a questionnaire that the Commission asked it to complete, *inter alia*, to assist the Commission with queries in relation to matters it considered to be relevant to the continuation inquiry (including an understanding of the financial assistance provided by the GOR to the AN industry). The GOR failed to respond to a subsequent request for information by asking it to complete a supplementary questionnaire seeking to understand separate issues to those contained in the initial questionnaire (including initiatives by GOR that affect the AN industry and

² Report 565 at [7.3].

³ Dumping and Subsidy Manual, Section 35.3, P.176.

quarterly export and import data). Whilst the GOR made a submission, it did not respond to the matters requested by the Commission within the time required by the Commission and which the Commission deemed relevant to the inquiry. Accordingly, the sole Russian exporter of AN⁴ to Australia during the investigation period failed to cooperate with the Commission.⁵ In the absence of the requested information, the Commission relied upon a report commissioned by a single Russian AN conglomerate – the EuroChem Group – that seeks to re-establish export supply to the Australian market⁶. In Orica's view, the Commission placed undue weight on that commissioned report as the assumptions relied upon by the Commission in the Eurochem-Brattle Report lacked reliability, as they were not verified or validated by primary sources (specifically, for "delivered" gas prices to the Eurochem facilities to establish that prices paid were at levels not subject to Government of Russia influence).

The unwillingness of the GOR to respond to the required Government questionnaires to establish the existence of a particular market situation hinders the Commission's assessment of the benchmark gas price to be considered in the determination of Russian AN normal values. Orica submits that the Commission's determination of the benchmark, normal values and dumping margins are erroneous and do not reflect the actual normal values and dumping margins for AN exporters in Russia.

(c) Participation in Investigation 565

The Commission did not receive exporter questionnaire responses from exporters that exported to Australia during the inquiry period⁷. The Commission did, however, receive exporter questionnaire responses from two affiliated Russian AN producer companies that did not export the goods to Australia during the investigation period. The two Russian producer companies were:

- JSC Novomoskovsky Azot ("NAK Azot"); and
- JSC Nevinnomyssky Azot ("Nevinka").

NAK Azot and Nevinka are part of the EuroChem Group of companies that is the second largest producer of AN in Russia (and also commissioned the report referred to above). Neither company was an exporter of AN (i.e. "the goods") to Australia during the investigation period. There is no explanation of why these two companies, and not other Russian AN producers, provided responses.

The Commissioner did, however, consider NAK Azot and Nevinka as "cooperative exporters" for the purposes of Report 565.

(d) Ascertainment of variable factors

The Australian Industry's application for the continuation of measures claimed that a particular market situation for AN sold in Russia continued to exist⁸. The Commission did not receive a response to the Government Questionnaire forwarded to the GOR. The Commission similarly did not receive a response to the Supplementary Questionnaire from the GOR.

The Commission has therefore relied upon information from two affiliated Russian AN producers that did not export AN to Australia during the investigation period.

(i) Export price

Because NAK Azot and Nevinka did not export AN to Australia, the Commission determined export prices under section 269TAB(3) "*having regard to all relevant information*". This included a "list of export sales" information provided to the Commission from NAK Azot and Nevinka about Russian export data to third countries to which NAK Azot and Nevinka exported during the period. This

⁴ Report 565 at [2.3.4.2].

⁵ See, for example, Report 565 at [6.3].

⁶ Eurochem-Brattle Report, The Cost of Russian Gas – A Benchmark Study on Russian Industrial Gas Prices, Prepared for Eurochem, 2 November 2020.

⁷ The Inquiry (or investigation) period was from 1 July 2019 to 30 June 2020.

⁸ A particular market situation finding for AN from Russia was determined in previous Report 312, with earlier findings using surrogate country information due to the GOR's influence on input gas prices.

information pertained to non-arms length transactions [see report at 6.5.2] and was not substantiated or verified by any primary documents, including evidence that payments actually took place. Whilst the Commission then confirmed this “list of export sales” with TradeData International Pty Ltd (“TDI”), an organisation that specialises in the dissemination of import and export data, this should not have replaced the requirement for the Commission to ensure that the information it used to determine such a critical issue, was verified by primary sources of information. Neither NAK Azot or Nevinka itself provided the Commission with export sales documentation, including pricing ex factory to third countries.

The Commission considered the data from TDI to be “reliable and relevant” as it was considered to be representative of export price information that the Commission had sourced from a purchased report titled “*Russia Ammonium Nitrate (AN) Market Outlook 2020 Report*”. Report 565 is silent as to how the Commission established that the purchased TDI Russian export price information and the export prices in the Russian Ammonium Nitrate (AN) Outlook 2020 Report were reliable – particularly in the absence of export sales information from the two actual Russian exporters. This remains unclear. Additionally, the Report used by the Commission appears to have been compiled by an internet research firm with little experience or credibility in the AN industry or AN market in general. As reflected in Orica Australia’s submission of 30 March 2021⁹ the Merchant Research and Consulting Report titled “Ammonium Nitrate Russia Market 2021”:

- has utility as a research document only as it reflects publicly available information only;
- lacks any endorsement by any industry specialist which is also a reason to question its legitimacy and correctness of content; and
- is not a source that industry participants rely upon (unlike the industry specialist [source] reports published on AN).

Further, TDI told the Commission that it had obtained its information “from a data provider who originally obtained the data from the GOR”. The report is not a primary source and therefore it is difficult to reconcile the Commission’s statement that the report is “reliable”. There is nothing in Report 565 that explains the identity of the “data provider”, how the “data provider” verified the information that it had obtained from the GOR (if at all), and how TDI verified the information that it had obtained from the “data provider”. Yet the Commission accepted the reliability of this information in circumstances where it had earlier criticised the GOR for not cooperating with its investigation.

The Commission filtered the Russian export data (obtained from TDI) for the countries to which the Russian AN producers NAK Azot and Nevinka exported during the period. The Commission stated the following (in respect of the NAK Azot exports)¹⁰:

‘Whilst NAK Azot provided the Commission with a listing of its export sales to third countries, these sales were to a related trader. Based on information available to the Commission, the Commission was not able to positively ascertain that these sales were arms length transactions.’

The Commission held the same reservations for export sales information of Nevinka that were also via a related trader.

The Commission has therefore relied upon Russian export sales information for countries nominated by NAK Azot and Nevinka as export destinations for AN produced by the companies.

Orica submits that the Commission’s determination of export prices for the two AN producers NAK Azot and Nevinka is neither correct nor preferable. The information is “selective” and unreliable as it does not identify the actual export prices obtained by the two AN producers for the goods. Rather, the published export prices reflect prices for (non-arms length) sales by the intermediate trader, which is a related entity. Again, it is difficult to see how this data could be seen to be “reliable”.

⁹ EPR Document 046.

¹⁰ Report No. 565, Section 6.5.2.

Additionally, the NAK Azot and Nevinka production facilities are significant distances from the nearest port and incur an inland freight component that cannot be quantified in the absence of full cooperation of the AN producer and its related-party trader. The export price information relied upon by the Commission is therefore “unverified”, as it ignores export prices for all other Russian exporters and is uncharacteristic of the ADC’s usual requirements export price information from the Russian port to a third country and includes an inland freight component, the price of which has not been disclosed¹¹. The export prices for Russian AN exported to Australia are typically at the ex-factory level for exporters of subject goods. The export prices that have been calculated by the Commission are therefore erroneous and substantially overstated. It was incorrect for the ADC to have accepted, and relied upon, unverified Russian export sales data that cannot be considered reliable.

For these reasons, the Commission’s determined export price for the two Russian AN producers – who are not actual exporters of the AN – as reflective of export prices for Russian AN exported from Russia during the investigation period is wrong. Similarly, the export price information relied upon by the Commission is not representative of future exports of AN to Australia.

(ii) Normal value

Orica agrees with the Commission’s assessment “*that there is a situation in the domestic market for ammonium nitrate in Russia for the inquiry period*”. Orica does not, however, agree with the Commission’s determination of normal values for the Russian exporters of AN.

• **Benchmark gas input price**

In its determination of an appropriate benchmark competitive market cost for the key raw material gas input, the Commission identified its preferences in descending order as:

- private domestic prices;
- import prices; and
- external benchmarks.¹²

The Commission ruled out private domestic prices as subject to influence by the GOR and the price cap in place for the majority government-owned Gazprom, the largest supplier of gas and owner of the Russian domestic gas distribution network.

The Commission rejected import gas prices due to the inability to identify gas imports for Russia.

The Commission confirmed its preference to use an external benchmark gas price based upon “*the Russian gas price at the German border*” consistent with the Commission’s benchmark used in the last continuation of measures investigation (i.e. Inquiry No. 312).

The Commission’s preference for a German gas price was based on the following:

- it was consistent with the approach in the last continuation investigation (i.e. Inquiry No. 312);
- the *Eurochem-Brattle Report* identified the German market as the nearest competitive market [for liquid gas] to Russia;
- German gas prices are likely to represent a competitive market price for gas;
- Russian gas is delivered to Germany via gas pipelines;
- the Commission was in possession of relevant information to calculate adjustments for export taxes and transport costs (i.e. this referenced *Eurochem-Brattle Report*);
- Russia was considered a “significant supplier” of gas to Germany;
- the German gas prices will reflect “the qualities of the Russian gas, including calorific values” thereby requiring less adjustments for differences in gas supplied from alternate sources; and

¹¹ TradeData International export data is published at FOB point, Russian port.

¹² Report 565, Appendix C, C3, p 93.

- the Commission considered that as Russia supplies a significant proportion of Germany's gas requirements, "the price best reflects and incorporates Russia's cost to produce gas".

Orica notes that at no stage prior to the publication of *Statement of Essential Facts No. 565* ("SEF 565") did the Commission notify the Industry Applicants of its proposed external benchmark methodology. Nor did the Commission at any stage challenge the industry view of relevant gas price submitted in its application. Rather, in SEF 565 the Commission merely stated that it received no submissions opposing the assumptions in the *Eurochem – Brattle Report* recommending the use of German gas prices.

Orica's submissions in response to SEF 565 detailed its concerns in relation to adjustments to the Russian gas price at the German border; however, those concerns were rejected.

The disparities that have emerged between the Commission's findings in Report 312 and Report 565 reflect the adjustments made to the Russian gas price at the German border in the course of ascertaining a benchmark price. The adjustments considered necessary by the Commission included:

- an adjustment to reflect a price at the Russian border by deducting relevant German charges and costs to arrive at the border price;
- adjustments to remove relevant export costs and export transport costs; and
- an adjustment back to an equivalent "netback price" that is comparable to a price paid by the Russian exporters.

The Commission relied upon the AN producers' self-commissioned *Eurochem-Brattle Report* to adjust for export taxes and costs on the Russian gas price at the German border. The "export tax" is consistent with Australia's Rent Resource Tax and should be considered a levy that corrects the artificially low Russian gas price to an equivalent competitive market gas price that compensates Russia for the export of its natural resource. Further, the "tax" applies only to sales by Gazprom, a majority government-owned monopoly exporter (and is thus, in effect, a mark-up by the seller rather than an external impost). Gazprom's prices net of that "tax" are not the product of competitive market conditions. The appropriate benchmark is the price at which gas is sold into a competitive market. Whether the export tax is an aspect of the particular market situation or distortive of independent suppliers' prices in Russia (cf Appendix C at C4.1.3) is not to the point. The GOR's "export tax" therefore should not be removed from the benchmark gas price.

The Commission stated that it made an adjustment to "*account for the difference between Russian domestic transmission costs for export gas and domestic supply for each cooperating exporter*". The Commission stated that it "*used Gazprom's published unit prime cost of transmitting the gas domestically in Russia*" to adjust the border gas price to the AN producer's premises. This approach leads to the Commission's benchmark price being distorted by the very 'market situation' whose effect the analysis is intended to account for. It ignores the reality that Gazprom – the monopolistic owner of all gas distribution facilities in Russia - is majority owned by the GOR that sets the rates of transmission through the Gazprom network. The Russian domestic gas transmission charges are determined by the GOR and hence not free from GOR influence.

The methodology followed by the Commission in Report 312 – taking the price as determined at the German border, inclusive of taxes and all transportation costs up to the border, less export costs, plus an amount for cost of domestic transport to the relevant AN production facility (i.e NAK Azot and Nevinka, in this instance) is the correct methodology for determining a benchmark gas price unaffected by GOR influence. In its report SEF 565, the Commission does not provide reasons for its decision to deviate from its prior methodology for determining the price.

The Commission stated that the *Eurochem-Brattle Report* included a "*netback comparison of the Russian exporter's prices and the German hub price*". Again, the Commission stated "*It noted that no submissions were received from interested parties contesting the methodology applied in this report [i.e. Eurochem-Brattle Report] to establish a netback price prior to the publication of SEF 565*"¹³.

¹³ Report 565, Appendix C, C4, p 97.

Orica submit that the Commission has followed the simplistic, adjustment methodologies for export tax, gas transmission charges and export costs as reflected in the Eurochem commissioned *Eurochem-Brattle Report*, which are favourable to Russian AN producers. The derived benchmark gas price does not reflect a competitive market price for gas at the German border, but rather, an internal gas price, influenced by the GOR, that benefits Russian AN producers.

Further, the netback “comparisons” are included at pp 31-33 of the *Eurochem-Brattle Report*. As the data has been redacted from the text of the “V.D. Netback comparison” section of the Report and from the graphs, interested parties are unable to interpret any clear “methodology” of the quantification of the netback adjustments made.

The Commission’s reliance on and acceptance of the benchmark gas price as determined in the *Eurochem-Brattle Report* is not the correct or preferable benchmark price for gas supplied to a Russian AN production facility for the purpose of determining whether the Russian AN producer is sourcing gas in Russia on a competitive basis.

The appropriate methodology for a benchmark gas price for Russian gas is that which was reflected in Report 312.

- ***Uncooperative exporters***

The Commission relied upon the incorrectly determined normal values for NAK Azot and Nevinka in the determination of normal values for the remaining approximately 80 per cent of AN produced in Russia. Report 565 states that the gas purchases for NAK Azot and Nevinka were “*comparable to the competitive price benchmark during the inquiry period*”.¹⁴ However, this finding is erroneous as it is premised on the AN producers’ source of gas being from a private (i.e. non-Gazprom) source. The Commission erroneously concluded that the remaining 80 per cent of the Russian AN industry purchase gas at the benchmark price as supplied by private suppliers in Russia – this ignores the reality that the bulk of the AN industry would be purchasing lower priced gas from Gazprom.

The Commission’s determination of normal values for uncooperative exporters is therefore incorrect and not the preferred normal value that reflects GOR influenced gas prices in the AN cost base.

(e) *Conclusion – Russian AN normal value*

The Commission’s determined Russian gas benchmark does not remove the full effects of the GOR influence on the delivered gas price to an AN production facility. The use of the incorrect gas benchmark price has contributed to the Commission’s determination of Russian AN normal values at less than the full competitive market cost for AN. Therefore, the Commission’s determination of normal values for AN in Russia is neither correct nor preferable on the basis of the information before it.

The Commission’s assessment of normal values in Russia for AN is the foundation for its subsequent incorrect recommendation that future exports of AN from Russia **may** likely be at dumped prices. Had the Commission determined AN normal values consistent with the methodology applied in Report 312 (which it should have done), it would have found that the expiration of anti-dumping measures would lead, or would be likely to lead, to a continuation or recurrence of dumping in Australia. The Commission should have so found, and recommended to the Minister to secure the continuation of the anti-dumping measures.

The Commissioner’s incorrect conclusion on dumping margins for Russian exports to Australia is further questioned by the Commissioner’s reliance on select export data information at the FOB Russian port (as published by TradeData International) that was not verified to the cooperative Russian producers’ records and calculated at the ex-factory level.

¹⁴ Report 565, [6.5.3], [6.6.3].

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 for the Minister to revoke the reviewable decision under s 269ZZM(1)(b) and to substitute it with a decision to secure the continuation of the anti-dumping measures concerned.

The ADRP should make a recommendation to the Minister to that effect pursuant to s 269ZZK(1)(b). It should calculate the normal value of the goods to be calculated under section 269TAC(2)(c) in such a way that the benchmark gas price for AN produced in Russia should reflect the German border gas price, unadjusted for export taxes and export costs, and uplifted for domestic transmission charges delivered to the Russian AN factory.

The inclusion of the correct gas benchmark cost in the section 269TAC(2)(c) constructed normal value for AN producers would confirm that the Russian AN producers' gas costs do not reflect competitive market costs. Normal values for Russian AN producers would be calculated under section 269TAC(2)(c) in accordance with the methodology proposed by the Applicant; and dumping margins above negligible levels would be confirmed.

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 argument in support of this ground and the making of the proposed correct or preferable decision is set out in answer to question 9 above.

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 from the reviewable decision as the proposed decision would result in the determination of positive dumping margins for AN exported to Australia by Russian AN producers.

C. Second Ground – likelihood that dumping of Russian AN will recur

9. Grounds for review

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

(a) Russian AN exports to Australia

The Industry Application for the continuation of measures included information pertaining to the Russian AN export volumes to Australia between 2016/17 and 2019/20. The following table confirms the volumes as reflected in Table 2 of the Applicant Industry application for the continuation of measures.

Table 2 – Import volumes of ammonium nitrate from the Russian Federation (tonnes)

Source	2016/17	2017/18	2018/19	2019/20*
Russian Federation	9,350	21,756	30,691	5,478
China, Sweden & Thailand	49,743	82,455	70,298	27,347
Indonesia	86,540	13,800	9,218	35,200
Others	6,773	19,492	95,104	71,141
Total	152,407	137,503	205,312	139,166

Source: Australian Bureau of Statistics monthly import data.

Note: 1. 2019/20 includes 11 months to May 2020 only.

It scarcely needs to be pointed out that the relatively low import volumes from Russia in recent years (compared to other sources), and the absence of verified dumping during the inquiry period, reflect the existence of anti-dumping measures and provide only minimal guidance as to what will occur if measures are allowed to lapse.

However, the Industry application¹⁵ demonstrated that Russia retained a presence in the Australian market throughout the duration of the anti-dumping measures. That indicates the capacity to take advantage of the more favourable position that Russian exports will enjoy if the measures lapse. The application confirmed that:

- explosives emulsion manufacturers continued to source Russian AN;
- Russian exporters had maintained distribution links into the Australian market;
- Russian exporters possess excess production capacity to supply the Australian market; and
- Russian exports to other countries in 2019/20 were at dumped prices (refer Table 4 of Industry application at EPR Document No. 001).

Approaches made to industry applicants since the publication of the Minister's decision (which are not part of the "relevant information" – cf s 269ZZK(4), (6)) are also relevant to the likelihood of exports from Russia to Australia increasing as a result of the expiry of the measures. Orica respectfully requests that the Panel convene a conference under s 269ZZHA to allow this further information to be presented and considered.

(b) Russian AN exports to third countries

The Industry Application provided information to demonstrate that Russian AN exports to other destinations (Table 3 of Industry Application) which were at significantly lower FOB export values

¹⁵ Investigation No. 565, EPR Document 001.

(data sourced from TDI) than the export price to Australia for the August 2019 shipment. This information confirmed the existence of dumping by Russian AN producers in global markets.

The existence of dumping by Russian AN producers was also confirmed by the European Commission ("EC") in its Regulation 2020/2100¹⁶ that continued anti-dumping measures for a further five year period. The EC's investigation established, on the basis of information sourced from three unaffiliated AN producers (including Nevinka), that the Russian exports of AN to third countries were at export prices lower than ex-factory domestic prices. The EC was satisfied that Russian AN exports to third countries were at dumped prices.

This is also supported by the information contained in the Applicant's submission (Table 3 of Industry Application) which highlighted that Russian AN exports to other destinations were at significantly lower FOB export values than the export price to Australia for the August 2019 shipment. This information confirmed the existence of dumping by Russian AN producers in global markets.

The recent and timely findings of the EC support Orica's contention that Russian AN exports to third countries were at dumped prices. This supports Orica's position in relation to the Russian AN industry's excess capacity and the willingness of Russian exporters to export their product at dumped prices.

(c) Russian AN excess capacity

Submissions to the Commission following SEF 565 by members of the Australian industry highlighted the excess capacity for AN in Russia in 2021. This ranges between 380kt to 800kt p.a. The AN industry also highlighted plans for AN capacity expansion by two uncooperative exporters:

- SBU AZot 250tepa expansion said to be commissioned in 2021;
- Acron expansion of 180ktepa due on line in late 2021.

In Report 565, the Commission stated that the Eurochem Group's operating capacity "was over 100 per cent".¹⁷ It also stated that, according to the Russian Ministry of Economic Development ("MED"), utilisation rates advised by the Russian Fertilisers Producers Association were "95.7 per cent (2016), 97.3 per cent (2017), 91.2 per cent (2018) and 96.7 per cent (2019)".¹⁸

The EC's Regulation 2020/2100 confirmed that its investigations identified spare Russian capacity of 440kt.

The EC's finding is supportive of the information available to the Applicant that significant spare capacity exists in Russia to export to Australia.

The Commission further determined that most Russian AN spare capacity is High Density AN ("HDAN") fertiliser grade and not Low Density AN ("LDAN") explosives grade. As has been stated by the industry in responses to the Statement of Essential Facts:

- (i) HDAN is a direct substitute to AN solution ("ANsol") used for emulsion manufacture in Australia (and in some cases LDAN used in emulsion manufacture), which accounts for xx-xx% of the market. HDAN spare capacity in Russia is therefore very relevant to the Australian market, and presents a likely substitute to Australian manufactured AN; and
- (ii) HDAN and LDAN are like goods and the Commission has previously been satisfied (Reports 28, 116, 312, 473) that HDAN is a like good and is used in emulsion manufacture.

In a report provided as part of the Industry application, [source] noted the propensity of Russian producers to swing capacity between a variety of AN products to meet market need. [Source] noted

¹⁶ European Union Regulation 2020/21 of 15 December 2020.

¹⁷ Report 565, [7.6.1.1].

¹⁸ Report 565, [7.6.1.1].

that the capacity to supply technical grade AN was operating at just 60%, hence providing significant spare capacity (in excess of two million tonnes pa). The Commission has not sufficiently considered this key fact provided by an industry expert in its analysis of the global AN and fertiliser markets and export trade.

(d) Will future exports likely be dumped?

Aside from the particular errors noted above, the Commission's analysis of the variable factors provides no clear guide to whether future exports to Australia would be dumped. No data was provided by producers who had actually exported to Australia during the relevant period. The export prices determined for the cooperative exporters (NAK Azot and Nevinka) are an artificial construct. While normal values could in principle be determined for NAK Azot and Nevinka, there was no explanation of why data was presented for these two companies and not other Russian AN producers or of how their production costs compared to other Russian AN producers.

The dumping margin determined for uncooperative and other exporters is based on the analysis of NAK Azot and Nevinka and is thus similarly conjectural. It does, however, suggest that exports from any Russian producer other than NAK Azot and Nevinka (ie, most of the Russian AN industry) to Australia would be dumped at a non-trivial margin (2.8%).

The proper calculation of the variable factors (avoiding the errors explained in ground 1 above) produces significantly higher dumping margins and, despite the limitations of the data, provides a strong indication that future exports of Russian AN to Australia will be dumped. The supporting evidence referred to above (as assessed by the Applicant and the EC) confirms that it is highly probable that future exports of Russian AN to Australia will be at dumped prices.

The Commission should have been satisfied that expiration of the measures would likely lead to any exports of Russian AN being exported to Australia at dumped prices¹⁹ and that the dumping margins would be significant.

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 for the Minister to revoke the reviewable decision under s 269ZZM(1)(b) and to substitute for it a decision to secure the continuation of the anti-dumping measures concerned.

The ADRP should make a recommendation to the Minister to that effect pursuant to s 269ZZK(1)(b). In doing so, it should be satisfied that the expiration of the anti-dumping measures would lead, or would be likely to lead, to a continuation of the dumping, because the expiration of the anti-dumping measures would likely lead to exports of Russian AN to Australia being at dumped prices.

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 correct and preferred decision that Russian AN producers possess excess AN that, if exported to Australia (should the measures expire), would likely be at dumped prices.

¹⁹ Cf Report 565, [7.8].

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 from the reviewable decision as the proposed decision would result in the determination of the likelihood that future Russian AN exports to Australia will be at dumped prices.

D. Third Ground – Will future exports of Russian AN cause, or threaten, a recurrence of material injury?

9. Grounds for review

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

The Commission's assessment as to the likelihood that future material injury would be threatened or recur included an assessment of the following factors:

- price injury – on existing and future supply contracts;
- volume injury – including the ability of Russian AN producers to supply; and
- profit and profitability.

(a) Russian landed prices the lowest of all sources

At [7.7.1.1] of Report 565, the Commission confirmed that landed Russian AN prices into Australia were the lowest of all countries during the investigation period. This finding supports Orica's claim that Russian AN producers have the lowest export prices of all AN producers due to the GOR influence on raw material gas prices.

Orica highlights that the Commission's findings affirming Russian AN landed prices as the lowest in the Australian market confirm the need for the anti-dumping measures to continue in respect of exports of AN that are likely at dumped prices.

(b) Anti-dumping measures have been effective

The Commission's threat of future injury analysis failed to adequately consider whether the anti-dumping measures had been effective in addressing injurious dumped exports from Russia. The Applicant submit that the measures had the desired effect.

It is significant that the anti-dumping measures on AN exported from Russia had the desired effect during a period of increased import volumes. The FOB export prices for the volumes excluding Russia were below the Russian AN anti-dumping measure floor price (confirming the floor price had the desired effect).

Imports from Russia increased in 2017/18 – albeit at prices reflecting the floor price in the applicable dumping measure. Over this period, imports from China, Sweden and Thailand also surged – but at much lower export prices than the Russian floor price. Exports from China, Sweden and Thailand are now the subject of anti-dumping measures (see Report 473). Investigation 473 commenced in June 2018, necessitating importers to seek out additional sources of supply including from Russia (with import volumes further increasing to 30.691 tonnes in 2018/19). The import volumes from Russia again reflected the impact of the applicable dumping measure.

The decline in Russian export volumes to Australia in the subsequent 2019/20 (i.e. investigation period) can be attributed to the combined effect of:

- (i) the applicable anti-dumping measures; and
- (ii) the surge in exports to Australia from Chile, Lithuania and Vietnam at prices significantly below the Russian AN floor price operating in the anti-dumping measure.

(c) Impact of Russian exports on existing and future supply agreements

The Commission acknowledged that the estimated Russian landed price is below other countries that have exported to Australia. The Commission confirmed that "...it is reasonable to assume that these prices may affect contract negotiations going forward"²⁰. In its rejection of claims that Russian AN

²⁰ Report 565, [7.7.1.2], p 67.

volumes would increase should the measures be allowed to expire, the Commission stated “*..that the ability of Russian exporters to service large ongoing contracts in the Australian market will necessarily be limited by its high capacity utilisation.*”

The Commission’s reservations are not shared by Orica due to the preparedness of Russian exporters to supply third country market in significant volumes at dumped prices. Russian exporters could redirect product from those countries to Australia, charge higher prices than they currently do in those countries, but still significantly undercut existing prices in Australia. Further, as noted above, it is by no means clear that Russian producers are operating near full capacity: the EC was concerned about the excess capacity available to Russian AN producers to supply the European market.

The Commission’s view that import volumes from Russia would be limited to “spot sales” appears to be based upon its interpretation of EuroChem’s claims that it is operating at 100 per cent utilisation, and MED’s claims about high utilisation rates for Russian AN fertilizer plants. The Applicant notes that the EuroChem AN plants account for only 20 per cent of total Russian AN production, and no other Russian producer (such as Uralchem, Acron or SDS Azot that account for 56.6 per cent of Russian capacity²¹) participated by providing the information required for the Commission to reasonably have an informed view about. These other producers make in excess of 7 million tonnes per annum collectively (*Confidential named source*).

The relatively high utilisation rates referred to by the Commission do not appear to be a hindrance to Russian AN producers supplying export markets as required. Indeed, the additional plant capacities in Russia will assist in this regard. Nor, as noted above, do those high utilisation rates prevent AN being redirected from one export market to another as the relative attractiveness of those markets changes,

Orica notes the willingness of importers to seek new import sources of supply following the imposition of measures (i.e. importers switching from imports ex China, Sweden and Thailand following the imposition of measures to countries such as Chile, Lithuania and Vietnam). With the expiry of measures on Russian AN it is very likely that importers will seek out Russia as a source of supply to supplement imports from other sources not the subject of measures. In that regard, while the Commission notes (Report [7.7.1.2]) that most AN supplies to Australian users occur under long term supply contracts, that factor does not preclude significant downward pressure on prices as a result of the expiry of the measures. First, as noted by the submission from Glencore referred to in that section of the Report, most contracts are for 2 to 5 year terms. Most, therefore, will fall due for renegotiation within the next 5 years (the period that the measures, if continued, would have covered). The availability of AN from Russia at dumped prices is highly likely to affect the course of those negotiations. Secondly, as advised by the industry applicants, some existing supply contracts [*commercially sensitive pricing details*].

Orica provided details to the Commission of the commercial impact that low priced imports have on its realised price with contracted customers and the subsequent impact on profit. As noted in Investigations 312 and 473, the presence (and even threat of supply) of low priced imports are used by competitors and customers to apply pricing pressure during contract negotiations as customers apply leverage to realise better price outcomes. Despite the Commission acknowledging that if measures are removed that exports from Russia are likely to be dumped and be lower than the import supply cost from other countries, the Commission has erroneously concluded that this would only impact a small spot market. It is unrealistic to think that a competitor would not use the availability of the lowest priced imports to reduce supply costs. This behaviour would result in a depressive price impact on the market that would extend pervasively beyond a small spot portion of the market. It is also logical that competitors would seek to manage their profit risk by engaging in longer term supply contracts.

Orica notes that most of its contracted business must be renewed over the next 5 years and hence is significantly exposed to this commercial behaviour if measures on Russian AN are removed. Orica quantified the commercial negative impact at \$xxxm in NPV across its business over the next 5 years

²¹ Investigation 565, EPR Document 014.

by submission²² (dated 25 March 2021). This represents a negative impact of xxx% of Orica's EBIT based on the profits detailed in the investigation period.

Included in this impact is the specific injury on two key contracts: [account name] (-\$xxxm NPV over 5 years) and [account name] (-\$xxxm NPV over 5 years). Orica provided key details of the link in these contracts from low-cost imports to contract pricing formulae.

[Customer] contract

[Customer specific injury as referenced in Confidential Appendix 4 of Anti-Dumping Commission Report 565 provided to Orica Australia].

[Customer] contract

[Customer specific injury as referenced in Confidential Appendix 5 of Anti-Dumping Commission Report 565 provided to Orica Australia].

(d) *Recurrence of material injury*

The information discussed above confirms the following:

- anti-dumping measures have been effective in limiting material injury to the Australian industry manufacturing like goods;
- landed Russian AN prices are the lowest of all import sources of supply into the Australian market;
- the landed Russian AN prices undercut the Australian industry's selling prices;
- Russian AN producers possess excess capacity to supply the Australian market with significant volumes of AN;
- exports of Russian AN to Australia would not be limited to spot sales;
- * the availability of Russian AN at dumped prices would affect the renegotiation of long term supply contracts, leading to a loss of volume or price depression (or both) for the Australian industry;
- Russian AN exporters have retained distribution channels into the Australian market; and
- Russian high density ammonium nitrate ("HDAN") is a low-priced source of AN for explosives emulsion manufacturers in Australia.

When the foregoing is considered in the light of exports of Russian AN to third countries being at dumped margins and the high likelihood that future exports to Australia will be at dumped prices, it is likely that, in the absence of the anti-dumping measures continuing, the Australian industry would experience a recurrence of material injury that the measures are intended to prevent.

The finding that it is not likely that the Australian industry would experience, or be threatened with, a recurrence of material injury in the absence of measures is not the correct or preferable decision. The available evidence confirms that, in the absence of the measures, the Australian industry will likely incur material injury from future AN exports from Russia at dumped prices.

²² EPR Document 039.

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 for the Minister to revoke the reviewable decision under s 269ZZM(1)(b) and to substitute for it a decision to secure the continuation of the anti-dumping measures concerned.

The ADRP should make a recommendation to the Minister to that effect pursuant to s 269ZZK(1)(b). In doing so, it should be satisfied that the future export of dumped exports of Russian AN to Australia will likely cause, or threaten, a recurrence of material injury that the anti-dumping measures are intended to prevent.

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 argument in support of the ground and the proposed correct of preferable decision is set out in answer to question 9 above.

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 from the reviewable decision. If the proposed decision would result in the determination of the likelihood that future Russian AN exports to Australia will be at dumped prices that will likely cause, or threaten, a recurrence of material injury to the Australian market.